https://doi.org/10.12697/JI.2022.31.01

Anneli Albi*

Professor of European Law
University of Kent

A Paradigm Shift in the Role of Courts?

Disappearance of Judicial Review through Mutual Trust and other Neofunctionalist Tenets of EU Law

The article submits that EU law has profoundly been changing the role of courts in Europe, from protecting the fundamental rights of individuals – especially in the event of coercive exercise of public power – towards being seen as agents of, or obstacles to, integration, as well as towards a focus on trust, effectiveness and enforcement, and protection of the market and of the neoliberal economic order. The article postulates for the consideration of the discourse that this change is one aspect of a more fundamental, ongoing Kuhnian paradigm shift in European constitutionalism, from the broader classic comparative (especially continental) European understanding of constitutional law to autonomous EU governance. The latter – contrary to the prevailing assumptions – is predicated on different foundational ideas for the exercise of public power, especially functionalism, neofunctionalism, neoliberalism and market integration, and concepts of international law. The growing tensions around the EU law principle of mutual trust exemplify the 'incommensurabilities' between the two paradigms; the article devotes a chapter to Birgit Aasa's EUI doctoral thesis on the CJEU case law on mutual trust, summarising Aasa's compelling concerns about the systemic unsuitability of trust in the courtroom in Western democratic constitutionalism. The article links Aasa's research findings to concerns that have been raised with regard to other areas and ways in which judicial review has been disappearing through EU law, including through the neofunctionalist doctrine of 'Integration through Law' and through the replication of the US constitutional thinking on the role of courts. The article additionally points to concerns about the resulting far-reaching changes in material constitutional law and fundamental rights protection; these are particularly acute for the post-totalitarian and post-authoritarian constitutional tradition, which, whilst adhered to by more than half of the Member States in both Western and Central and Eastern parts of Europe, is little known in the mainstream EU discourses. The article suggests that questions about the role of courts in European constitutionalism, as well as about the broader paradigm shift, need joined-up, inclusive discussion as part of the debate on the future of Europe. For this to be made possible, a number of structural issues in the EU law scholarly discourse must first be addressed.

1. Introduction: Concerns about the obsolescence of national constitutions and a paradigm shift in the exercise of public power, with radical alterations of European constitutional law, including in the role of courts

The present article seeks to invite joined-up discussion between the national legal communities and the somewhat 'closed epistemic community' of EU lawyers[*1] about the changing role of courts through autonomous EU law. The article was inspired by profoundly important research about the systemic unsuitability of trust in courtrooms by a young Estonian legal scholar, Birgit Aasa, in her doctoral thesis 'The Principle of Mutual Trust in EU Law: What is in a Name?', defended at the European University Institute (EUI) in Florence.[*2] The importance of Aasa's work has been recognised by two awards: the Estonian national award for the best doctoral thesis in the field of social sciences, and a special award of the Constitutional Law Foundation of the Estonian Academy of Sciences. This article has its origin in the evaluation report that I wrote as a member of the doctoral thesis defence committee. I was subsequently asked by the Editorial Board of *Juridica International* to convert the report into a publication, to which I gladly agreed, as I found Aasa's thesis to be a ground-breaking, fascinating and courageous work that critically explores, and compellingly questions, the suitability of the principle of mutual trust – developed by the European Court of Justice (CJEU) and increasingly elevated to constitutional status in the EU – to the realm of law and judicial adjudication.

The contribution subsequently evolved into the present, expanded article, where I will outline Aasa's main research findings (Chapter 2), and link these to broader concerns that have been voiced by scholars and judges about the changing role of courts through EU law, and which have hitherto not been discussed in a joined-up manner. These include concerns about other areas and ways in which judicial review has been disappearing through EU law (Chapters 5, 7), and about a reorientation of the role of courts from the protection of fundamental rights of the individual – especially in the event of coercive use of public power – towards being seen as agents of, or obstacles to, integration, as well as towards a focus on enforcement, efficiency, trust, protection of market values and of the neoliberal economic order (Chapter 5). Furthermore, throughout the article, I will briefly point out that in numerous other areas of comparative (especially substantive, continental) European constitutional law, scholars have observed radical alterations and even disappearance of long-standing constitutional rules through judicial interpretation grounded in autonomous

* Professor of European Law, University of Kent (Canterbury, UK). Some early parts of this paper (especially the material in Chapters 5, 7, 8 and 9) were presented as part of a keynote speech entitled 'Judicial protection, due process and trends towards efficiency: Remarks in the light of Europe's post-totalitarian constitutional tradition' at the ACA-Europe (Association of Supreme Administrative Courts in Europe) seminar 'Due Process', held on 18-19 October 2018 in Tallinn, <http://www.aca-europe.eu/index.php/en/evenements-en/645-tallinn-18-and-19-october-2018-seminar-due-process> (accessed 30 August 2022). The author is grateful for the discussion that followed, including the remarks by some judges that they had not been aware about the way in which their role is seen in neofunctionalism and other EU integration theories (as summarised below in notes 136-137 and the accompanying text), and that they see their role in the protection of fundamental rights. The author is additionally grateful for the comments of the two anonymous referees and Birgit Aasa, and for the linguistic editing and substantive comments by Siiri Aulik. The author would also like to extend heartfelt thanks to the large number of kind Estonian and other colleagues and researchers who have not dismissed this research offhand as Euroscepticism or populism, and have over the years engaged in constructive discussions and provided thoughtful feedback, which eventually led to identification of the Kuhnian paradigm shift. Any errors are solely the responsibility of the author. The article has resulted from the research project 'The Role and Future of National Constitutions in European and Global Governance', funded by European Research Council grant No 284316. The views cannot be attributed to the European Research Council. Due to the very extensive scope of the theme and limited space available in the present article, the reader is kindly asked to bear in mind the following note with regard to referencing: where the work of further authors has been cited or used in other publications of the present writer or by other scholarly papers referred to in this article, only the names of further authors will be written out; in case of citing, the reader is kindly asked to look up the full publication details from the papers indicated.

1 See Päivi Leino-Sandberg and Janne Salminen, 'Languages and EU Law Discourse: A View from a Bilingual Periphery' *VerfBlog*, 2 June 2014, <https://verfassungsblog.de/languages-eu-law-discourse-view-bilingual-periphery/> (accessed 30 August 2022), and below notes 123-125 and the accompanying text regarding Daniel Thym's observation about a 'disconnect' between the national and EU legal discourses.

2 Birgit Aasa, *The Principle of Mutual Trust in EU Law: What is in a Name?* PhD thesis defended at the EUI on 26 February 2021. Version dated 7 February 2021, available at the EUI library and on file with the present writer; cited with the permission of the author. The thesis was supervised by Prof Urška Šadl (EUI). The members of the defence committee were Prof Bruno De Witte (EUI), AG Michal Bobek (CJEU) and the present writer.

EU law, which has equally received limited attention. These include changes in the standard and logic of protection of fundamental rights, including under the EU Charter, the 'lost' and 'forgotten' protections in classic European criminal law dating back to the Enlightenment era, and concerns about the destruction of the social state (Chapters 8, 5, 6).

Indeed, a growing number of scholars have voiced concerns about the 'twilight' of constitutionalism, 'the end of constitutionalism as we know it', the obsolescence of national constitutions, and even a shift of paradigm from constitutional law to autonomous EU governance where formal legal constraints on public power have been replaced by economic and executive exigencies.[*3]

The central contribution of this article, submitted for the consideration of both the Estonian as well as wider European and international readership, is that the concerns raised by Aasa with regard to the EU law principle of mutual trust – as well as the other above-mentioned developments – are part of a more fundamental, **ongoing Kuhnian paradigm shift in European constitutionalism**, where there are two parallel and to a significant extent incommensurable worlds of constitutionalism: the epistemic world operating with the broader national and comparative (especially continental) European understanding of constitutional law, and the epistemic world of autonomous EU law and governance (Chapter 4). I will argue that contrary to the long-standing assumption that national and EU constitutional law are part of a multi-level system with broadly congruent values, autonomous EU governance is, in fact, predicated on entirely different foundational ideas for the exercise of public power, especially functionalism and neofunctionalism, market integration and neoliberalism, theories of transnational governance, and concepts of international law, which have had the effect of profoundly changing classic European constitutional law, including the role of courts.

Regarding neofunctionalism, I will in particular flag for awareness and discussion the little known (at least beyond the EU epistemic communities) but in practice widely influential doctrine of 'Integration through Law', which helps to better understand the underlying logic and broader objectives of the CJEU mutual trust requirements that in practice have been leading to a large-scale dismantling of national constitutional rules and judicial controls (Chapter 6). I will also briefly point out the different understanding of the role of courts in the United States (US) constitutional thinking, and the impact of its replication through the EU legal order.

I will further seek to flag for cognizance that the profound changes that have unfolded through the paradigm shift have by and large not been discussed because of numerous structural issues in the EU scholarly and legal discourses, which have been elucidated in the research on the epistemology of EU law (Chapter 3). These include the agenda to shift 'European' law, research and discourse from national and comparative European constitutional law to autonomous, self-referential EU law, the 'silencing' and 'exclusion' of critical voices, and what scholars have described as the 'disconnect' between the national and EU legal discourses.[*4]

To illustrate issues around judicial protection that arise in classic European constitutionalism but which to a great extent lose their relevance in autonomous EU governance, including under the EU Charter, I will bring examples mainly from Estonia. However, contrary to the prevailing assumptions, these constitutional problems are not idiosyncratic and, indeed, have been widely encountered especially in the post-totalitarian and post-authoritarian constitutional systems both in Western and Central and Eastern parts of Europe, as I have documented in other publications. I will, in particular, devote a chapter to the Estonian public debate on the case of Neeme Laurits where, in hindsight, the automatic extradition without judicial review of an innocent individual who had compelling alibis can be regarded as emblematic of the ongoing paradigm shift (Chapter 9).

I will end with a suggestion that questions around what ought to be the role of courts in European constitutionalism need informed, joined-up and inclusive discussion as part of the debate on the future of Europe. This, in turn, requires broader discussion about the growing obsolescence of national constitutions and a paradigm shift to an entirely different system of public power (Chapter 10). Essentially, my concern is that with idealistic aspirations in the name of 'Europe', something very valuable in terms of European constitutional achievements in the exercise of public power is hastily being consigned to history, with no wider awareness and with extremely limited possibilities for open discussion due to the above-mentioned structural issues in the EU discourse.

3 See below notes 56-59 and the accompanying text.

4 See eg below notes 21, 26-29 and 123-125 and the accompanying text

As a preliminary note to the text that follows, it is important to emphasise at the outset that this article does not concern the European Court of Human Rights in Strasbourg or other international courts, which typically have a more subsidiary and specific mandate to ensure a basic standard of fundamental rights protection where this has failed in the national legal orders. Indeed, the argument in this article is partly also written with a concern that the growing difficulties caused to the Member States' constitutional orders specifically by the EU legal order and the something akin to 'super agent'[*5] remit of the EU Courts may be one of the reasons behind the growing backlash in the United Kingdom (UK) and elsewhere against the European Convention on Human Rights system, not least because it is difficult to explain the differences and specificities to the wider public.

2. The importance of Birgit Aasa's doctoral thesis 'The Principle of Mutual Trust in EU Law: What is in a Name?' for the discourse on national courts in European constitutionalism

I read the above-mentioned doctoral thesis of Birgit Aasa on the CJEU requirement for mutual trust with great interest, as I have been grappling with similar questions in recent years when working on a comprehensive, forthcoming comparative monograph[*6] – hereinafter referred to as the '*Comparative Study*' – in the aftermath of the European Research Council (ERC) funded large-scale research project 'The Role of National Constitutions in European and Global Governance' (hereinafter 'The Role of Constitutions' project). The *Comparative Study* is based on 29 in-depth national reports, written by leading constitutional law scholars and published in the two-volume, open access book *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*.[*7] One key theme addressed in the national reports and in the *Comparative Study* is the requirement of mutual trust in relation to extraditions under the European Arrest Warrant (EAW) system and beyond. Both books collate extensive concerns expressed in the Member States by legal scholars, judges (especially by a large number of dissenting judges), ombudsmen and other institutions in relation to the automaticity of extraditions, whereby no substantive judicial review is allowed by the CJEU even in cases where there is compelling evidence of innocence, or serious human rights issues have been raised. However, typically the assumption seems to be that the problem affects only the respective individual Member State, the constitutional rules of which are presumed to be idiosyncratic compared to the shared 'European' approach. In many Member States, for a long time there was no awareness that the concerns in these and many other areas of EU law are, in fact, widely shared, as typically such concerns have not been discussed in a joined-up manner. In practice, the automaticity of extraditions required by the CJEU has become the new 'normal'.

The above broader findings, which focus more on the national constitutional side of the theme, tally with and corroborate the analysis and conclusions of Birgit Aasa, who in her doctoral thesis has carried out remarkably comprehensive and systematic research on the mutual trust case law of the CJEU. Aasa's thesis astutely identifies and articulates the manifold broader legal, philosophical, semantic and other paradoxes and contradictions in the conceptualisation of mutual trust in EU law and CJEU case law.

As Aasa notes, there has been a growing scholarly and judicial backlash against the CJEU requirement of mutual trust, especially as regards '**blind trust**', and in the field of criminal law and the European Arrest Warrant; this literature is synthesised in the thesis. However, Aasa's critique goes beyond merely the 'blind trust': in essence, it **questions the suitability of the principle of trust in the courtroom**. Aasa's

5 Alec Stone Sweet and Thomas L Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO' (2013) 1(1) Journal of Law and Courts pp 61-88. – DOI: https://doi.org/10.2139/ssrn.2024889; see below note 153 and the accompanying text.

6 Anneli Albi, *A Comparative Study on National Constitutions in EU Governance* (TMC Asser Press and Springer, forthcoming 2023).

7 Anneli Albi and Samo Bardutzky (eds) *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law – National Reports*. Volumes I and II (The Hague: TMC Asser Press and Springer 2019). – DOI: https://doi.org/10.1007/978-94-6265-273-6.

thesis further makes a completely original contribution to the existing research in several respects, of which the following three are of particular centrality.

The first main original contribution is that Aasa has undertaken the identification and **systematic analysis of a total of 115 CJEU judgments involving mutual trust over forty-five years**, which form the foundational data of the thesis. Aasa perceptively traces the evolution of the principle and classifies the cases into four generations of case law, teasing out paradigmatic shifts and changes. Through these four generations, Aasa shows how mutual recognition travelled from the internal market to criminal law and beyond. I doubt that the sheer scale of the mutual trust requirements – and their far-reaching consequences in terms of dismantling the respective national rules and autonomy, which will be explored below – is fully understood by the legal and scholarly communities. In any event, the present writer was surprised to read that mutual recognition has been extended to such a scale as to **require trust – in the abstract – in the Member States' legal systems, including criminal justice systems, as well as in the EU administration of justice as such**.[*8] Aasa shows that in the more recent case law on the *sui generis* constitutional questions, the principle of mutual trust has been deployed further – in line with CJEU's well-established tendency towards instrumental creep of competences – to establish for the EU a role in enforcing the rule of law in the Member States. Additionally, the principle has become part of the *raison d'être* of the autonomous EU constitutional order. Aasa perceptively grasps the patterns emerging and the gist of the problems and paradoxes, and articulates these to the reader in a clear, incisive and engaging style of writing. In a nutshell, **mutual trust 'in effect prioritises the speedy and simplified application and effectiveness of EU law over meaningful judicial controls** […] **and prevents Member States from applying their higher constitutional standards of fundamental rights protection'**.[*9] Aasa also brings numerous examples of basic legal errors and miscarriages of justice that have ensued in the cases she has explored. The present writer would add that the above dimensions – trust by courts, speedy application and effectiveness of EU law, and disapplication of higher national fundamental rights protection – have thus also become part of the EU concept of the rule of law, to be enforced by the CJEU. The profound differences compared to the more classic European *Rechtsstaat*-tradition of the rule of law will be briefly outlined when exploring the case of the automatic extradition of Neeme Laurits in Chapter 9.

The second main innovative contribution in Aasa's thesis lies in the extensive research on the **interdisciplinary literature** regarding the notion of trust, and the subsequent analysis of the CJEU case law in the light of these perspectives. The interdisciplinary literature studied ranges from economic behavioural theories of rational choice, and organisation and management theory, to perspectives from the literature in the field of sociology, philosophy, psychology and beyond. This is complemented by a fascinating linguistic and semantic analysis that explores the differences between facets of trust and related conceptual cognates such as **gullibility, hope, faith and confidence**, and the different degrees of epistemic basis, such as evidence, expected in each. Aasa observes that where the CJEU requires trust despite the existence of contrary evidence, this is 'more akin to a degree of faith, as faith can be conceptualised as a trusting belief despite contrary evidence'; where mutual trust prohibits the obtaining of evidence, this has similarities with hope and gullibility, and 'results in recklessness'.[*10] Aasa finds that 'mutual trust transforms to an illusion or utopia which has little to do with evidence, confidence, or rationality'.[*11]

Aasa's third and overarching original contribution is the argument that is gradually and carefully built throughout the thesis: that whilst required by the CJEU and enforced as an increasingly constitutional principle of the EU, **trust is not, in fact, at all suitable for governing legal relations and courtroom matters**. In particular with reference to Piotr Sztompka's monograph on a sociological theory of trust, Aasa explains that institutionalisation of distrust is a precondition for the architecture of liberal democratic constitutionalism. Since power corrupts, distrust is especially necessary with regard to those in power; monitoring and control mechanisms have been introduced to create an overall system of trust. As part of this, there are **certain professions that entail the exercise of suspicion and distrust as a professional duty**, including the police, border guards, attorneys, ticket controllers and, crucially, judges; scholars are also placed in this list. Courts are expected to be neutral, objective, professional

8 Aasa, supra note 2, pp 139-147.

9 Aasa, supra note 2, p 183. Emphasis added.

10 Aasa, supra note 2, pp 298-299.

11 Aasa, supra note 2, p 252.

institutions settling societal disputes, not adjudging on the basis of trust, which brings in subjectivity, bias and the colouring of evidence to one or the other side. The broader principles of institutionalised distrust include regular elections, accountability, legitimacy, division of powers, limited competences, etc, to which there is a precommitment through constitutions and international agreements.[*12]

The above analysis leads Aasa to conclusions which entail a good deal of courage and a strong conscience in the context of mainstream EU discourses, which I commend and will return to below. The thesis observes, with reference to the publications of Sztompka and others, that the legalisation, institutionalisation and universalised obligation of trust is characteristic of autocratic regimes. The requirement of trust, which prohibits criticism and scepticism, **leads to a culture of naiveness and dysfunctionality**.[*13] Aasa goes on to observe that '[t]he way in which the principle of mutual trust plays out in the EU legal order and simultaneously affects national constitutional orders has more in common with **institutionalised trust as an autocratic principle** than it does with institutionalised distrust as a democratic principle'.[*14] Whilst many are likely to brush off Aasa's concerns about the EU being 'autocratic' as unusual, aberrant and isolated views of a young scholar from a peripheral, post-Soviet Member State, the present writer would point out that a growing number of eminent academics have raised similar concerns with regard to different developments in EU governance, especially in the euro crisis management, eg that EU crisis governance is marked by 'executive authoritarian managerialism'[*15] and 'authoritarian liberalism'.[*16]

In general, whilst Aasa's thesis begins with somewhat emotive language – the author explains that trust is an emotionally loaded concept that belongs to the realm of personal relations[*17] – the thesis goes on to develop a very serious and compelling argument about profound, systemic flaws in the CJEU requirements for national courts, and the use of the principle of mutual trust in an instrumental way to advance the integrationist agenda. The issues and paradoxes raised are deeply disquieting, especially for those who are used to operating more within the paradigm of a continental European – and especially post-totalitarian or post-authoritarian – understanding of constitutionalism, particularly in the rights-sensitive area of criminal law.

Indeed, one broader contribution of Aasa's doctoral thesis is that it makes it harder for the mainstream EU discourse to carry on ignoring the concerns that have been expressed in a long-standing and growing stream of critical EU law scholarship about the integrationist agenda, teleological interpretation methods and the corresponding excessive judicial activism of the CJEU. An overview of the historical debates (eg the publications of Hjalte Rasmussen and Trevor Hartley) and of more recent critical literature (especially the monograph by (the former London SOAS scholar) Gunnar Beck, and a monograph by Gerard Conway) has been provided by Michal Bobek, who inter alia explores scholarly concerns that the CJEU carries out judicial review in a way where 'anything goes', and asks whether 'a body consistently deciding in one direction' can be called a court.[*18] The present writer has elsewhere provided an overview of some further critical concerns, especially as regards the effects on national courts.[*19] The most well-known criticism in recent times is probably that expressed by the former President of the German Constitutional Court, Roman Herzog. In an article with a strongly worded title 'Stop the European Court of Justice', Herzog wrote that 'the ECJ deliberately and systematically ignores fundamental principles of the Western interpretation of law, that its decisions are based on sloppy argumentation, that it ignores the will of the legislator, or even turns

12 Aasa, supra note 2, pp 289-295, with references to literature, especially Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge: CUP 1999).

13 Aasa, supra note 2, pp 289-299, with reference to Sztopmka, supra note 12.

14 Aasa, supra note 2 pp 291ff. Emphasis added.

15 C Joerges and M Weimer, 'A Crisis of Executive Managerialism in the EU: No Alternative?' *Maastricht Working Paper 2012/7*. – DOI: https://doi.org/10.2139/ssrn.2190362.

16 Alexander Somek, *The Cosmopolitan Constitution* (Oxford: OUP 2014) pp 23-24. – DOI: https://doi.org/10.1093/acprof:oso/9780199651535.001.0001; Michael Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford: OUP 2021). – DOI: https://doi.org/10.1093/oso/9780198854753.001.0001.

17 Aasa, supra note 2, pp 11-12.

18 Michal Bobek, 'The Legal Reasoning of the Court of Justice of the EU' (2014) 39 European Law Review pp 419ff, 423, 426.

19 See the two-part article Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism"', Part 1: (2015) 9(2) Vienna Journal of International Constitutional Law pp 151-185. – DOI: https://doi.org/10.1515/icl-2015-0203. Part 2: (2015) 9(3) Vienna Journal of International Constitutional Law pp 291-343. – DOI: https://doi.org/10.1515/icl-2015-0302. Concerns about the CJEU are collated in Part 2, pp 332-339, and concerns about the effects on national courts are collated in Part 1, pp 175-179; see also below notes 131-137 and the accompanying text.

it into its opposite […]'.*[20] Observations about the CJEU being something akin to a judicial, executive and legislative 'super agent' will be briefly outlined in Chapter 5.

Why such questions have hitherto not been more widely discussed and addressed has been elucidated by scholars researching the epistemology of EU law, whose work will be outlined in different parts of this article. They have shown that for a long time, there has been scarcity of critical discussion on EU integration, which professors Ian Manners and Richard Whitman have described as 'silencing' and 'exclusion' of 'dissident voices'*[21]. In relation to the historical evolution of EU law and scholarship, different scholars have mentioned the 'stifling and defensive intellectual environment characterised by the self-identification with the project of integration perceived as […] precarious and fragile'.*[22] The limited critical work that has been published in the past with regard to the Court of Justice has generally not been well received or has been vehemently criticised.*[23]

Against this background, I strongly commend Aasa's conscience and courage to voice the concern that in this area, the EU acts in accordance with autocratic rather than democratic principles, undermining democratic constitutionalism and fundamental rights. Equally, she has forthrightly documented instances where the CJEU case law is 'illogical', 'circular', 'a juridical legal fiction without basis in reality', or even 'a conscious misrepresentation of fact, rules, and reality' so as to turn from a legal fiction 'to a lie'.*[24] I also noted with interest Aasa's remark that scholars, similarly to judges, have a particular role in which they are required, within the purport of their task, 'to treat the trusted with distrust and regard any reports of trustworthiness with distrust', and that exercise of suspicion is their professional duty.*[25]

A further broader contribution is that whereas the critical EU law discourse has hitherto focused on the CJEU, Aasa's thesis in essence shows that the CJEU case law has also fundamentally been changing the role of courts and of judges in the Member States, as well as the logic of law and, more generally and alarmingly, what is regarded as 'European' legal thinking – questions around which I have seen very limited discussion thus far.

As noted in the introductory section, in the rest of this article, I will link Aasa's research findings to other issues that have been raised by scholars and judges about the changing role of courts through autonomous EU law, in order to invite joined-up discussion about the future direction of travel. In particular, I will submit for the consideration of the readers that the issues raised in Aasa's thesis are part of a broader, ongoing Kuhnian paradigm shift in European constitutionalism.

3. Structural issues in EU law research, including the agenda to shift from national and comparative European constitutional law to autonomous, self-referential EU law: Real-life consequences

In order to understand the scale of the changes in the role of courts through EU law, it is important to draw attention to some structural issues and methodological flaws in the operational setting of EU law research. In the present writer's view, these are in need of wider acknowledgment and corrective redirection, so as to enable meaningful discussions with regard to the role of courts as well as other profound alterations in European constitutional law that will be outlined throughout the article.

The most profoundly impactful structural issue is illustrated well in the choice of methodology in Aasa's thesis: the thesis is in the main based on the study of autonomous EU law, and the analysis of the

20 Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice' *EUobserver* (10 September 2008) <www.euobserver.com> (accessed 1 July 2015).

21 Ian Manners and Richard Whitman, 'Another Theory is Possible: Dissident Voices in Theorising Europe' (2016) 54(1) Journal of Common Market Studies pp 3, 5-9, 12. – DOI: https://doi.org/10.1111/jcms.12332.

22 Harm Schepel and Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3(2) European Law Journal p 169. – DOI: https://doi.org/10.1111/1468-0386.00025.

23 For an overview of the literature, see Schepel and Wesseling, supra note 22, pp 169, 184, 186.

24 Aasa, supra note 2, pp 188, 243, 244.

25 Aasa, supra note 2, p 292, with reference to publications of Niklas Luhmann and Piotr Sztompka.

above-mentioned interdisciplinary literature on the concept of trust. For a thesis on courts, it is somewhat striking that comparative European constitutional law, including Estonian constitutional law, is missing beyond generic, minimal references. The dimension of democratic constitutionalism does not, in fact, enter into the text until towards the final parts of the thesis, and is approached through the work of a sociological theory of trust by Sztompka.

The above point is not made here to single out this particular thesis; instead the aim is to flag for wider cognizance that this approach is representative not only of the influential research carried out at the EUI, College of Europe in Bruges and other leading centres of EU law, but of an increasingly prevalent, default methodological approach, whereby the baseline for much of 'European' legal research has shifted to autonomous, self-referential EU law. National and comparative European law tend to be mentioned only briefly in footnotes, or even entirely omitted, at least beyond the narrow, neofunctionalist lens of assessing compliance and correct implementation, or generic, reductionist references to 'sovereignty' and 'national constitutional identity'.

A growing number of scholars have started to express concern about this type of approach, and have sought to bring light to the underlying dynamics. For example, Antoine Vauchez has documented that historically, the European Commission has promoted and funded specialised EU law journals and university centres, with the aim of shifting EU studies away from a comparative analysis of national laws (which would aim to identify common principles) to the study of the 'specificity' of EU law, focusing on the relationships between EU law (and the CJEU) and national law (and courts).*[26] In the context of private law, Simone Glanert has explored debates amongst private law experts regarding the European Commission's programme of gradually replacing national laws, which have been embedded in a tradition and culture, by a unique 'European' law and a transnational legal 'neo-language' devoid of national cultures and histories. In her extensive comparative research and with reference to similar concerns by Pierre Legrand, Glanert compellingly shows why this direction of travel is wholly misguided.*[27] The present writer has sought to explain the different dimensions of the sidelining of comparative European law in favour of autonomous, self-referential EU law, including through the types of articles that get past gatekeepers for publication in leading journals of European and international constitutional law, which on a closer look tend to be oriented towards autonomous EU and global constitutional law.*[28] The reorientation of research from comparative to autonomous EU law may also have its origins in the colonial roots of international law, whereby research was deployed to legitimise a central authority instead of reliance on 'comparative colonial administration', as will be briefly outlined in Chapter 4.

There is a further related dimension, which is the scarcity of possibilities to publish national, comparative and/or critical research on EU law in the main, high visibility journals. Concerns about the 'stifling and defensive intellectual environment' regarding research on EU law were noted in the preceding chapter. More generally, Ian Manners and Richard Whitman, in a special issue of the *Journal of Common Market Studies*, have observed that in EU integration scholarship, all (at the time) 28 Member States' systems have been dissolved as easily as the administrative regions in French politics, and that in the mainstream journals of EU studies, alternative voices have rarely been published; publication in other journals leads to limited visibility and citations.*[29] The above dynamics also reinforce what scholars have described as a **'disconnect' between EU and national legal discourses**, which is caused by practical obstacles, such as language barriers and lack of manpower in smaller Member States, as will be outlined in Chapter 4.

One should also briefly mention that EU law and research are marked by depoliticisation in terms of the 'right-left' political dichotomy; the division has instead been between 'integration friendly' and 'integration sceptical' camps.*[30] This helps to understand why growing literature about the EU having entrenched

[26] Antoine Vauchez, 'The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of the EU Polity' (2009) 16(1) European Law Journal pp 20-21. – DOI: https://doi.org/10.1111/j.1468-0386.2009.00494.x.

[27] Simone Glanert, 'Speaking Language to Law: The Case of Europe' (2008) 28(2) Legal Studies pp 163ff. – DOI: https://doi.org/10.1111/j.1748-121x.2008.00084.x.

[28] See also below note 70 and the accompanying text, and more fully Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 307ff.

[29] Manners and R Whitman, supra note 21, p 7, with reference to the work of A Kreppel regarding comparison with the French system.

[30] Armin Von Bogdandy, 'A Birds-eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective' (2000) 6(3) European Law Journal p 210. – DOI: https://doi.org/10.1111/1468-0386.00105. More generally on depoliticisation of EU integration, see Gian-Giacomo Fusco

something akin to 'authoritarian neoliberalism', which will be briefly outlined in Chapter 5, has by and large been overlooked in the mainstream discourses and especially in the national legal discourses.

More generally, a conversation needs to be started about the wide-ranging implications of the prevailing operational setting where EU scholarly research is part of a broader political project in which there is only one admissible end-vision for the EU. In the field of political science, Quincy Cloet, in her research on 'hegemonic' and 'peripheral' narratives in EU discourse, observes that European studies are set apart from other disciplines, as they 'are geared towards a political project rather than an entire branch of knowledge or sphere of society'.*[31] Scholars researching the epistemology of EU law have elucidated that the EU has to a significant extent been a 'juristic' project – written by a 'community' of lawyers, clerks, scholars and judges, and thus legal expertise is effectively a precondition for participating in the policy debates.*[32]

In this regard, the growing community of more critically oriented EU law scholars – who would like to see democratic constitutionalism retained at the national level or are concerned about the entrenchment of neoliberalism or other various problematic developments in EU integration – must have observed with disquiet that the *European Law Journal*, which was specifically established to enable critical and contextual study of EU law and integration, has recently been overhauled to seemingly advance the neofunctionalist 'Integration through Law' doctrine that will be explored in Chapter 6. In 2020, the Journal's Editorial and Advisory Boards resigned *en masse* from their positions in protest after the publisher, Wiley, sought to appoint Editors-in-Chief without consulting them.*[33] Impressionistically, the new editorial team seems to be composed of more traditionally oriented EU law scholars, many of whom are staff, visiting professors and/or alumni of the College of Europe in Bruges, or work in EU institutions or Brussels universities. Indeed, one of the first initiatives envisaged is a project on the future of Europe organised by the Bruges College of Europe.*[34] The introductory Editorial, entitled 'What European Law Journal stands for?', explains the redefined mission as follows: 'The editorial line of the ELJ is based on the conviction that integration through law [...] represents one of the best means at our disposal to ensure a European, if not global, liberal and sustainable way of life. This is what the ELJ stands for.'*[35] For academic freedom and for exploration of different visions for the future of the EU, it is particularly commendable that the former editorial board has meanwhile embarked on establishing a new journal, *European Law Open*, the 2022 mission statement of which mentions openness to questioning the 'dogmas' of EU law.*[36]

For the purposes of the rest of this article, which postulates an ongoing Kuhnian paradigm shift in European constitutionalism, the prevailing academic landscape that is described above will be referred to as the systemically neofunctionalist operational setting of EU law research; neofunctionalism will be explored in Chapter 4.

I would submit for the consideration of European legal research communities that the combined structural issues in EU research need joined-up attention by national associations of legal scholars and lawyers, national academies of sciences, ministries of justice, grant funding bodies, editorial boards of journals, job and fellowship panels, etc. In the numerous formal and informal accounts that I have collated about the experience of scholars working on national and comparative law, it is a common experience that they tend to be penalised for not regularly publishing in high-visibility European and international journals or, indeed, in the English language. A strikingly large number of colleagues have informally mentioned that if they have submitted to a leading EU law journal an article that has a starting point in national or comparative constitutional law or in national criminal law, social law, etc, especially if they document problems posed by

and Michalis Zivanaris, 'The Neutralisation of the Political. Carl Schmitt and the Depoliticisation of Europe' Republished (2022) 30(2) Journal of Contemporary European Studies pp 363ff. – DOI: https://doi.org/10.1080/14782804.2021.1873109.

31 Quincy Cloet, 'Two Sides to Every Story(teller): Competition, Continuity and Change in Narratives of European Integration' (2017) 25(3) Journal of Common Market Studies p 295. – DOI: https://doi.org/10.1080/14782804.2017.1348339.

32 Schepel and Wesseling, supra note 22, p 165; Francis Snyder, 'New Directions in European Community Law' (1987) 14(1) Journal of Law and Society p 167. – DOI: https://doi.org/10.2307/1410304, cited in Jo Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996)16(2) Oxford Journal of Legal Studies p 231, 234. – DOI: https://doi.org/10.1093/ojls/16.2.231; Vauchez, 'The Transnational Politics of Judicialization', supra note 26, pp 4 and 26ff.

33 See a manifesto of the previous Editorial Board in *Verfassungsblog*: Joana Mendes and Harm Schepel, 'What a Journal Makes: As We Say Goodbye to the *European Law Journal*' *VerfBlog* (4 February 2020) <https://verfassungsblog.de/what-a-journal-makes-as-we-say-goodbye-to-the-european-law-journal/> (accessed 30 August 2022).

34 Karine Caunes, 'What the European Law Journal stands for?' (2020) 26(1-2) European Law Journal pp 2-8.

35 Caunes, supra note 34.

36 'Editorial: Introducing European Law Open' (2022) 1(1) European Law Open pp 1-5.

EU law to the national legal system, the referees have either rejected the piece outright or have asked them to rewrite the entire article to explain the constitutional matters more fully to EU lawyers, to shift the starting point to the literature on 'Europeanisation of law', or to provide a fuller and more 'balanced' account of the CJEU case law; this has also been the present writer's experience. It is not clear how the existence of a systemic problem could formally be researched and documented, also since referee reports are confidential. Above it was noted that statistical research of the leading EU political science journals by Ian Manners and Richard Whitman has revealed 'silencing' or 'exclusion' of critical and comparative voices.*[37]

In any event, the adverse impacts are then compounded by the impression (although this needs to be corroborated with statistical data) that a very large proportion of grants, especially EU grants – including the very large and prestigious European Research Council grants – tend to be awarded to scholars working on EU law, in English and in the academic 'centre' countries. This compounds the structural problems faced by national and comparative research communities, who are not deemed to be sufficiently 'world-leading' and 'competitive'. There is a real need to support and reward, rather than penalise, scholars who work on national and comparative (and other areas) of law, often in two or more languages, which is very time-consuming and requires far more extensive specialist knowledge of multiple legal systems, advanced language skills, etc.

In terms of possible ways forward, one practical question is how to make funding available for pan-European comparative constitutional law journals and meeting forums where the starting point would be classic European constitutional law, and where concerns about EU law could be put forward openly and discussed in a joined-up manner. EU-funded scholarly and judicial projects and networks come with subtle but effective peer pressure. Scholars have observed that in supranational expert networks, co-optation by the networks creates 'a nearly irrebuttable presumption of competence', whereas those who do not abide are 'marked with the stigma of the outsider', and have to collate a lot more evidence for their arguments, which then nevertheless often tend to be regarded as 'outlandish'.*[38] In the present writer's observation, those who advocate retaining the diversity of the national legal orders tend to be placed in these categories. But there is also a need for a review of the publication policies of the existing high-visibility journals, in that critical and comparative articles ought to be included as a standard practice. This is important not only from the viewpoint of academic freedom and scholarly integrity, but also as legal scholarship is of direct relevance to shaping EU law and policy. If articles outlining the problems caused by EU law in national legal orders are routinely excluded from high-visibility journals, there is no – or limited – wider awareness about the existence of the problems and, furthermore, that the problems are often widely shared. Those problems that do occasionally make it to the mainstream attention are then typically dismissed as 'particularistic' or 'idiosyncratic' and, eventually, prospects and possibilities for addressing them are extremely limited. A further practical matter is that funding is also needed for the translation of key works from less known languages into English, and for more extensive comparative projects and publications. Through the 'Role of Constitutions' project it emerged that EU state aid rules prohibit the use of public grant funding to subsidise the publication of large-scale comparative books (except where these are made available open access, which is very costly), as this would distort the market. Yet the reality is that it is much easier and economically viable to publish a book simply on some aspect of autonomous EU law, which then has the effect of distorting knowledge about 'European' law.

There are many additional reasons why the above structural issues in the EU discourse need to be addressed by the mainstream scholarly and legal communities. For one, if these were to come to wider public scrutiny, this could significantly reduce trust in academic research and expertise as well as trust in law, courts and lawyers more widely. Indeed, this has happened to some extent in the United Kingdom, eg with media criticism regarding EU Jean Monnet funding. There is also widening discontent on the part of voters all over Europe, an issue which will be explored in the final chapter.

All of the above is also of further direct practical importance for constitutional law and the role of courts: the structural problems and methodological flaws in the EU discourse have had far-reaching, real-life consequences in terms of disappearing awareness and understanding – and consequently judicial protection – of classic tenets of (continental) European constitutional law. Anne-Lise Kjaer has expressed concern 'what will happen to the mutually divergent national languages and cultures of law' when European

37 Manners and R Whitman, supra note 21, pp 3, 5-9, 12.

38 Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford: OUP 2008) pp 166-168. – DOI: https://doi.org/10.1093/acprof:oso/9780199542086.001.0001.

lawyers 'involve themselves in an increasingly self-referential European legal discourse' where 'communicating about law and speaking the law are no longer conducted in divergent national legal languages, but in a Europeanized legal language with no reference to the domestic laws of the Member States'.[*39] Kjaer additionally shows how such developments are changing 'what people believe is real'.[*40]

One such practical, real-life consequence is that **the role of courts seems to be undergoing a profound change through EU law, but by and large without discussion so far**. This will be explored more fully in Chapter 5; here one could briefly note that regarding the requirement of trust for courts, scholars with grounding in more classic European constitutional law and criminal law have pointed out why trust is not suitable in systems of criminal justice. For example, Ester Herlin-Karnell has extensively explained that whilst 'trust has been the driving assumption in EU criminal law cooperation', trust has been regarded as wholly misplaced and even dangerous in classic criminal law.[*41] A study by the Centre for European Policy Studies observes that criminal justice systems are

> designed to operate on the basis of distrust among the actors. If judges and juries had mutual trust in the police, then there would be no need for a trial, the defendant would obviously be guilty because the police say so and the judge and the jury trust the police.[*42]

I would add that the above concerns are particularly acute in relation to what I have in result of the above-mentioned 'Role of Constitutions' project categorised as the **post-totalitarian and post-authoritarian constitutional systems** amongst the EU Member States. These include the constitutions of Germany, Italy, Spain, Portugal, Greece, and Central and Eastern European countries (including Hungary before 2010 and Poland before 2015).[*43] In fact, the post-totalitarian and post-authoritarian constitutional tradition is shared by more than half of the Member States, but awareness about it has by and large been missing in the mainstream EU discourses. Most of the constitutions of this type, including the Constitution of Estonia, contain extensive, detailed provisions on constitutional fundamental rights, and especially as regards safeguards for deprivation of liberty and access to courts, which are often worded notably more stringently and offer more extensive protection than the relatively generic provisions set out in the ECHR and the EU Charter of Fundamental Rights.[*44] This is because of historical experience where authorities exercised power over individuals in an arbitrary, repressive and coercive manner, and countless innocent individuals sat in jails, were sent to concentration camps or penal colonies or were deported to Siberia, or lost their lives. As the Czech Constitutional Court has recalled in a well-known ruling, the totalitarian system 'made the judiciary a submissive and unthinking instrument in the enforcement of totalitarian power'.[*45] As an aside, can this and other parts of history really be written out of law as per the above-mentioned EU agenda to create new, transnational law devoid of national histories?

At the same time, it is important to note that these types of safeguards are less developed in the political and historical types of constitutions, which are generally described as more flexible and pragmatic (eg UK, the Netherlands, Nordic countries), as well as in the traditional legal type of constitutions (eg France, Belgium, Ireland). An important difference that needs greater cognizance is that in the political type of constitutional cultures, courts are distinctly more deferential and pragmatic, and that as a result, EU and

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39 Anne Lise Kjaer, 'Theoretical Aspects of Legal Translation in the EU: The Paradoxical Relationship between Language, Translation and the Autonomy of EU Law' in Susan Šarčević (ed) *Language and Culture in EU Law. Multidisciplinary Perspectives* (Routledge 2015) p 98. – DOI: https://doi.org/10.4324/9781315591445.

40 Kjaer, supra note 39, p 105.

41 Ester Herlin-Karnell, 'The Integrity of European Criminal Law Co-operation: The Nation State, the Individual, and the Area of Freedom, Security and Justice' in Fabian Amtenbrink and Peter AJ van den Berg (eds) *The Constitutional Integrity of the European Union* (The Hague: Asser Press 2010) pp 237-262. – DOI: https://doi.org/10.1007/978-90-6704-445-5_10.

42 Sergio Carrera, Elspeth Guild and Nicholas Hernanz, 'Europe's Most Wanted? Recalibrating Trust in the European Arrest Warrant System', CEPS Special Report No 76 (March 2013) <https://ssrn.com/abstract=2275268> (accessed 17 April 2015) p 20.

43 The three broader types of constitutions are explained in greater detail in Anneli Albi and Samo Bardutzky, 'Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project', in Albi and Bardutzky, *National Constitutions*, supra note 7, pp 12ff, with particular reference to Cesare Pinelli. The theme is developed more fully in the forthcoming *Comparative Study*, supra note 6.

44 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, pp 13ff.

45 See the judgment of 17 December 1997, file No Pl ÚS 33/97; translation by Zdeněk Kühn, 'Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment *Ultra Vires*' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 797.

ECHR law have, in fact, significantly expanded judicial review.*[46] Since many of the countries with political or traditional legal constitutions are at the 'centre' in terms of influence in EU discourses, this may have contributed to the fact that the concerns raised about the curtailment of judicial review through EU law in the context of post-totalitarian and post-authoritarian constitutional systems have hitherto largely been overlooked. In particular, given the high level of influence and authority that British scholars have in EU discourses, there is a need for greater awareness that their commentary typically proceeds from a legal background in which EU law has led to a 'juridification' of the national constitutional system and has enhanced fundamental rights protection. Indeed, in the UK there is no written constitution, fundamental rights protection is based on the Human Rights Act (1998) that in essence transposes the ECHR, judicial review is limited, parliamentary legislation cannot be annulled, the concept of the rule of law is more ambiguous and procedural, there is executive dominance with wide discretion, adjudication by the courts is casuistic and based on precedent, and there is a somewhat state-phobic orientation whereby many social state structures and protections that are in place in other parts of Europe are left to the market or to charities.*[47] In any event, for clarity, it ought to be noted that the present article is written with grounding in Estonian and wider post-totalitarian constitutionalism, modelled on the German constitutional *Rechtsstaat*.

Indeed, one practical consequence of the methodological shift from comparative to autonomous, self-referential EU law is that the differences in the constitutional cultures of the Member States have by and large been overlooked, and all constitutions tend to be generically reduced to notions of sovereignty and idiosyncratic national constitutional identity. I noted with interest that Signe Rehling Larsen has also observed that even EU pluralist discourses have been 'blind' to profound differences in the constitutional cultures of the Member States.*[48]

4. What should be the baseline for assessment of the role of courts: A Kuhnian paradigm shift from (continental) European constitutional law to autonomous, neofunctionalist EU governance?

There is a further profound dimension to the preceding discussion on the CJEU requirement of mutual trust and the shift in the research methodology from national and comparative European constitutional law to autonomous, self-referential EU law. It is submitted for the consideration of the readers that these are part of a more fundamental change: an **ongoing Kuhnian paradigm shift** from the broader classic, comparative (especially continental) European understanding of constitutional law to autonomous EU governance, which is predicated on new and very different foundational ideas for the exercise of public power.

Returning to Birgit Aasa's thesis, it raises the question of **what should be the baseline** to trace the paradigm changes, and also which fundamental rights ought to apply – national constitutional rights, EU Charter or international human rights.*[49] Aasa briefly observes that mutual trust is part of **a governance regime**, and used in a **functional** manner to achieve borderless Europe.*[50] Regarding the CJEU, Aasa's thesis discusses, and takes issue with, the underlying integrationist rationale of the CJEU, and shows how the CJEU has used the principle of mutual trust in an instrumental way to enhance the constitutional dimension of the EU legal order.*[51] The principle of mutual trust has been used in relation to the '*raison d'être*' of the Area of Freedom, Security and Justice (AFSJ) and, more broadly, as an existential principle of the European Union, which functions for the purposes of primacy, autonomy, unity and effectiveness of EU

46 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, p 20.

47 For 'juridification', pragmatism and several of the other aspects listed, see Alison L Young, Patrick Birkinshaw, Valsamis Mitsilegas and Theodora A Christou, 'Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification' in Albi and Bardutzky, *National Constitutions*, supra note 7, pp 83ff.

48 Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84(3) Modern Law Review p 478. – DOI: https://doi.org/10.1111/1468-2230.12614. See also below notes 102-103, 108 and 127, and the accompanying text.

49 Aasa, supra note 2, eg pp 119, 166.

50 Aasa, supra note 2, p 42, with reference to the work of Cecilia Rizcallah.

51 Aasa, supra note 2, eg pp 26-28, 49-50, 226-227.

law.[*52] It strengthens the EU's 'actorness'.[*53] The principle has a top-down, structuring-constitutionalising function.[*54] Aasa concludes that the CJEU has used the principle in a way where the ends justify the means, and practical difficulties have been brushed aside in the name of the noble goal of ever closer union.[*55]

I noted with interest that Aasa's thesis partly drew on my earlier article 'Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-operative Constitutionalism'' (hereinafter 'Erosion of Constitutional Rights'), where I concluded that EU constitutionalism represents a thin, weak, procedural version of constitutionalism, which centres around a very different type of constitutional keywords, such as supremacy, uniformity, direct effect, autonomy, effectiveness and trust.[*56] I had reached this conclusion with reference to a growing number of scholars who have voiced concerns about the 'twilight' of constitutionalism (Petra Döbner and Martin Loughlin), 'the end of constitutionalism as we know it' (Ming-Sung Kuo), the obsolescence of national constitutions (Andrea Simoncini); Carol Harlow and Susana Galera have both noted the emergence of a **thin, weak, procedural version of judicial review**, as well as of the rule of law and democratic control, in the context of EU and global economic co-operation, with reduced opportunities for citizens to challenge public decisions.[*57]

In my subsequent research based on the above-mentioned 'Role of Constitutions' project, it emerged that what is at stake is, in fact, even more profound. I have come to share the finding of a small but growing number of scholars that what has been underway is **a paradigm shift from constitutional law to autonomous EU governance**.[*58] This paradigm shift has been most clearly posited by Alexander Somek, who finds that the EU's euro crisis management represents a change from a constitutional law paradigm to a paradigm of governance, where formal legal constraints on public power have been replaced by economic and executive necessities; we have entered into '[t]he brave new world of exigencies'.[*59] On a closer look, autonomous EU governance is predicated on an eclectic mix of **entirely different foundational ideas for the exercise of public power**; these will be collated and explored more fully in another publication, along with how these have been altering comparative European constitutional law, including through foundational changes.[*60] It has been well-established since the early seminal rulings of the CJEU that EU law is decoupled and independent from national constitutions; what has received little attention is that it is thereby also disconnected from, and not based on, the broader comparative European understanding of constitutional law.

For the purposes of the present article on the role of courts, the following foundational ideas for the exercise of public power in autonomous EU governance are the most relevant: functionalism and neofunctionalism; market integration and neoliberalism; origins of EU law in international law, including roots of international law and of functionalism in colonial administration; the US federal constitutional system, including fiduciary constitutionalism from the private law on trusts; theories of transnational governance; and cosmopolitanism.[*61]

The new foundational ideational setting has not hitherto been clearly stated or discussed, at least beyond references to US federal constitutionalism. Indeed, with regard to the impact of functionalism, Jan Klabbers has elucidated that 'lawyers and others working in or with international organizations have all been speaking the language of functionalism without realizing it';[*62] 'the theory of functionalism is rarely

52 Aasa, supra note 2, eg pp 26, 162-163, 181-182, 222-228, with references to case law and literature.

53 Aasa, supra note 2, pp 228-229, with reference to the work of Marise Cremona.

54 Aasa, supra note 2, pp 226-229, with references to further literature.

55 Aasa, supra note 2, p 252.

56 Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 291ff.

57 For a summary of, and references to, the respective publications, see Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 304ff.

58 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, p 24, with references to scholarly writings by eg Alexander Somek (see also below note 59 and the accompanying text), Agustin Menéndez, Joana Mendes and others. This theme is developed more fully in the forthcoming *Comparative Study*, supra note 6.

59 Somek, *The Cosmopolitan Constitution*, supra note 16, pp 22ff.

60 A brief summary is available in Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions' supra note 43, pp 25ff; this theme is developed more fully in the forthcoming *Comparative Study*, supra note 6.

61 These will be more fully explored in the *Comparative Study*, supra note 6; some references to respective literature will be provided below in this and subsequent chapters.

62 Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25(3) The European Journal of International Law p 651. – DOI: https://doi.org/10.1093/ejil/chu053.

spelt out in any detail' and 'its intellectual origins have always remained hidden from view', including origins in colonial administration.[*63]

This is important to note, as much of European legal scholarship has hitherto proceeded from the assumption that the values of European and EU constitutionalism are congruent, and are broadly part of the same, multi-level system. Those specialising in EU and global constitutional law do, however, note that national and post-national constitutional law are intrinsically different; often a mention is made of Joseph Weiler's widely quoted remark (in the context of democracy) that if one were to use botanical language, they are different like apples and oranges.[*64] What has not received attention is that – if one were to extend this metaphor to the constitutional orders – the different varieties of apples are gradually being replaced by one orange, as EU law has expanded from the single market into virtually all areas of law, having thereby also profoundly changed the national law of the Member States.

With regard to neofunctionalism, I would like to gratefully acknowledge the enormously enlightening observations about the overall state of play in the European constitutional discourses, which were made by another young Estonian doctoral student, Maris Moks, at the Hertie School of Governance in Berlin,[*65] and for whom the main normative point of reference had come to be EU law. As part of her draft PhD thesis 'Guardianship of the Constitution versus the Expectations of European Integration: Judicial Review of the Euro-crisis Management', Moks carried out an extensive literature review, especially on the euro crisis accounts by EU constitutionalists. As part of this work, Moks perceptively pointed out that **EU law and integration discourses operate in the mindset of neofunctionalism**. Moks reached the conclusion that there are two parallel discourses – amongst scholars whose work is based on neofunctionalism and amongst scholars whose work is based on comparative constitutional law – who are both critical of the relevant court judgments but on entirely different, contrasting grounds. Moks made the following observation: whilst 'European constitutionalists and comparative constitutional lawyers are both deeply concerned' by the courts' judgments in the economic crisis, this is

> for completely different reasons, underpinned by contradicting normative tensions. The first criticize the crisis-caused case law as an **obstacle to further EU integration**, whilst the latter raise an alarm on the account of the failed protection of citizens' constitutional rights.[*66]

Moks observed that 'the representatives of one side do not seem to be fully aware of their counterparts' position'.[*67] She further brought examples of writings of neofunctionalist scholars who see the role of law and of the judiciary as being 'agents' of integration. According to Moks' literature review, the leading neofunctionalist legal scholars, especially in terms of publications on the role of courts, include Joseph Weiler[*68] and Renaud Dehousse. As a side note, the present writer would add that both are current or former presidents of the EUI; Joseph Weiler has been found to be the most influential legal scholar in the field of EU law on the basis of a comprehensive survey carried out in the framework of an ERC research project by Jan Komárek.[*69] Weiler is also one of the authors of the 'Integration through Law' doctrine, which will be explored in Chapter 6, and has, amongst many influential posts, been a long-standing Editor-in-Chief of the world-leading *International Journal of Constitutional Law*. The mission statement of the affiliated 'breakaway' scholarly association has pondered on the 'death' of 'Comparative Law' and affirmed its broader orientation 'by choice' towards 'Global Constitutional Law' and 'Global Administrative Law'.[*70]

63 Klabbers, supra note 62, pp 645, 675.

64 Joseph HH Weiler, *The Constitution of Europe. 'Do the New Clothes Have an Emperor' and Other Essays on European Integration* (Cambridge: CUP 1999) p 268.

65 Maris Moks, draft (discontinued) PhD thesis *Guardianship of the Constitution versus the Expectations of European Integration: Judicial Review of the Euro-crisis Management* (Hertie School of Governance in Berlin, 2017), on file with the author and cited with the permission of Maris Moks.

66 Moks, supra note 65. Emphasis added.

67 Moks, supra note 65.

68 See also the observations by Torres Pérez about neofunctionalist writings on courts by Weiler, below note 136 and the accompanying text.

69 Preliminary results presented by Jan Komárek and Michał Krajewski, 'So, who is influential? Methodological reflections', at IMAGINE project workshop 'Freedom and Power of European Scholarship' (23 June 2021, Prague/Copenhagen/Zoom) <https://imagine.sites.ku.dk/> (accessed 30 August 2022); the results are being prepared for publication.

70 'ICON·S – The International Society of Public Law. Mission Statement' <http://icon-society.org/site/mission> (accessed 2 August 2022).

Impressionistically, the neofunctionalist terminology of law, where any deviation on the part of national courts tends to be reduced to sovereignty, national identity, Euroscepticism or 'obstacles to integration', also tends to prevail in the publications and events of FIDE (*Fédération Internationale pour le Droit Européen*), ECSA (European Community Studies Association) and other scholarly associations in the field of EU law and integration, and their national branches (eg UACES in the UK). A recent ECSA-Austria funded anthology on Member States' constitutions, while providing an impressively comprehensive account on national constitutions, in the book description nevertheless frames the lens of the study through the question 'Do individual constitutions, and the legal cultures underlying them, pose an obstacle to future EU integration?'[*71]

The observations by Maris Moks about the different perspectives of EU constitutionalists and comparative constitutional lawyers tally with those of Peer Zumbansen who has, on the basis of a comprehensive overview of the literature, pointed out that state-based and comparative constitutional law have 'little in common' with the transnational constitutionalisation processes and the 'autonomous', 'beyond' state constitutional language.[*72] Whilst the former limit and place constraints on public power, transnational constitutionalisation removes the accountability mechanisms and frees space for the dynamic forces of constantly newly emerging functional and specialised fora of law-making.[*73]

In subsequent ongoing research, the above profound observations by Maris Moks eventually led me to articulate that the conflicts between national and EU constitutionalism that I and many other scholars and judges have been grappling with for so many years represent an **ongoing Kuhnian paradigm shift in European constitutional law**. Professor Thomas Kuhn, in his world-leading book on the history of science,[*74] articulated how scientific revolutions often come about as a result of a competition between two 'incommensurable' paradigms. Puzzled by the fact the arguments of some scholarly work he studied seemed ignorant and full of egregious errors, Kuhn came to the insight that scholars tend to be part of something akin to scientific 'tribes' or sub-cultures, clustering around the shared intellectual traditions of their disciplines. Following a period of turmoil, uncertainty, debate over fundamentals and expression of explicit discontent, this eventually tends to lead to a 'paradigm shift', with the discourses settling into the new dominant paradigm and the new conceptual framework.[*75] Such Kuhnian paradigm shifts are often invisible, at least initially.

I would submit for the consideration of the readers that in the context of European constitutional law, the Kuhnian paradigm shift finds expression in that there are, broadly speaking, **two parallel worlds of constitutionalism**.

The first is **the world of the broader national and comparative European understanding of constitutional law**, where the constitutions continue to be the principal normative point of reference, along with the classic understanding of European constitutional law and corresponding substantive values, such as fundamental rights, the rule of law, democracy, separation of powers, the social state and public good, judicial protection and constitutional review, and where the people are the ultimate source of public power.

The second and increasingly predominant is **the world of autonomous EU law and governance**, where the mindset, legal thinking and epistemic communities operate with keywords that are predicated on the new foundational ideas for the exercise of public power noted above, especially functionalism, neofunctionalism, neoliberalism, the tenets of international law and theories of transnational governance. The keywords include effectiveness, direct effect, uniformity, coherence, trust, enforcement, teleological

71 Stefan Griller, Lina Papadopoulou and Roman Puff (eds) *National Constitutions and EU Integration* (Hart Bloomsbury, 2022); the description is available at <www.bloomsbury.com/uk/national-constitutions-and-eu-integration-9781509906765/> (accessed 30 August 2022).

72 Peer Zumbansen, 'Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-pluralist Order' (2012) 1(1) Global Constitutionalism p 47. – DOI: https://doi.org/10.1017/s2045381711000037. See also pp 31 and 38, with further references, especially to Martin Loughlin.

73 Zumbansen, supra note 72, p 47, with reference to Martin Loughlin.

74 Thomas Kuhn, *The Structure of Scientific Revolutions. 50th Anniversary Edition with an Introductory Essay by Ian Hacking* (Chicago: University of Chicago Press 2012) – DOI: https://doi.org/10.7208/chicago/9780226458144.001.0001. For a summary, see John Naughton, 'Thomas Kuhn: the Man Who Changed the Way the World Looked at Science' *The Guardian* (19 August 2012) <https://www.theguardian.com/science/2012/aug/19/thomas-kuhn-structure-scientific-revolutions> (accessed 30 August 2022).

75 As summarised by Naugthon, supra note 74.

interpretation and the market. There are further underlying neofunctionalist tenets and doctrines which will be outlined below, especially 'Spillover' and 'Integration through Law', and precepts of neoliberalism, such as prioritisation of market values, deregulation, privatisation, replacement of public good by universal commodification, etc. In theories of transnational governance, there has been a paradigmatic shift from polity to society; '[t]he constitutional state operating through formal law making and political representation is allegedly dated', having been replaced by 'technical administration of depoliticized rational decisions', which are also dejuridified.*[76] In the new broader foundational ideational setting, it is not entirely clear what the source of public power is: in functionalism, it is based on apolitical, technical expertise;*[77] in theories of transnational governance, self-constituted authority has been noted;*[78] in neoliberalism, regulation is based on the presumed economic 'rationality' and the expertise of the technocratic institutions, but many have observed that, in reality, there has been a foundational change from accountability to the people to accountability to the markets or, essentially, to the international creditor community*[79].

One key underlying source of tensions and incommensurabilities seems to be that broadly speaking, the epistemic communities of autonomous EU law and governance regard the EU legal order as one single and unitary legal order,*[80] from Dublin to Rome and from Paris to Tallinn, apart from some strands of constitutional pluralism. As Agustín Menéndez has observed with concern, the consensus that 'European governance should become the *new grammar* of European law' means, 'in more pedestrian English', 'replacing supposedly quaint or obsolete constitutional law, tainted by its relationship with the nation-state, with a new array of procedures and institutional formations'.*[81] At the same time, for the epistemic communities of national and comparative law, the constitutional orders of the Member States have continued to co-exist, with powers having been delegated – on the basis of the respective national constitutions – to the EU, subject to certain limits and conditions and in specified fields, mainly in the internal market although with subsequent (and much contested) expansions to ever wider fields.

Although the broader classic understanding of constitutionalism is still mostly the norm in the Member States, it has strangely and increasingly come to be reduced to idiosyncratic national constitutional identity, as the epistemic communities of EU governance tend to have much more power and visibility due to the structural issues and the prevailing operational setting in EU law research that was outlined in Chapter 3. The reality is that EU law communities have a clear set of leading journals that are widely read and where discussion is continued; they have a much greater proportion of high-ranking publications. There is very generous EU funding for research grants, research centres, meeting forums, professional associations, as well as funding for doctoral and post-doctoral fellowships in the field of EU law and integration. All this contributes to EU law and integration communities having far better transnational networks and mobilisation capacities, which is especially evident in the sharp reprimand of any deviant national constitutional courts. According to one interpretation of Kuhn's work, a paradigm shift succeeds not because of rational disagreement but because those who adopt it 'are **systemically influential** and end up dominating the academic discourse and indoctrinating the new generation of practitioners with the new paradigm'.*[82] The present writer would submit that scholars and lawyers of autonomous EU law and governance have become such systemically influential and predominant epistemic communities.

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76 As per transnational governance literature insightfully summarised and elucidated by Jiří Přibáň 'The Concept of Self-limiting Polity in EU Constitutionalism: A Systems Theoretical Outline' in Jiří Přibáň (ed) *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (Routledge 2016) pp 39, 42-44, 48, 51. – DOI: https://doi.org/10.4324/9781315608273.

77 Eg Klabbers, supra note 62, pp 664-665.

78 As per transnational governance literature summarised by Přibáň, supra note 76, pp 42-44, 51ff.

79 Harvey, below note 166, eg 72-73; Michael Wilkinson, 'The Reconstitution of Postwar Europe: Lineages of Authoritarian Liberalism' *LSE Working Paper 05/2016* <http://www.lse.ac.uk/law/working-paper-series> (accessed 30 August 2022) pp 22 and 27ff, with reference to the publications of Chris Bickerton and Wolfgang Streeck. See also below note 174 and the accompanying text, and the debates regarding the Portuguese Constitutional Court, below notes 201-203 and the accompanying text. See also below notes 163-166 and the accompanying text on the entrenchment of neoliberalism.

80 Paul J Cardwell, 'The End of Exceptionalism and a Strengthening of Coherence? Law and Legal Integration in the EU Post-Brexit' (2019) 57(6) Journal of Common Market Studies p 1408. – DOI: https://doi.org/10.1111/jcms.12959.

81 Agustin Menéndez, 'Book review on Alexander Somek *Individualism*' (2009) 7(3) International Journal of Constitutional Law p 550. – DOI: https://doi.org/10.1093/icon/mop018. Emphasis original.

82 As Kuhn's key themes have been summarised by Nigel Stobbs, 'The Nature of Juristic Paradigms Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' (2011) 97(4) Washington University

Indeed, I would submit that something akin to a systemically neofunctionalist operational setting has come to be embedded in EU law research, at least beyond national law journals which are rarely read and cited by EU law scholarship. The 'exclusion' and 'silencing' of critical and comparative voices – which was noted in Chapter 3 – also means exclusion of much of the legal thinking and conceptual apparatus of the paradigm of classic European constitutional law. In such an operational setting, issues which for national legal communities are basic constitutional common sense typically need extensive explanation, pleading and justification in EU law journals and scholarly forums, and there is often an atmosphere where defending national constitutions is regarded as somehow inherently nationalist or populist. Moreover, such constitutional issues have become even harder to raise after the illiberal turn of Poland and Hungary.

That neofunctionalism is, indeed, the key ideational component underlying autonomous EU governance as well as EU law and integration studies becomes evident when one turns from the focus on comparative constitutional law to reading more extensively the work of EU law and integration scholars.*[83] Whilst there is no space here to delve further into neofunctionalism, many readers will be familiar with the main tenets of neofunctionalism, such as 'Spillover', 'Never let a good crisis go to waste', the characterisation of the European Court of Justice as a 'motor of integration', the doctrine of 'Integration through Law', and the instrumental mobilisation of scholarly and other epistemic communities to advance the European project. What is important for the purposes of this article is that in neofunctionalism, the exercise of public power is oriented towards fundamentally different reference points and broader objectives in comparison with national and comparative European constitutional law.

One profound difference is, as Jan Klabbers has elucidated, that in the theory of functionalism that governs much of international law thinking, international and supranational organisations are regarded as 'purely beneficial creatures' and as a 'a higher form of being', and any co-operation is inherently good.*[84] There are no pathways of thinking about how to deal with situations where supranational or international organisations undermine fundamental rights or the rule of law, or may even display autocratic or authoritarian tendencies. This also helps to explain a somewhat puzzled observation in Aasa's thesis that the EU constitutional principles are structural and not concerned with the substantive content of policies.*[85] Examples of how this plays out eg in fundamental rights protection or in EU enforcement proceedings can be found throughout this paper.

The present writer would add that the presumption of inherent benevolence and rationality of international institutions has led to a larger-scale structural problem whereby causes of problems tend to be attributed to the national level, with blindness to deeper underlying causalities that often lie in the policies of the international institutions, leading to misguided policy prescriptions that may well exacerbate the problem.*[86] This could perhaps tentatively be referred to as a vicious cycle caused by the presumption of inherent rationality of international institutions and blindness to the underlying causalities. By way of a topical example, I have rarely seen discussion on whether the underlying causes of the widening rule of law crisis in Central and Eastern Europe may include some of the neoliberal policies imposed by the EU or IMF, such as the harsh austerity measures, privatisation, commodification and financialisation that have led to unaffordable housing and public services, and which have caused a lot of resentment. Notably, before the illiberal turn in Hungary, 1.7 million citizens – or more than one-sixth of the population – had taken out foreign currency-denominated mortgages and loans from subsidiaries of Western European banks, which often became unmanageable after exchange rate increases.*[87] What has also been very under-researched is the human suffering and long-term effects of the so-called 'shock therapy' that was administered to the whole region by the IMF in the transition years, which the Nobel Prize laureate economist Joseph Stiglitz

Jurisprudence Review <https://openscholarship.wustl.edu/law_jurisprudence/vol4/iss1/4> (accessed 30 August 2022) pp 105-106 and footnote 37. Emphasis added.

83 Generally on neofunctionalism and EU law, see Graínne De Búrca,'Rethinking Law in Neofunctionalist Theory' (2005) 12(2) Journal of European Public Policy p 310. – DOI: https://doi.org/10.1080/13501760500044082; and Alec Stone Sweet, 'Neofunctionalism and Supranational Governance (unabridged version)' *Faculty Scholarship Series, Paper 4628/2012*, <http://digitalcommons.law.yale.edu> (accessed 30 August 2022).

84 Klabbers, supra note 62, pp 665-666, 646, with references to literature.

85 Aasa, supra note 2, eg pp 225-229.

86 Cf also Anghie, below note 110 and the accompanying text.

87 The data is from 'Hungary', in *Encyclopaedia Britannica* (2010) p 409.

and others have seen as a cause of the rise in poverty, inequality and non-emergence of a strong middle class and healthy civil society in some Central and Eastern European countries. Indeed, in light of the war in Ukraine, Stiglitz' chapter 'Who Lost Russia' would seem to warrant closer public attention.[*88]

Further differences in the thinking of the epistemic communities of autonomous EU governance, in comparison with those of national and comparative European constitutional law, include the following. In the neofunctionalist ideational setting, national constitutions, courts and other institutions are approached from the perspective of whether they advance or pose 'obstacles' to integration.[*89] The 'national' tends to be equated with nationalism and sovereignty, which are deemed to be the underlying problems that need to be overcome. As a consequence, there is a very limited attention span for anything 'national' beyond compliance, correct implementation and loyal co-operation.[*90] There is a tunnel vision whereby progress is to be achieved through 'Europeanisation', in the specific meaning of a gradual transfer of law and power from the nation-states to the EU level,[*91] along with a shift to autonomous EU law and legal language. More generally, neofunctionalism tends to redirect policy, law and even fundamental rights protection from finding optimal solutions – eg to the needs of a people of a country – to what best achieves successive shifts of law and competences to the EU level. On the national level, much of the political, legal, policy-making, scholarly and other talent and energy has over many decades been directed to the narrow cause of advocating, or opposing, new, successive transfers of power to the EU level.

Ultimately, the underlying dogmatic premise in neofunctionalism and in much of EU law, policy and discourse is the belief that the path to human progress lies in leaving behind nation-states. Indeed, this assumption is present in one way or another, for somewhat differing reasons, in most of the new foundational ideas for the exercise of public power in autonomous EU governance listed above. As Alexander Somek has observed with regard to EU discourses, the '[m]ainstream discourse … is blinded by the belief that the one remaining obstacle to human progress is the nation state'.[*92] Signe Rehling Larsen has documented that the project of unification of Europe in a way where nation-states need to be left behind has been in particular promoted by German scholars, politicians and the legal community as part of post-fascist constitutionalism, due to the origin of the Nazi atrocities in nationalism and excesses of people power and democracy.[*93] Rehling Larsen takes issue with this broader objective, and perceptively points out that many other Member States, eg the Nordic countries and the UK, do not find that the problem is the nation-state or the people, as they have not had such drastic experiences with the people. Furthermore, Rehling Larsen points out that the peoples of Central and Eastern Europe have historically been oppressed by foreign imperial powers, especially during the Soviet era, having barely managed to preserve their languages and cultures, and thus the respective constitutions do not see people and the nation-state as a threat but rather commit to upholding the nation-state and democratic self-determination.[*94]

As a side remark, it is likely that the scholarly and legal communities in Estonia, the other Baltic states and other countries of Central and Eastern Europe have not consciously considered the practical implications of the ultimate objectives of EU law and integration, and may wish to add their support to Rehling Larsen's observations. Indeed, the present writer's broader sense is that there has been a battle against the wrong enemy. Instead, another lesson incorporated in the German post-war Basic Law – that the root causes of the rise of authoritarian governments lie in economic insecurity and dependence, due to which strong protections were put in place for the social state – has received negligible attention; this theme will

88 Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin 2002) pp 167, 141, 162, 133ff, and chapter 5. For a summary of Stiglitz's work in Estonian, see book review by Anneli Albi, 'Stiglitz: Vaja on uut majandusmudelit ja finantssüsteemi' ['Stiglitz: A New Economic Model and a Financial System Are Needed'] *Sirp* (20 October 2011) <https://www.sirp.ee/s1-artiklid/c9-sotsiaalia/stiglitz-vaja-on-uut-majandusmudelit-ja-finantssuesteemi/> (accessed 30 August 2022). For a similar critique with regard to IMF policies in relation to developing countries, see Anghie, below note 104ff and the accompanying text. On entrenchment of 'neoliberal authoritarianism', see below notes 163-166 and the accompanying text.

89 See also observations by Moks, supra note 66, Avbelj, below note 187, and the book description by Griller, Papadopoulou and Puff, supra note 71, and the accompanying text.

90 See also Scharpf's remark that EU law has no language to describe the normative weights of the national concerns at stake, below note 185 and the accompanying text.

91 See also remarks about 'expansion of European law as an end in itself' by Joerges, below note 182 and the accompanying text.

92 Somek, *The Cosmopolitan Constitution*, supra note 16, p vii.

93 Rehling Larsen, supra note 48, 482ff.

94 Rehling Larsen, supra note 48, 488ff.

be explored in Chapter 5. It is additionally worth recalling that this is not the first time that the Estonian legal system and legal community – and those of other countries in the broader post-Soviet area – have experienced the effects of an ideational setting that sees progress in leaving behind the national legal cultures. Tõnu Tannberg, Professor of Estonian history at the University of Tartu, has extensively researched how in the Soviet Union the goal was to fight against nationalism, including in law and legal science, and to shift law and legal science discourses to the (Soviet) Union level, along with ideological muzzling.[*95]

Beyond neofunctionalism, a brief mention should be made of the origin of the EU legal order in international law, and the fact that EU law scholars tend to have their educational and research background in international law.[*96] It is important to flag for wider awareness that as Martti Koskenniemi had extensively elucidated, international law is a field that has its own language, 'grammar', 'constitutive assumptions', 'conceptual matrix' and 'deep structure'; these are very different from what Martin Loughlin describes as the 'vernacular language' of public law, including the resulting legal thinking and operating methods.[*97] Regarding the influential discourses of international and global constitutional law, Aoife O'Donoghue has written a highly insightful monograph documenting how their vocabulary differs from traditional constitutionalism: the former have a starting point in, and use parameters of, international law, and are marked more generally by a thin understanding of constitutionalism as merely consisting of organisational rules, legalisation and depoliticisation, juridification, hierarchy, coherence, etc.[*98] O'Donoghue suggests that as global constitutionalism is not based on the constitutional values of democracy, separation of powers and (a substantive understanding of) the rule of law, at this stage it is better described as an 'entirely novel form of governance', instead of using the vocabulary of constitutionalism.[*99]

For the purposes of the present paper, what is important is that in the EU legal order, many of the keywords have been transplanted from international law, such as effectiveness, direct effect and enforcement, along with the thin understanding of constitutionalism and of the rule of law. For example, the principle of effectiveness – a key tenet of functionalism – has been regarded as the '"basis" of the normativity of international law'.[*100] There is also the replication in the EU legal order of the international law orientation towards pragmatism and *ad hoc* solutions. Crucially, the above international law concepts, keywords and understanding of constitutionalism were meant for treaties and inter-state co-operation, to advance peace and ensure basic standards of human rights. The international law concepts, keywords and the thin understanding of constitutionalism were never meant – and, indeed, are intrinsically unsuitable – for gradually replacing, through the EU legal order, much of the national legal orders of the states, including the complex and carefully fine-tuned formal and substantive constitutional norms, legal thinking and terminology. The resulting distorted logic of law is particularly evident and acute in the disappearance of the delicate balances, rule of law safeguards and judicial protections for the individual in the field of criminal law, and their replacement by the principle of effectiveness and *ad hoc* measures.[*101] The lack of attention to this so far (as a tentative thought that needs further exploration) may partly have its cause in the drive in international law literature towards universalisation, whereby complex national jurisdictions with constitutional, legal, social, economic and other systems and political and institutional organisation often seem to be

95 Tõnu Tannberg, presentation 'Õigussüsteemi rakendamine poliitilise režiimi teenistusse Eestis 1950. aastatel' ['The deployment of the legal system in the service of the political regime in Estonia in the 1950s'] at the Estonian Lawyers 35th Congress 'Eesti Vabariik 100 – Kaasaegne riik' ['Republic of Estonia 100 – Modern State'] (4 October 2018) <https://www.uttv.ee/naita?id=27592> (accessed 30 August 2022).

96 This has been observed eg by Giuseppe Martinico, 'Constitutionalism, Resistance and Openness: Comparative Law Reflections on Constitutionalism in Global Governance' (2015) STALS (Sant'Anna Legal Studies, Pisa) Research Paper No 5/2015, pp 5ff and 10-11, as cited in Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 299-300. This was so in particular in the early days, and explains the importance attributed to enforcement and sanctions in the accounts on the 'constitutionalisation' of the EU legal order, compared to weakness of enforcement in international law; see Joseph HH Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) 26(4) Comparative Political Studies, pp 530-531. – DOI: https://doi.org/10.1177/0010414094026004006.

97 See Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge: CUP 2005). – DOI: https://doi.org/10.1017/cbo9780511493713, especially pp 6-12, 183, 503, 558, 589. For differences compared to Martin Loughlin's account of public law as a 'vernacular language', see p 586 and footnote 8.

98 See Aoife O'Donoghue, *Constitutionalism in Global Constitutionalism* (Cambridge: CUP 2014). – DOI: https://doi.org/10.1017/cbo9781107279377. See also Martinico, supra note 96, as cited in Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 299-300.

99 O'Donoghue, supra note 98, p 243.

100 Koskenniemi, supra note 97, p 220 footnote 217, and p 523 footnote 15.

101 See eg below notes 213-215, as well as 194 and 205, and the accompanying text; see also Chapter 9.

reduced to somewhat Hobbesian sounding sovereignty, 'national egoism' and the state's 'private realm'.[*102] The 'national' dimension has even been seen as the 'subconscious' or 'unconscious', with international law being the public, 'conscious' realm.[*103]

A further dimension of international law is that its origins lie partly in colonial administration, as has come to be more widely acknowledged in recent years, especially thanks to the seminal monograph of Antony Anghie, whose work started the Third World Approaches to International Law (TWAIL).[*104] Anghie documents how the formative stages of development of international institutions – along with their operational methods and techniques – were profoundly shaped by the League of Nations Mandate System, which established an intricate trusteeship system of colonial administration and management, with institutions such as the Permanent Mandates Commission.[*105] Anghie documents how the core elements of the system have subsequently been replicated in global financial and economic governance, especially through IMF and World Bank governance, which, in essence, are widely seen in the developing countries to represent neo-colonialism.[*106] Several elements elucidated in Anghie's book have striking similarities with EU governance, and merit attention due to their far-reaching effects on the system of public power. For the purposes of the issues raised in the present article, the following will be briefly flagged. Colonial and neo-colonial administration entrench what Anghie calls the ''economization' of government', with references to Foucault's notion of 'governmentality',[*107] whereby the role of the national governments is reoriented from responsibility to the people to protecting the neoliberal economic order – and in the interests of multinational corporations and their financiers. The internal matters of the states are reduced to 'national identity', particularism, backwardness and 'cultural difference', which have to be replaced by a new, universal law and order.[*108] The Mandate System was a new system of international law,[*109] marked by top-down imposition of conditionality, especially of neoliberal economic policies, and by far-reaching monitoring and management through progress reports, backed up by disciplinary proceedings. Anghie additionally draws attention to the 'peculiar cycle' that 'creates a situation whereby international institutions present themselves as a solution to a problem of which they are an integral part.' He adds that '[s]uch a situation is very much part of contemporary international relations';[*110] indeed, examples of such dynamics in the context of the current rule of law crisis were brought above. In terms of fundamental rights, some interesting parallels with EU governance that the present writer spotted in Anghie's book include '[a] distorted, economistic version of human rights' when mediated through governance, with a shift away from human dignity;[*111] the conceptualisation of non-discrimination and equality in a way that benefits foreign traders, entrepreneurs and investors, without regard to adverse effects or growing social inequality for the local residents;[*112] the quest to create an individualistic and liberated 'economic man';[*113] and the conceptualisation of the rule of law in a way that advances commerce and where the international institutions themselves are not subject to any rule of law requirements.[*114] One recurring theme is the subjugating and debilitating effect of large debt commitments, the meeting of which necessitates specific policies that are harsh for the people and the country, as well as requiring harmful exploitation of the environment and natural resources.

102 On Hobbesian sovereignty, see eg Koskenniemi, supra note 97, pp 90-92, 192; on national and state 'egoism', see ibid pp 476-483; on state jurisdiction as 'private realm', see ibid pp 5, 248.

103 Literature on the 'interior life' and internal systems of the state as 'subconscious' is noted in Anghie, below note 104, pp 134-135.

104 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP 2007) – DOI: https://doi.org/10.1017/cbo9780511614262.

105 Anghie, supra note 104, eg pp 123, 140, 183.

106 Anghie, supra note 104, eg pp 117-118.

107 Anghie, supra note 104, especially pp 179ff and footnote 254.

108 Anghie, supra note 104, eg pp 4, 6, 177, 312.

109 Anghie, supra note 104, pp 123ff, 180.

110 Anghie, supra note 104, eg p 178.

111 Anghie, supra note 104, eg pp 263, 270-272.

112 Anghie, supra note 104, eg pp 270-271.

113 Anghie, supra note 104, eg p 167. Cf also below notes 167 and 230-231 and the accompanying text.

114 Anghie, supra note 104, eg pp 267, 272.

Crucially for central themes in the present article, Anghie elucidates that the Mandates System created an entirely new science of 'colonial administration based on a deductive and experimental method'*[115], which provided legitimisation for the new, 'extraordinarily intrusive' techniques of monitoring and management on the part of the central authority – the Permanent Mandates Commission – which removed the need for scholars to rely on the cruder science of 'comparative colonial administration'.*[116] The new science of colonial administration was marked by centrality of the economy, which was understood to be a universal discipline that transcended cultural particularities, and thus all mandate countries could be assessed by **the same, homogenised criteria, against which any deviations or particular native practices had to be justified**.*[117]

Anghie's concern is that the above and other IMF and World Bank methods and policies are the underlying cause of 'the deep and enduring inequalities that afflict this planet'; he notes that articulation of the historical and conceptual origins allows identification of the source of the problem and to bring about a change to further justice and increase the well-being of humanity.*[118] Whilst one of Anghie's concerns is that what has been imposed on the developing countries is the law of European countries, the present writer would submit for the consideration of the readers that a form of neo-colonialism seems to have rebounded vis-à-vis the EU Member States through EU and IMF governance and conditionality, including the imposition of very large – and increasingly indeterminate – debt liabilities. Indeed, many aspects of the EU legal order seem to be closer to the above, neo-colonial operating techniques and processes rather than federalism. It was seen above that functionalism also has intellectual origins in US colonial administration, as pointed out by Klabbers.*[119] That colonialism was present in the drafting process of the EC Treaties has extensively been documented in the context of the now forgotten 'Eurafrica' project.*[120]

Turning briefly to the United States federal system as the model which has gradually and somewhat on auto-pilot been replicated through the EU legal order, elsewhere I have called for discussion with regard to the wide-ranging concerns of scholars about the profound differences in US constitutional law and in (especially material continental) European constitutional law, and the ways in which US constitutional thinking, through its effects on EU law, has been changing continental European constitutionalism.*[121] In the present paper, the concerns that 'America is a harsh place' as regards criminal justice and social welfare,*[122], as well as the different understanding of the role of courts, will be briefly explored in Chapter 5.

Whilst the above and other conceptual and historical origins of autonomous EU governance will have to be explored more fully in another publication due to space constraints, the ways in which various components of the ongoing paradigm shift have been leading to a very different understanding of the role of courts, along with profound changes to the well-established tenets and achievements of substantive comparative (especially continental) European constitutional law and the system of exercise of public power, will be briefly outlined in the chapters that follow.

One might wonder why it has not come to light earlier that an underlying reason for many tensions in EU/European constitutional law is that there is entirely different legal thinking in the two broader, parallel epistemic communities, with scholars talking past one another. Besides the numerous structural issues in the mainstream EU law discourse mentioned throughout this article, one could add that scholars have noted a '**disconnect**' or a lack of meaningful dialogue between the national and EU legal discourses. Daniel Thym, for example, has evocatively summarised many of the issues in his *Verfassungsblog* post 'The

115 Citation of Wright, by Anghie, supra note 104, p 184 in footnote 271.

116 Anghie, supra note 104, pp 184-186.

117 Anghie, supra note 104, pp 184-185. For the present writer's remarks about similarities of this dynamic with EU law, see the text that follows supra note 82, the text accompanying below note 127, and Chapter 10.

118 Anghie, supra note 104, eg pp 311-313, 317, 320. For similar concerns regarding IMF neoliberal conditionality from a non-colonial perspective, see Stiglitz, supra note 88.

119 Klabbers, supra note 62, pp 645, 675.

120 Peo Hansen and Stefan Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury Academic 2014). – DOI: https://doi.org/10.5040/9781472544506.

121 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, pp 32-34. See also Somek's research below note 129, and Avbelj, below note 248, along with the accompanying text.

122 James Q Whitman,'"Human Dignity" in Europe and the United States', in Georg Nolte (ed) *European and U.S. Constitutionalism. European Commission for Democracy Through Law* (Venice Commission CDL-STD (2003)037) <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(2003)037-e> (accessed 30 August 2022) p 81. Also published in Georg Nolte (ed) *European and US Constitutionalism* (Cambridge: CUP 2003). – DOI: https://doi.org/10.1017/cbo9780511493904.008. See further below notes 158-160 and 169, and the accompanying text.

Solitude of European Law Made in Germany': foreign languages as 'an [...in]surmountable hurdle', the lack of citations of national literatures in influential EU law journals, the situation where 'smaller jurisdictions do not have enough manpower to sustain debates about specialised questions of EU law', etc.[*123] Thym suggests that 'we have to find ways to link national and European debates' in order 'to overcome the disconnect'. In a follow-on blog post, Päivi Leino and Janne Salminen share similar concerns in the context of Finland, and observe, inter alia, that much of the research in European law published in national languages in national journals risks being 'ignored simply because important knowledge might be shut in rather closed circles'. They argue that

> [k]eeping in mind the close relationship between law, legal research and culture, a situation where the European legal elites would discuss and publish legal research only in one language and in international fora could risk research being increasingly isolated from everyday societal debates and develop the results of such studies into being something for a closed epistemic community.[*124]

Even in the UK, where the issue of language barriers is not present, Danny Nicol observed (pre-Brexit) that 'British constitutional scholarship for the most part tends to focus on Britain's internal institutions'. He further observed a 'reluctance to engage with globalisation' and especially with the constitutional entrenchment of neoliberalism through EU law.[*125]

The 'disconnect' and other structural issues in EU research and discourse also reinforce the problem that EU epistemic communities often do not, in fact, have a good understanding of national and comparative (continental) European constitutional law, which may well also be one of the reasons why constitutional issues arising at the national level tend to be simplistically blurred into notions of sovereignty, national constitutional identity and Euroscepticism. National constitutional matters are widely presumed to be idiosyncratic, particularistic, emotive, backward and irrational, and can only be invoked in exceptional cases where national constitutional identity is at stake, although even such cases are still regarded by many as negative and as posing regrettable 'obstacles to integration'.[*126] Indeed, recent decades have been marked by a deeply embedded generic, dogmatic assumption that progress is achieved through a replacement of Westphalian constitutionalism – that is based on nation-states and territorial rule – with supranational, international and global governance that are deemed to be inherently superior and of a higher order. On a closer reading of the literature, it emerges that much of the respective discourse has been oblivious or blind to the level of development and quality of, and the values protected by, the complex national rules and systems, and which are gradually being consigned to history. There is a particularly marked absence of awareness about the substantive, material constitutional law of the EU Member States.[*127]

Indeed, there appears to be a profound, systemic flaw in the mainstream discourses, which have by and large been blind to the fact that what is being consigned to history through the drive towards denationalisation, is, in fact, **an advanced, carefully fine-tuned system of public power** that is based on complex formal, institutional, procedural and substantive constitutional rules. Furthermore, it has also hitherto been overlooked that discarding national constitutional orders has the further profound but largely undiscussed effect of **abandoning much of the broader comparative (especially continental) European understanding of constitutionalism, including shared tenets and advanced 'constitutional achievements'**[*128]. These in several aspects quite possibly represent **the most advanced**

123 Daniel Thym, 'The Solitude of European Law Made in Germany' *VerfBlog* (29 May 2014) <https://verfassungsblog.de> (accessed 30 August 2022).

124 Leino-Sandberg and Salminen, supra note 1.

125 See Nicol, below note 163, pp 5ff.

126 This view, which is very widely held in EU scholarship, has recently culminated in the argument of R Daniel Kelemen and Laurent Pech that scholars who developed the theory of constitutional pluralism and the related notion of national constitutional identity are guilty of the fact that the illiberal regimes of Poland and Hungary have abused these concepts to justify undermining the rule of law. They find that the theory of constitutional pluralism is 'inherently dangerous' and needs to be recalled altogether, and replaced with traditional primacy of EU law; 'the time has come to dismantle constitutional pluralism'. R Daniel Kelemen, Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies, pp 61, 74. – DOI: 10.1017/cel.2019.11.

127 Cf also above notes 48, 102-103, 108 and 117, and the accompanying text regarding national jurisdictions as 'national egoism' and 'private realm' in international law discourse, and as 'particularistic' and backward in colonial administration.

128 The expression 'constitutional achievements' is borrowed from Dieter Grimm, who uses it more generally in relation to the democracy and rule of law elements in modern constitutions. Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and

constitutionally codified and judicially protected fundamental rights, social rights and rule of law safeguards in the world, especially the post-totalitarian and post-authoritarian constitutional protections and rule of law safeguards for the individual, as well as the Nordic approach to the social state. Indeed, Somek regards especially the constitutions based on the German model as representing the emancipation of constitutionalism, especially if one compares this to the US system, as well as the EU paradigm shift to decision-making on the basis of exigencies, with a corresponding regression in constitutionalism.[*129] The present writer would add that the constitutional protections have resulted from '[t]he Battles That Won Our Freedoms', to use an expression from an evocatively entitled BBC Radio 4 programme, which recalled that the protection of fundamental rights has gradually been achieved in result of human suffering and prolonged battles which so many individuals in history have fought.[*130]

But with the reality of national constitutions being reduced to idiosyncratic matters of national identity, 'European' constitutional law has come to denote autonomous EU law predicated on a neofunctionalist ideational setting, and not the broader comparative (especially continental) European understanding of constitutional law. Some of the examples of how autonomous EU governance has changed and displaced key achievements and tenets of comparative European constitutional law in different areas of constitutional law, from fundamental rights to criminal law and the social state, will be brought in Chapters 5, 8 and 9, after first taking a closer look at the way in which autonomous EU governance has been changing the role of national courts.

5. The role of national courts in neofunctionalism and beyond: Agents of integration; trust, efficiency and loyal co-operation; enforcement and shielding an economic order from contestation?

Returning to questions around the role of courts, the broader ideational setting of neofunctionalism and other new foundational ideas for the exercise of public power also help to make sense of the rather different understanding of the role of courts in autonomous EU law, which I first sought to articulate in the above-mentioned 'Erosion of Constitutional Rights' article. In that article, I observed that 'the role of courts is increasingly shifting towards a framework of trust, loyal co-operation, and effectiveness in the context of EU law'.[*131] I referred to a Czech scholar, Michael Švarc, who has noted a wider 'shift of paradigm' through the EU mutual recognition instruments which require automatic execution and trust by courts that fundamental rights and fair trial requirements have been observed.[*132] I also summarised Gareth Davies' concerns that the CJEU's approach in advancing the EU free movement rights has led to very disorientating, destabilising and contemptuous effects on the national constitutional structures;[*133] that the CJEU case law represents 'the humiliation of the state as a constitutional tactic' and has attempted 'to turn national courts upon each other; to reverse the hierarchy; to instruct lower judges to judge higher ones'; and that all this has led to 'a world turned upside down for the traditional constitutionalist'.[*134] I additionally referred to Michal Bobek's concern, in the broader context of preliminary rulings and the focus on uniformity, about

András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP 2012) p 104. – DOI: https://doi.org/10.1093/law/9780199578610.003.0001.

129 Somek, *The Cosmopolitan Constitution*, supra note 16, p 10 and pp 85-86 footnotes 38 and 42 (summary of writings of authors comparing German and US constitutionalism). On Somek's finding about a paradigm shift, see above note 59 and the accompanying text.

130 'The Battles that Won our Freedoms' *BBC Radio 4* (March-April 2021), <www.bbc.co.uk/programmes/m0001xq1> (accessed 30 August 2022). See also below notes 177 and 178, and the accompanying text.

131 Albi, 'Erosion of Constitutional Rights', Part 1, supra note 19, pp 175ff.

132 Michael Švarc et al, 'Czech Republic' in Julia Laffranque (ed) *Reports of the XXV FIDE Congress Tallinn 2012*, *Volume 3: The Area of Freedom, Security and Justice, Including Information Society Issues* (Tartu: Tartu University Press 2012) p 269.

133 Gareth Davies, 'The Humiliation of the State as a Constitutional Tactic' in Amtenbrink and van den Berg, supra note 41, pp 147ff. – DOI: https://doi.org/10.2139/ssrn.4132514.

134 Davies, 'The humiliation', supra note 133, p 165.

the hollowing out of the essential function and intrinsic value of the courts, which is to protect individual rights.[*135]

In the above-mentioned article, I further collated extensive examples of the extremely negative and harsh comments in EU law publications with regard to those national constitutional courts who have voiced constitutional concerns in relation to some aspect of EU law, especially the effects of the European Arrest Warrant on fundamental rights. I documented how in much of EU law literature, such concerns were simplistically reduced to Euroscepticism and old-fashioned protection of sovereignty, with substantive constitutional issues by and large having been overlooked. In hindsight, this is squarely representative of neofunctionalist legal thinking, where a measure is assumed to be superior merely because it is supranational rather than national, without much regard to its substance, especially as regards the classic fundamental rights and rule of law parameters for constitutional validity.

I further pointed out that the intellectual framework of this type of simplistic framing has been elucidated, inter alia, in the work of Aida Torres Pérez. Torres Pérez has traced the origin of the research frame that focuses on resistance and compliance by judges to accounts in the literature which might be classified as (a) neo-realist, which portray courts as delegates of state governments voicing national interests; (b) neo-functionalist, which focus on judicial self-empowerment, with seminal research by Joseph Weiler; and (c) Karen Alter's influential competition of courts theory premised on the view that '[j]udges are primarily interested in promoting their independence, influence and authority'.[*136] I also referred to Arthur Dyevre's article 'European Integration and National Courts: Defending Sovereignty under Institutional Constraints?', which is widely representative of this type of legal thinking. Using the frame of Eurocentrism/Natiocentrism, Dyevre's article provides seven hypotheses to explain the stance of national constitutional courts towards the EU, none of which include references to constitutional values beyond sovereignty, such as fundamental rights or the rule of law.[*137]

Turning to the perspective of the epistemic communities in the parallel world of (especially continental) European constitutional law, I would venture to say, based on the extensive concerns that emerged from the 'Role of Constitutions' project national reports, that in a purely national context, the requirements of near-automatic extraditions without judicial review would be deemed unconstitutional in at least half of the Member States, especially those which have constitutional courts. In the national reports in the abovementioned *National Constitutions* book, the following observations have been made to describe the effect of EU law, and especially of mutual recognition, on courts:

- In Slovenia, scholarship has warned that the 'uncritical application of the principle of mutual recognition bears the danger of transforming the judge into a kind of a "ticking box" automaton checking only pre-established criteria and neglecting his/her duty of a critical assessment and safeguarding fundamental (constitutional) rights to the defendant'. This argument is grounded in the principle of separation of powers.[*138]
- The report on France notes that 'the principle of mutual recognition certainly risks transforming the role of the judge into a more passive one. However, this transformation is not inevitable and should in any case not be easily accepted by the judges themselves'.[*139]
- The criminal law experts in the report on the UK (pre-Brexit) note that 'the role of the judiciary has shifted to an administrator whose hands, particularly at first instance, are largely tied by the

135 Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10(1) European Constitutional Law Review p 89. – DOI: https://doi.org/10.1017/s1574019614001047.

136 Aida Torres Pérez, *Conflicts of rights in the European Union. A Theory of Supranational Adjudication* (Oxford: OUP 2009) pp 106-107, 100. – DOI: https://doi.org/10.1093/acprof:oso/9780199568710.003.0001, referring to Weiler, 'A Quiet Revolution', supra note 96, pp 510, 523. In footnote 49 at p 107 Torres Pérez cites Karen Alter, *Establishing the Supremacy of European Law. The making of an International Rule of Law in Europe* (Oxford: OUP 2001) p 45. – DOI: https://doi.org/10.1093/acprof:oso/9780199260997.001.0001.

137 Arthur Dyevre, 'National Courts and European Integration: Defending Sovereignty under Institutional Constraints' (2013) 9(1) European Constitutional Law Review pp 150 and 162. – DOI: https://doi.org/10.1017/s157401961200106x.

138 Anže Erbežnik, 'Mutual Recognition in EU Criminal Law and Its Effects on the Role of a National Judge' in Nina Peršak (ed) *Legitimacy and Trust in Criminal Law, Policy and Justice Norms, Procedures, Outcomes* (Farnham: Ashgate Publishing Limited 2014) p 131, as cited in Samo Bardutzky, 'The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 710.

139 Laurence Burgorgue-Larsen, Pierre-Vincent Astresses and Véronique Bruck, 'The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 1201.

principle of mutual recognition. However with time, judges have been gaining 'confidence' in questioning the presumptions created by mutual recognition'.[*140]

- The criminal law expert in the report on Croatia notes on the basis of relevant national judgments that 'the only role of the Croatian courts was to be actors of loyal co-operation, efficiency and trust. They have expressly assumed this role themselves'.[*141]
- In Spain, in the context of constitutional challenges to the EU and IMF austerity and welfare state restructuring programmes, the Constitutional Court is said to have remained 'a passive spectator'.[*142]

Birgit Aasa's thesis also repeatedly notes that there are increasingly acute tensions in the Member States with regard to mutual trust, that there is confusion about national courts as guardians of legality, and that national courts have embarked on 'creative legal thinking' and inventing other innovative ways to surpass mutual recognition, eg by preferring not to ask the CJEU.[*143]

One could add concerns expressed by judges in dealing with EU law matters more generally on the basis of interviews carried out in the research of Ursula Jaremba with Polish judges (before the 2015 illiberal turn).[*144] For example, despite an overall euro-friendly orientation, the judges' anonymous answers to a questionnaire were nonetheless critical of the CJEU's teleological methods, which some found illegitimate, as they undermine legal certainty, change the role of the courts from applying law to creating law, and at times result in contra legem interpretations.[*145] Since a high proportion of judges were concerned about the complexity and 'time-consuming, laborious and troublesome' process of applying EU law, the unpredictable judgments of the CJEU were seen as a further alienating factor. As one judge noted, 'you don't know what to expect, you don't know where you are standing'.[*146] The teleological interpretation also reminded some older judges of the communist times, with one judge noting, 'I don't like crossing the same river twice'.[*147] Another judge observed that '[i]n my opinion, the Court goes too far in its jurisprudence. No one can control them and they do what they want. […] There are no checks and balances there […]. [A]t present it starts to become absurd, it touches upon a normal citizen in an absurd way'.[*148]

Michal Bobek has noted with regard to the extensive use of teleological interpretation and e*ffet utile* (the principle of effectiveness) in the CJEU's case law that '[h]eretical though it may sound, there are some striking similarities between the communist/Marxist and Community approaches to legal reasoning …'[*149]. The early Stalinist phase of Marxist law required judges to disregard the remnants of the old bourgeois legal system. They had to apply the law in an anti-formalistic, teleological way, directing their aim towards the victory of the working class and the communist revolution. In EU law, the purpose also comes first, leading to reasoning that consequentially follows from the purpose, using open-ended clauses such as *effet utile*; these take precedence over a textual interpretation of the written law.[*150] Bobek has further observed that the use of the doctrine of *effet utile* in EU law entitles the EU judges 'to do pretty much anything'; 'purposive reasoning is often reduced to one and only one purpose: the full effectiveness of Community law, which is turned into the crucial principle not allowing for any balancing or opposition'.[*151]

140 Young, Birkinshaw, Mitsilegas and Christou, supra note 47, p 108.

141 Iris Goldner Lang, Zlata Đurđević and Mislav Mataija, 'The Constitution of Croatia in the Perspective of European and Global Governance' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 1163.

142 Joan Solanes Mullor and Aida Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 582.

143 Aasa, supra note 2, eg pp 30, 250, quoting, and with references to, Madalina Moraru.

144 Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Brill 2014). – DOI: https://doi.org/10.1163/9789004261471.

145 Jaremba, supra note 144, chapters 4 and 5, especially pp 222, 232-233, 264, 270, 274, 276.

146 As cited in Jaremba, supra note 144, pp 222, 233.

147 As cited in Jaremba, supra note 144, p 222.

148 As cited in Jaremba, supra note 144, pp 222, 232-233, 264, 270, 274, 276.

149 Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: "Don't Do as I Say"?' (2007) 10 Cambridge Yearbook of European Legal Studies p 23. – DOI: https://doi.org/10.5040/9781472564610.ch-001.

150 Bobek, 'On the Application', supra note 149, pp 23 ff.

151 Bobek, 'On the Application', supra note 149, pp 1, 10, 21, citing Radoslav Procházka, 'Prekážka rozhodnutej veci – judikatúra Súdného dvora ES a jej dopad *na konanie vnútroštátnych súdov*' ['*Res iudicata* – the Case law of the Court of Justice and its Impact on the Procedure before National Courts'] (2007) 10 *Justičná revue* pp 1240, 1248.

Crucially, from the perspective of the paradigm of autonomous EU governance, the above-mentioned issues, broadly speaking, do not arise, since – in line with the underlying neofunctionalist ideational setting – progress is to be achieved through the gradual shift of power to supranational level, leaving behind the old-fashioned, nation-state-based Westphalian constitutionalism. Indeed, in neofunctionalist thinking, the principal mission of the CJEU is seen as being a 'motor of integration', and national courts are assessed as being either agents of, or obstacles to, integration.[*152]

There is a further stream of literature by US based political science scholars – whose work has been influential in EU law – which sees the CJEU as a 'trustee court' and 'super agent'. The origins of this theory lie in '[c]ontemporary delegation theory, with its emphasis on principal, agents, and dilemmas of agency control', which 'is an adaptation of concepts of contract law to the political world', including concepts from fiduciary constitutionalism, the law of trusts and other private law concepts.[*153] In this school of thought, scholars view the fact that the European Commission 'almost always wins' in enforcement proceedings and that the defendant states lost in 95% of the proceedings in 928 rulings in the 1978-99 period as a central aspect of the constitutionalisation of the EU.[*154] Damian Chalmers has also made the observation that the mission of enforcement proceedings and imposition of severe fines on Member States is turning the CJEU 'into an active agent of EU executive government'.[*155] A further dimension of the CJEU remit, as scholars have widely observed in hindsight, is that over the decades, the CJEU has acted as a far-reaching legislator, sidelining democratic processes.

The very different understanding of the role of courts in the two parallel worlds of constitutionalism squarely illustrates what in Kuhnian terms is an 'incommensurability' of the paradigms, and that the same concepts and vocabularies have entirely different meanings; crucially, therefore, there can also be no meaningful communication and debate about the content, ending in 'communication breakdowns'.[*156] From the perspective of classic European constitutionalism, where the role of courts is to apply law, to constrain public power and to protect fundamental rights vis-à-vis the exercise of public power – as part of the separation of powers and with the aim to ensure the freedom of the individual – the above roles of the CJEU as a sort of 'super agent' – combining the roles of an integration motor, adjudicator, legislator, enforcer and imposer of hefty fines – seems, in fact, rather dystopian. From the point of view of the classic European system of exercise of public power and the increasingly sharp tensions, it may be worth considering a broader differentiation of the vocabulary of governance from the long-standing 'vernacular' of constitutionalism, including to convey the different mission and very broad remit of the EU judiciary.[*157] Regarding Kuhn's observations about the difficulty of a meaningful communication about the content, perhaps this is why disagreeing voices simply tend to be dismissed in mainstream EU discourses as Euroscepticism, as old-fashioned protection of sovereignty or national constitutional identity, or by sharply attacking the individual judges and scholars whose judgments or writings are out of line.

Given that one of the main points of reference for the development of the EU legal order is the US federal system, it additionally seems important to draw attention to considerable differences in the US approach to the role of courts in the field of criminal law, which is marked by coercive efficiency and is generally described as 'harsh'. Yale Law School professor James Q Whitman, summarising his monograph *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, observes that '[c]riminal justice offers many … examples of American practices that Europeans reject as not only

152 I am grateful to Maris Moks for this explanation regarding national courts; see Moks, supra note 65.

153 Stone Sweet and Burnell, supra note 5, pp 62, 67, with further references, including the influential writings of Giandomenico Majone and Karen Alter.

154 Stone and Brunell, supra note 5, pp 70-71, referring to the research by Tanja A Börzel, Tobias Hofmann and Diana Panke. See also on the role of sanctions in the understanding of the 'constitutionalisation' of the EU legal order, Weiler, 'A Quiet Revolution', supra note 96.

155 Damian Chalmers, 'The European Court of Justice is Now Little More than a Rubber Stamp for the EU' *EUROPP Blog* (8 March 2012) <http://blogs.lse.ac.uk/europpblog/2012/03/08/ecj-rubber-stamp-replacement/> (accessed 19 April 2015).

156 Kuhn, supra note 74, pp 94, 148-149, 197-203.

157 In British media headlines, the CJEU has been described as an 'imperial court' due to its quest for primacy vis-à-vis the democratic constitutional orders of the Member States. See Ambrose Evans-Pritchard, 'Europe's Imperial Court Is a Threat to All Our Democracies' *The Daily Telegraph* (14 January 2015) <www.telegraph.co.uk/finance/comment/ambroseevans_pritchard/11346512/Europes-imperial-court-is-a-threat-to-all-our-democracies.html> (accessed 30 August 2022). As an aside, the same article recalls earlier media commentary on a CJEU case where an Advocate General found that criticism of the EU is akin to 'blasphemy' and may legitimately be suppressed.

harsh, but no less than barbarous'.*[158] He continues: 'American society *is* harsh, and nowhere more so than in its criminal punishment'. … [T]he differences are profound, and indeed often shocking'.*[159] Examples include the length of prison sentences, which are about ten times as long as for comparable offences in Germany and France; the rate of imprisonment which is the highest in the world, that a much wider range of offences are criminalised than in Europe, and the degrading treatment of prisoners.*[160] One could add that in the US, it is a standard practice to have out-of-court proceedings, especially plea-bargaining. The US judicial terminology includes the notions of trusteeship and a strong focus on enforcement; this seems to partly reflect the US concept of fiduciary constitutionalism that was mentioned above, and which seems to have profoundly shifted European constitutional thinking towards the role of the CJEU being one of enforcement and disciplining of the Member States. These and other aspects of US judicial thinking and terminology – including the notion of 'judicial governance'*[161] as well as the casuistic approach based on the law of precedent and the repressive orientation in criminal law – have also increasingly engulfed Europe, through the EU legal order as well as through the Anglo-American legal thinking and terminology that prevails in English-language law journals.

As an aside, all of the above is also of direct relevance to the EU agenda to train 700,000 judges and legal practitioners with a view to creating a 'true European judicial culture'. In this regard, Herman van Harten has perceptively articulated reasons to be 'afraid of' a top-down educating of judges by European Commission appointed experts, as national judges 'are not executive "parts" of European governance'.*[162]

There is a further profound dimension in the reorientation of the role of courts, which will be explored in a separate publication due to space constraints, and will only be flagged here briefly for cognizance. It is that a growing number of scholars have started to voice concerns that through EU governance, as well as the IMF and World Bank conditionality, **the role of the legal order and of courts has, in fact, come to be to constitutionally entrench and protect the neoliberal economic order**, and to shield it from contestation.*[163] Ian Bruff and Cemal Burak Tansel have used the term 'authoritarian neoliberalism', which 'is fast becoming an established part of critical social science scholarship', to highlight

> how contemporary capitalism is governed in a way which tends to reinforce and rely upon practices that seek to **marginalize, discipline and control dissenting social groups** and oppositional politics rather than strive for their explicit consent or co-optation. Such practices include **the repeated invocations of 'the market' or 'economic necessity' to justify a wide range of restructurings** across various societal sites […], the growing tendency **to prioritize constitutional and legal mechanisms** rather than democratic debate and participation, **the centralization of state powers by the executive branch** at the expense of popular participation […], **the mobilization of state apparatuses for the repression of oppositional social forces** […], and the heightened pressures and responsibilities shifted onto households by repeated bouts of crisis and the restructuring of state's redistributive mechanisms.*[164]

In the context of the EU legal order, Alexander Somek and Michael Wilkinson both sum up similar developments as 'authoritarian liberalism', and in one way or another invite the legal community to engage with the dogma of 'There is no Alternative'.*[165] Typical neoliberal policies include dismantling the role of the state; prioritisation of the market; deregulation; privatisation of public services; sell-off of public assets; universal commodification and 'financialisation of everything'; increase in personal and public debt, including

158 JQ Whitman, supra note 122, p 81, with reference to a monograph by the same author.

159 JQ Whitman, supra note 122, p 84.

160 JQ Whitman, supra note 122, p 84.

161 I am grateful to Fabio Ratto Trabucco for this observation.

162 Herman van Harten, 'Who's Afraid of a True European Judicial Culture? On Judicial Training, Pluralism and National Autonomy' (2012) 5(2) Review of European Administrative Law, pp 132-133, 147-148ff. – DOI: https://doi.org/10.2139/ssrn.2117842.

163 See eg Danny Nicol, *The Constitutional Protection of Capitalism* (Hart 2010) pp 152-153, 159-164. – DOI: https://doi.org/10.5040/9781472560698. More generally, see Somek, *The Cosmopolitan Constitution*, supra note 16, and Wilkinson, *Authoritarian Liberalism*, supra note 16.

164 Ian Bruff and Cemal Burak Tansel, 'Authoritarian Neoliberalism: Trajectories of Knowledge Production and Praxis' in Ian Bruff and Cemal Burak Tansel (eds) *Authoritarian Neoliberalism. Philosophies, Practices, Contestations* (Routledge 2020) pp 233-235. – DOI: https://doi.org/10.1201/9780429355028. Emphases added.

165 Somek, *The Cosmopolitan Constitution*, supra note 16, pp 23-24; Wilkinson, *Authoritarian Liberalism*, supra note 16.

by converting private debt into public debt through bank bailouts during financial crises; prioritisation of debt payments to creditors over the needs of the people; consequent austerity programmes; curtailing of social rights, worker protection and protests; and entrenchment of the values of exploitative profit-seeking, competition and efficiency. In neoliberalism, the role of courts is oriented, in particular, towards efficiency and enforcement, especially enforcement of contracts for debt recovery.[*166] The human being is reduced to a *homo economicus* – a competitive market actor who pursues narrow, individualistic self-interest with a view to maximising wealth and utility;[*167] examples of how this treatment of the individual plays out in the field of criminal law will be brought in Chapter 9.

The above concerns about judicial protection of neoliberalism find corroboration in the *National Constitutions* book: in the field of social state and social rights, there are about one hundred cases in the national reports of different Member States where an EU or IMF measure imposing one or another neoliberal policy has been challenged in the courts and where in most cases the measure has eventually been prioritised over national constitutional protection; the cases will be collated in the *Comparative Study*. By way of similar findings from other scholars, Maria Tzanakapoulou has shown that the externally imposed austerity measures 'render domestic constitutional principles of social justice virtually void of content'.[*168] Fritz Scharpf's concern about the destruction of the Member States' social systems through CJEU negative integration case law will be outlined in Chapter 6.

In terms of the broader picture, it would seem that through EU law and integration, the national courts, as well as the legal and scholarly communities more generally, may have, broadly speaking, been involved in a gradual process of dismantling the nation-state and the social state, and in the entrenchment of a competitive, coercive, profit-seeking and exploitative neoliberal market order. What is consigned to history with the nation-state includes some of the most advanced social state protections in the world, especially if one compares with the US federal constitutional system, which is regarded as state-phobic and does not have a social element. That 'America is a harsh place' has been noted by James Whitman not only in the field of criminal justice but also in relation to social welfare.[*169] The US does not have many seemingly basic (continental) European entitlements, such as paid maternity leave, free university education and publicly funded media; universal health insurance was introduced only in 2010 following the 'Obamacare' reforms. One important but largely overlooked historical lesson incorporated in the overall design of the German post-war Basic Law, which contains an unamendable provision on the social state (Art 20), is the recognition that the root causes of the emergence of authoritarian regimes are economic insecurity and dependence, and that a life lived with human dignity and with freedom of choice requires that a basic level of material needs is met.[*170] The post-totalitarian and post-authoritarian types of constitutions mostly contain extensive social rights, especially in Southern Europe. Furthermore, the Nordic countries have aimed to ensure a high level of social equality and social integration for all citizens by providing universal public services.[*171] Conflicts with market-oriented EU law have played out in several fields, including in a Swedish housing dispute where the European Commission required Sweden and some other Member States to dismantle their universal, subsidised rental housing policies as incompatible with EU state aid law due to distortion of competition on the market, beyond means-tested, British style 'residual' social housing measures to those in need. The Commission rejected the Swedish Government's arguments that '[t]he goal of housing policy is to create conditions for everyone to live in good housing at reasonable cost and in a safe and stimulating environment', that the policy also has 'a social integration function', and that the right to a home is protected in the Swedish Constitution and 'has long been an important part of Swedish welfare policy'.[*172] As a tentative thought for further exploration,

166 On neoliberalism and corresponding policies of 'the neoliberal state', see eg David Harvey, *A Brief History of Neoliberalism* (Oxford: OUP 2007), especially chapters 1 and 3 and p 3. See also Wilkinson, *Authoritarian Liberalism*, supra note 16. Earlier with regard to developing countries, see Stiglitz, supra note 88, and Anghie, supra note 104, and the accompanying texts.

167 For respective literature, see below notes 230-231 and the accompanying text.

168 Maria Tzanakopoulou, 'Europe and Constituent Powers: Ruptures with the Neoliberal Consensus?' in Eva Nanopoulos and Fotis Vergis (eds) *The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge: CUP 2019) p 156. – DOI: https://doi.org/10.1017/9781108598859.008.

169 JQ Whitman, supra note 122, p 81.

170 For historical background, see eg Somek, *The Cosmopolitan Constitution*, supra note 16, pp 10-13, 85-86 and 155.

171 See eg Scharpf, below note 185, p 25, and the Swedish Ministry of Sustainable Development, below note 172.

172 See Swedish Ministry of Sustainable Development, 'Response to complaint from European Property Federation' (CP 115/02) (8 November 2005), cited in – and with an outline of respective EU and comparative rules – Alexis Mundt, 'EU-Legislation

whilst nation-states often have a constitutionally mandated duty to advance the well-being of the entire population,[*173] neoliberal transnational governance seems to entail an element of class system and to prioritise the interests of wealthy, transnationally mobile investors and capital holders.[*174]

The present writer would suggest that instead of dismantling the nation-state, the constitutional protections and achievements that have existed and were operational until recent years – including in the field of the social state – ought to be restored, retained and advocated for consideration more widely. Furthermore, thinking is needed on how to reorient both the national as well as the EU and international legal orders towards a fundamentally more human-centric paradigm, which would value each and every individual on the grounds of their humanity and human dignity, and where the objectives would be around creating conditions for human and community flourishing, with organisational structures and constitutional and institutional culture that would be centred around compassion, supportiveness, meaningful democratic participation and responsiveness.[*175] There is a need for much stronger social state structures that would create material conditions which – in line with Maslow's theory of the pyramid of needs – would allow individuals to have freedom to devote their time, attention and life energies to the pursuit of intrinsically valuable and meaningful causes, higher values and reaching their greatest potential or 'self-actualisation'.[*176]

Instead, there has been growing realisation that the EU and global financial governance have sharply exacerbated social inequalities, eg in result of increasingly unaffordable public services privatised on the impetus of the EU, IMF and the OECD, and with people in ordinary employment on local salaries facing an out-of-reach cost of housing. The room for democratic self-government and contestation is severely constrained by little known but far-reaching rules of EU and global financial and economic governance, as well as by the way in which large debt burdens predetermine the policy choices. Many scholars, including the present writer, see these as the main causes of the widening popular discontent, rather than nationalism and populism as per EU promoted narratives; indeed, in Southern Europe, the protests were regarded as 'indignant citizen' movements. There is a growing sense that at this day and age, as humanity we should be much further along in terms of overcoming poverty, social injustice and other readily avoidable means of human suffering. Somek and Wilkinson make the important point that whereas popular sovereignty has widely come to be dismissed due to connotations with nationalism and populism, it has in fact been 'geared towards emancipation from any form of oppression, to avoid succumbing to circumstances that individuals or groups cannot control'. They see the return to popular sovereignty and democratic mobilisation by the people in the state as the principal way to bring about human emancipation from 'the coercive force of economic circumstance' that is 'tantamount to being subject to an anonymous and alien force', in order to shift to a 'fully authentic life and autonomous existence'.[*177] Maria Tzanakapoulou in her book 'Reclaiming Constitutionalism' makes a similar case that the conditions for citizens' fight for social equality and social progress in the context of the concentration of power and wealth to a narrow range of actors through the 'global neoliberal governmentality' in reality only exist in democratic constitutionalism in the states.[*178]

and Social Housing – An Overview'. Paper presented at the ENHR conference 'Housing in Expanding Europe: Theory, Policy, Participation and Implementation' (Ljubljana, 2-5 July 2006) pp 13ff, on file with the author and cited with the permission of Alexis Mundt.

173 In addition to the above Swedish example, see eg the Preamble of the Constitution of Spain, which mentions 'fair economic and social order' with the aim 'to promote the wellbeing of all its members'.

174 The issue is explicitly formulated in class terms, with neoliberalism said to specifically prioritise upper classes, international elites and financial communities, in the book by Harvey, supra note 166, eg pp 31ff, 72-73, and more generally by Tzanakapoulou, *Reclaiming Constitutionalism*, below note 178 and the accompanying text. See also more generally on prioritisation of the market and international creditor community Wilkinson, 'The Reconstitution', supra note 79 and the accompanying text; Anghie, supra notes 107 and 112, and Stiglitz, supra note 88.

175 For a paradigm shift in the field of criminal law from punishment and deterrence towards a humanistic, integrated and therapeutic approach to the individual, see Stobbs, supra note 82, pp 138-140. See also the example of Sweden, James, below note 229 and the accompanying text.

176 On Maslow's pyramid of needs and 'self-actualisation', see the Editors of Encyclopaedia, 'Abraham Maslow' in *Encyclopedia Britannica*, 23 June 2022, <https://www.britannica.com/biography/Abraham-H-Maslow> (accessed 21 July 2022). On philosophers who have explored human dignity and moral, emotional, social and other aspects of human emancipation, see Somek, *The Cosmopolitan Constitution*, supra note 16, ch 3.

177 Alexander Somek and Michael Wilkinson, 'Unpopular Sovereignty?' *LSE Law, Society and Economy Working Papers* 2020/3, pp 18-19. – DOI: https://doi.org/10.2139/ssrn.3556666. On the importance of 'the place', see also Somek, *The Cosmopolitan Constitution*, supra note 16, pp 264-283.

178 Maria Tzanakapoulou, *Reclaiming Constitutionalism. Democracy, Power and the State* (Hart Publishing 2020), eg chapters 6, 7 and pp 193ff. – DOI: https://doi.org/10.5040/9781509916153. In her further article referred to in supra note 168,

In any event, the need to shift away from the neoliberal, market-prioritising paradigm is also increasingly pressing due to rapidly accelerating climate change. A growing chorus of organisations and movements have been calling for systemic changes towards a more environmentally sustainable and socially just economic and financial system, and are perplexed about why something has not urgently been done. The national judicial as well as legal and scholarly communities might well hold a key role: whilst hitherto they have seen EU and international co-operation almost exclusively in idealistic terms, perhaps the time has come to start asking some important questions about what is it that they are, in fact, correctly and loyally implementing at the national level.*[179] Whilst there are many valuable EU environmental protection directives, EU law and the CJEU have entrenched a fundamentally market-based system that has prioritised eg the long-distance transport of food and basic goods that can be produced locally, a carbon trading system that has had negligible effect on curbing greenhouse gas emissions, and intensive farming by large agribusiness that puts small farmers producing natural, organic food out of business. Furthermore, the CJEU case law has curtailed the scope for public protests.*[180] In particular, the ongoing mutualisation of debt in the name of 'Europe' will make it harder – and maybe even impossible – for the concerned communities and citizens of one or more Member States to democratically decide to switch to an alternative economic and financial system that would be socially just and not require ever more profit and economic growth.

6. The neofunctionalist doctrine of 'Integration through Law' as a conceptual basis for the CJEU's 'negative integration' approach, including mutual trust, resulting in the dismantling of national autonomy and judicial controls

Returning to the effects of neofunctionalism on the role of courts, one important doctrine – which also helps to understand the ongoing Kuhnian paradigm shift and the ways in which the CJEU mutual trust requirement for courts curtails judicial review – is the 'Integration through Law' doctrine, which is little known outside specialist EU law communities but has a very broad and profound impact; indeed, scholars have increasingly called for its curtailment.

The 'neo-functionalist paradigm of integration-through-law', as extensively documented by Antoine Vauchez, has been one of the EU's most established and powerful meta-narratives, which has become the 'new common sense' of the EU legal and political discourses.*[181] The 'Integration through Law' doctrine was developed at the EUI by leading EU law scholars (including Joseph Weiler), who in broad lines envisaged the gradual transplanting of the US federal legal order to the EU. Five dimensions of the 'Integration through Law' doctrine are of particular relevance to the Kuhnian paradigm shift postulated in Chapter 4 and to the changing role of courts through EU law, and also help to understand the underlying dynamics of the problematic effects of CJEU mutual trust case law explored in Aasa's thesis.

The first such dimension is explained clearly by the eminent EU law scholar Christian Joerges, who sees the origin of the somewhat 'insensitive' drive towards 'ever-more-Europe' in '[t]he institutional framework of this project', which 'fosters the expansion of European law as an end in itself […] equating ever more law

Tzanakapoulou sees the constituent power as 'a living emancipatory body', pp 156ff. For historical 'battles that won our freedoms' see supra note 130 and the accompanying text.

179 Among others, Danny Nicol has in an extensively researched monograph built a compelling case for lawyers of constitutional and public law to take greater interest in possibilities to shift the transnational constitutional system in a direction that would press for greater autonomy and space for democratic contestation and for the use of a greater range of alternative economic strategies, instead of pre-committing the states in perpetuity to the severe, democracy-limiting constraints of neoliberalism. Nicol, supra note 163, pp 159-164.

180 See eg Case C-112/00 *Schmidberger* [2003] ECR I-05659; Case C-265/95 *Commission v France (Spanish Strawberries)*. ECR 1997 I-06959, ECLI:EU:C:1997:595.

181 Antoine Vauchez, '"Integration-through-Law". Contribution to a Socio-history of EU Political Commonsense' *EUI RSCAS Working Paper No 2008/10*, pp 1ff, 21ff. – DOI: https://doi.org/10.2139/ssrn.1260166. The 'neo-functionalist paradigm' of 'integration-through-law' is explained by Vauchez in footnote 4 of the paper.

with ever more Europe and the promotion of the benefit of its citizens'.[*182] In the field of criminal law, a scholarly manifesto has put forward a plea that passing (increasingly repressive) legislation by the EU to answer every social problem should not be considered 'as a value in itself'.[*183]

The second dimension is that a core element of the 'Integration through Law' doctrine is the specificity of EU law and disconnect from comparative law, and the quest to shift law towards autonomous EU law;[*184] this also helps to explain the developments around research methodology explored in Chapter 3. As Fritz Scharpf has observed, the 'Integration through Law' doctrine helps to understand why 'European law has no language to describe and no scales to compare the normative weights of the national and European concerns at stake'.[*185]

The third is that this doctrine specifically views **national differences as one of the main problems, and one which has to be overcome**. This is insightfully explained by Matej Avbelj, who has pointed out that the 'Integration through Law' project has had 'a wide and strong impact on the epistemology of EU law',[*186] in result of which the classic EU constitutional narrative has centred around '[h]armonisation, if not unification', where

> all the differences and diversity existing in the integration were perceived as obstacles, originally to free trade and then to integration as such. They were expected to give way, albeit incrementally, to the supreme Community law requiring uncompromised uniformity of its application across all the Member States.[*187]

With regard to the above point, Alexander Somek has further observed that the EU focus on the eradication of differences in national regulation, along with the CJEU emphasis on the principle of equality of citizens, represent the quest to build the autonomous legal order of the EU in a way that is independent from the co-existence of nation-states.[*188]

The fourth dimension – closely related to the previous one and directly relevant to Aasa's thesis on mutual trust – is that the 'Integration through Law' doctrine is the intellectual and conceptual basis for the so-called 'negative integration' approach, whereby the CJEU has systematically dismantled national protections, autonomy and judicial controls, initially in the single market fields and increasingly in ever wider areas of law, including through the requirement of mutual trust. Fritz Scharpf has raised this issue sharply in relation to the destruction of the Member State's social systems through CJEU negative integration case law; he finds that 'Integration through Law' needs to be 'contained'.[*189]

I would add that a similar dynamic seems to be at play in relation to the Member States' criminal law. Birgit Aasa's thesis, when exploring the problems posed to the legal orders of the Member States through the expansion of mutual trust from internal market to criminal law, notes that **the principle of mutual trust limits Member States' legislative, executive and judicial jurisdiction, with a corresponding loss of regulatory autonomy**.[*190] Aasa's thesis also mentions the race to the bottom.[*191] The 'negative integration' approach, including the underlying assumption that the nation-state needs to be abandoned, helps to understand the broader dynamics of the CJEU case law, which is necessary for identification of the problem and for discussion on how to bring about a change.

182 Christian Joerges, 'Three Transformations of Europe and the Search for a Way Out of its Crisis' in Christian Joerges and Carola Glinski (eds) *The European Crisis and the Transformation of Transnational Governance. Authoritarian Managerialism versus Democratic Governance* (Hart 2014) pp 38-39. – DOI: https://doi.org/10.5040/9781474201117.ch-001.

183 'Manifesto on the European Criminal Policy' (2009) (No 12) Zeitschrift für Internationale Strafrechtsdogmatik <www.crimpol.eu/> (accessed 8 September 2015) pp 707-716, at p 715.

184 Vauchez, '"Integration-through-Law"', supra note 181, pp 21-22.

185 Fritz Scharpf, 'The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy' *MPIfG Working Paper* 09/12 (2009) <http://www.mpifg.de/pu/workpap/wp09-12.pdf> (accessed 17 April 2015) p 22.

186 For details, see Matej Avbelj, 'The Pitfalls of (Comparative) Constitutionalism for European Integration' *Eric Stein Working Paper No 1/2008*, p 15. – DOI: https://doi.org/10.2139/ssrn.1334216.

187 As summarised by Matej Avbelj, 'Questioning EU Constitutionalisms' (2008) 9(1) German Law Journal p 8. – DOI: https://doi.org/10.1017/s2071832200006283.

188 Somek, *Individualism,* supra note 38, pp 213ff, 226.

189 Scharpf, supra note 185, p 34.

190 Aasa, supra note 2, eg pp 29, 140-143.

191 Aasa, supra note 2, eg pp 20, 33, 242.

The fifth element, and of particular importance to the ongoing Kuhnian paradigm shift, is the combined ways in which the neofunctionalist 'Integration through Law' doctrine changes the logic of 'European' law and 'European' legal thinking, including what is regarded as constitutionalism, and the logic of fundamental rights protection.

The above-mentioned and other scholars have called for greater awareness about, and curtailment of, the 'Integration through Law' doctrine. For example, Scharpf has observed that the EU law community has cheered the 'Integration through Law' approach without meaningful discussion, and finds that 'good Europeans' need to reconsider this underlying theory.[*192]

7. Outline of other areas where concern has been expressed about curtailment or disappearance of judicial review through EU law

Whilst so far the focus has been on the dismantling of judicial protection through the CJEU rules on mutual trust, protection of the neoliberal market order, and through the quest in the 'Integration through Law doctrine' to eradicate national differences, this chapter seeks to briefly flag for awareness that these are only some aspects of far wider-ranging ways in which judicial review has been disappearing through neofunctionalism and other new foundational ideas for the exercise of public power in autonomous EU law and governance. This reinforces concerns about more radical ongoing changes and the existence of a systemic problem, and that there is a need for a joined-up discussion on what ought to be the role of courts in European constitutionalism. Indeed, earlier scholarly concerns were noted about the emergence of a **thin, weak, procedural version of judicial review**, with reduced opportunities for citizens to challenge public decisions.[*193]

Due to space constraints, only a brief bullet-point list can be included here. Concerns about displacement and elimination of judicial review in direct ways in other areas of EU law include the following:

- In European Arrest Warrant cases and other areas, whereas many (especially post-totalitarian and post-authoritarian) national constitutions expressly require judicial review by a court, especially in cases of deprivation of liberty, in EU law the respective institution can be a 'judicial authority', which may be eg a ministry of justice or a prosecutor in EAW cases.
- There has been a sidelining of classic judicial protections in criminal law through the shift, in the implementation of EU measures, to a grey area of 'criministrative law', which removes the need for a higher standard of judicial and fundamental rights protection that has traditionally applied in the field of criminal law in Europe.[*194]
- Former Italian Constitutional Court judge Sabino Cassese has raised the concern whether fundamental rights 'are left without any safeguards at all' in the aftermath of the 'de-judicialisation' and shift to new out-of-court proceedings through EU banking resolution instruments, with review having shifted to administrative authorities at the expense of courts.[*195] There are similar concerns about a greater role for extra-judicial proceedings in other areas, including in the field of criminal law.
- Concerns have increasingly widely been voiced about 'displacement' of constitutional courts and constitutional review though EU law.[*196] In fact, it will be seen in the *Comparative Study* that the

192 Scharpf, supra note 185, p 34.

193 See Harlow and Galera, as referred to by Albi, 'Erosion of Constitutional Rights', supra note 57 and the accompanying text.

194 Anneli Soo, Alexander Lott, Andreas Kangur, 'Võimalused Euroopa Liidu halduskaristuste ülevõtmiseks Eestis' ['Possibilities for Adoption of European Union Administrative Punishments in Estonia'] (2020) (Issue 4) Juridica pp 242ff, with references to 'criministrative law' at p 243. See also panel 'Euroopa Liidu halduskaristuste sisseviimine Eesti õigusruumi: kas sobitamatu sobitamine sobivaimas võtmes?' ['Introduction of European Union administrative penalties into the Estonian legal order: Seeking to fit the unsuitable in the most suitable key?'] at the 36th Estonian Lawyers Congress, 8 October 2020. On 'criministrative law', see the presentation and slides of Markus Kärner, 'Euroopa Liidu sanktsioonide sobitamine Eesti riigisisesesse õigusesse: kümme aastat diskussiooni' ['Fitting European Union sanctions into Estonian national law: Ten years of discussions'] <www.uttv.ee/naita?id=30538#> (accessed 30 August 2022).

195 Sabino Cassese, 'A New Framework of Administrative Arrangements for the Protection of Individual Rights' (2017) (Issue 6) Rivista Italiana di Diritto Pubblico Comunitario pp 1330, 1334ff.

196 See eg Jan Komárek, 'Why National Constitutional Courts Should Not Embrace EU Fundamental Rights' *LSE Law, Society and Economy Working Paper No 23/2014*, pp 16ff. – DOI: https://doi.org/10.2139/ssrn.2510290.

type of constitutional review exercised in post-totalitarian and post-authoritarian constitutional systems has by and large been deactivated in the extensive areas of law that fall within the scope of EU law. The widely contested EU Data Retention Directive was only the second ever directive to be annulled by the CJEU – in 2014 – on fundamental rights grounds; this came in a second challenge following extensive national constitutional contestation. In post-totalitarian and post-authoritarian constitutional orders, the annulment rate is about one-third to more than one-half of all constitutional review cases, especially in abstract review proceedings where a motion is brought by a public body or institution (but with a low percentage in individual complaint cases). The annulments are predominantly based on the grounds of fundamental rights and general principles of law; annulments by the CJEU are based more on competence, procedural and technical grounds, and strikingly often tend to result in expanding the scope of EU law. The institutions and persons who bring constitutional review challenges – especially in abstract proceedings – have by and large been sidelined; the persons and institutions who tend to bring cases to the CJEU are different, being typically interested in contesting some national rule or measure. Through the preliminary rulings system, there has additionally been a reorientation from judicial review and constitutional review to questions of correct interpretation of EU law.[*197]

- Following on from the previous point, there is widespread political, scholarly and media reprimand of any sign of retaining constitutional review in EU law related matters on the part of Member States' constitutional courts. Whilst the comments against the German Constitutional Court have typically been particularly vitriolic, the stark criticisms of the Portuguese Constitutional Court clearly illustrate the foundational changes from accountability to the people to accountability to the international creditor community, and from the social state to neoliberalism through autonomous EU governance, along with blindness to possible causalities of the public debt caused by bank bailouts arising from EU law.[*198] In 2010–2015, the Portuguese Constitutional Court identified unconstitutionality in 9 of 13 cases regarding economic crisis austerity measures, and rejected at least 15 different legislative and executive acts regarding austerity, especially on the grounds of fundamental rights and the general principles of equality, proportionality and legitimate expectations.[*199] Amongst an avalanche of criticism directed at the Court, a leaked internal briefing document of the European Commission was essentially seen by the public as putting 'direct pressure' on the Court, using 'a blackmailing tone',[*200] and even as hinting at the potential abolition of the Portuguese Constitutional Court. The briefing document refers to the (neofunctionalist) research on courts by Prof Alec Stone Sweet, and then goes on to cite Prof Eduoardo Vera-Cruz, Director of the Faculty of Law of the University of Lisbon, who remarked that 'the only way to have politically neutral constitutional jurisdiction would be to place this area under the Supreme Court of Justice'.[*201] The briefing document additionally observes that the situation is 'worrying international creditors', that 'the Constitutional Court's decisions are […] perceived as a potential problem, with international implications' and that 'the CC is having an echo among the international partners and rating agencies'.[*202] The briefing document was covered in an article by the *Financial Times*, which through numerous quotes from economists and professors of political science and law strongly echoed the Commissions' viewpoints.[*203]
- There are EU and Council of Europe initiatives towards simplified judicial proceedings, advocating the example of those countries that have simplified their rules as a model of good practice for

197 For initial data, including research of the CJEU annulment cases by Takis Tridimas and Gabriel Gari, see Albi, 'Erosion of Constitutional Rights', Part 1, supra note 19, pp 176ff. Extensive data on annulment in the Member States is collated in the forthcoming *Comparative Study*, supra note 6.

198 See above notes 79, 86, 166 and 168, and the accompanying text.

199 Francisco Pereira Coutinho and Nuno Piçarra, 'Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution', in Albi and Bardutzky, *National Constitutions*, supra note 7, sects 2.7.3 and 2.8.3.

200 MEPs Edite Estrela (S&D) and Rui Tavares (Verts/ALE), Question for written answer to the Commission 'Interference by the Commission in the domestic affairs of a Member State', Ref No E-011999-13, on file with the author.

201 'Will the Constitutional Court Put at Risk the MOU Implementation?' *Internal Briefing Document of European Commission Representation in Portugal, DG Communication* (15 October 2013) p 3, on file with the author.

202 *Internal Briefing Document*, supra note 201, pp 1, 3.

203 Peter Wise, 'Portugal's Constitutional Court Threatens Country's Bailout' *Financial Times* (24 October 2013) </www.ft.com/content/884f61d2-3bfb-11e3-b85f-00144feab7de> (accessed 30 August 2022).

other countries that have retained more stringent judicial protections.*[204] Regarding the efficiency of judiciaries, in a more general context, the Consultative Council of European Judges (CCJE) in Opinion No 6 (2004) has suggested that '"quality" of justice should not be understood as a synonym for mere "productivity" of the judicial system; a qualitative approach should address rather the ability of the system to match the demand of justice in conformity with the general goals of the legal system, of which speed of procedures is only one element'. These views have also been echoed by Estonian judges.*[205]

- Through the global rule of law reform promoted by the US, plea-bargaining has been promoted in Europe and worldwide, with a shift to out-of-court proceedings. The alarming consequences have been explored in the evocatively entitled reports 'The Disappearing Trial' and 'Efficiency over Justice' by Fair Trials International.*[206]

In addition to the direct examples of disappearance of judicial review, there are numerous more subtle dimensions of curtailing or removing judicial review and judicial protection:

- The national reports in the *National Constitutions* book contain hundreds of cases where an applicant has sought protection of one or another constitutional fundamental right or rule, which is very often also a shared, long-standing tenet of comparative European constitutional law. Whereas in a purely national context, the well-established jurisprudence has been to protect such constitutional provisions, in the context of EU law, supremacy, effectiveness and uniform application of EU law have been prioritised, often after a preliminary ruling by the CJEU. Whilst normally it is the constitutional courts that are activist in protecting fundamental rights, in EU related cases, the lower instance courts have often been more protective of fundamental rights, but their decisions have subsequently been overturned by the highest courts in order to ensure the supremacy and effectiveness of EU law.
- Related to the preceding point, many issues of judicial protection that arise under the national constitutions simply lose their relevance if the normative point of reference shifts to the EU Treaties and the EU Charter; examples will be brought in the next chapter. This has a very large-scale effect, as EU law only allows for protection of the few most important constitutional rules that amount to national constitutional identity, or in limited areas where national laws have not been fully harmonised.
- Whereas especially in the post-totalitarian and post-authoritarian constitutional systems, constitutional norms and fundamental rights are binding, prescriptive and part of an integral system of constitutional law that is to be protected by the courts, through EU law there has been a shift to Anglo-American casuistic, precedent-based law that is ad hoc, pragmatic and markedly less clear in terms of legal certainty. Autonomous EU law muddles elements of numerous profoundly different legal systems, is difficult to access, and ultimately very few can understand it, let alone mount a critical analysis of it in a foreign language or organise and finance a campaign in 27 Member States to bring about a change. For citizens, the law, legal system and its objectives have increasingly become incomprehensible, unintelligible and remote, failing to provide protections that they had hitherto expected. There is also a sense of a loss of law-making that would aim to deal with deeper causes of problems and provide joined-up, long-term solutions.
- Overall, the word 'schizophrenic' has increasingly been used to describe the position of national courts and judges who have to deliver judgments that comply with EU law (and with further – at times conflicting – requirements of international law such as the ECHR, trade and investment treaties, etc), while also ensuring respect for at least the core rules of the national constitution.

[204] For a comparative overview, see Liina Reisberg, Maarja Oras and Liis Lindström, 'Due Process. General Report' (Supreme Court of Estonia, 2018), prepared for the ACA-Europe seminar 'Due Process' noted in the opening footnote (*), available at <www.riigikohus.ee/sites/default/files/kohtupraktika%20anal%C3%BC%C3%BCs/2018_TLL_GeneralReport.pdf> (accessed 8 August 2022).

[205] CCJE (2004) Op. No 6 of 24 November 2004, <https://rm.coe.int/168074752d> (accessed 5 September 2009), para 42. Similar observations have also repeatedly been made by Estonian judges at the Estonian Judges Forum <www.riigikohus.ee/et/oigusalased-materjalid/avalikud-esinemised-ja-artiklid> (accessed 5 September 2022). I am grateful to Ivo Pilving, Justice of the Supreme Court of Estonia, for bringing these points to my attention.

[206] 'The Disappearing Trial. Towards a Rights-based Approach to Trial Waiver Systems', Report by the Fair Trials International (2017) <www.fairtrials.org/articles/publications/the-disappearing-trial/> (accessed 5 September 2022). On US influence, see p 9. See also 'Efficiency over Justice: Insights into Trial Waiver Systems in Europe', Report by Fair Trials International (December 2021) www.fairtrials.org/articles/publications/the-disappearing-trial/ (accessed 5 September 2022).

Furthermore, they often face not only the risk of condemnation and humiliation from the EU law community if they deviate from EU law on constitutional grounds, but also of triggering the machinery of EU enforcement proceedings, state liability and hefty fines, including in situations where they seek to protect long-standing, classic European constitutional fundamental rights. This predicament was perhaps most clearly exemplified by the EU fines or threats of fines for delays in implementing the EU Data Retention Directive that were caused by widespread public and judicial concerns that introduction of mass surveillance would be incompatible with national constitutional fundamental rights regarding the inviolability of the home and communications. This is also one element that has led to the EU legal order increasingly being perceived as oppressive.

8. Examples of radical alterations in fundamental rights protection through EU law, and dimensions of judicial review that do not arise under the EU Charter

In the preceding section, it was noted that one aspect of the disappearance of judicial review is that many fundamental rights issues that arise under the national constitutions do not arise under the Charter; this will be explored more fully here.

To this end, there is a need to address one broader question that the present writer is frequently asked, including in the review process that preceded the publication of this article: it is whether the protection of fundamental rights – especially beyond the specific area of mutual trust and the European Arrest Warrant system – has not broadly remained the same, even if the adjudication has shifted from national courts to the CJEU, and the paradigm of constitutional law has been changing towards functionalism.

That there has been a broader erosion of constitutional fundamental rights and of the *Rechtsstaat*-based tradition of the rule of law through EU law has been extensively documented by the present writer in other publications; space constraints do not allow exploring this broader theme here. In particular, the above-mentioned, two-part article 'Erosion of Constitutional Rights in EU Law' documents constitutional adjudication in a large number of Member States, in different areas of law, including the European Arrest Warrant, the EU Data Retention Directive, general principles of law, the treatment of fundamental rights in EU law as 'restrictions' to economic and free movement rights which must be interpreted strictly, and the standard of constitutional review.[*207] The article additionally refers to literature on the epistemology of EU law, where it has been explained why these issues have not received wider attention; some of the reasons have been outlined in Chapter 3 of the present article. The 'Erosion of Constitutional Rights' article further outlines literature on some of the long-standing, structural criticisms regarding EU fundamental rights protection, which include the following four main concerns. First, there is the issue of 'double standards', which has several dimensions, including that the CJEU case law tends to advance vis-à-vis the Member States – in an activist manner – those fundamental rights and market freedoms that arise from EU law, while not allowing higher or more extensive protection under national constitutions. Another dimension is that measures of the Member States are frequently found to be in breach of the Treaties, whereas EU measures are rarely annulled. Secondly, if one looks at the actual outcomes of CJEU judgments, it emerges that the protection of classic fundamental rights has by and large remained rhetorical, having been trumped by market freedoms or other aspects of EU policy. Thirdly, the standard of protection is often set by the CJEU at the ECHR level despite the fact that the ECHR system is meant to provide the basic floor of protection rather than the ceiling; this tends to lead to ossification of a low level of protection, whereas under international human rights treaties a higher standard of protection under national constitutions is typically allowed. Fourthly, there is the general prioritisation of uniformity, autonomy and effectiveness of EU law over fundamental rights.

Following subsequent research through the 'Role of Constitutions' project, a clarification ought to be added that the issues around EU law lowering the standard of protection of fundamental rights arise more sharply in the context of the post-totalitarian and post-authoritarian constitutional systems. In the Member States that have a political, historical or traditional legal type of constitution – many of which have an older

[207] Albi, 'Erosion of Constitutional Rights', Part 1, supra note 19.

or laconic bill of fundamental rights – the protection of fundamental rights, as well as judicial review, has often been enhanced through EU law.

In the introductory chapter to the *National Constitutions* book, a summary of further major changes through autonomous EU law has been provided on the basis of material in the national reports. The changes include the following: a very different interpretation through CJEU case law of the general principles of law, such as legitimate expectations and non-retroactivity as well as the principle of proportionality; strains on legal certainty and on the clarity and 'quality of law'; significant changes to the cumulative rules which have traditionally been required for limitation of fundamental rights; manifold shifts of power to the executive branch, including a shift from the classic rule of parliamentary reservation of law to a wide use of governmental regulations; erosion of the social state; etc.[*208]

Other scholars have also started to voice sharp concerns that EU law has 'radically altered' classic European constitutional protections. Agustín Menéndez has summarised his 'structural critique' of constitutional review by the CJEU as follows:

> [...] the European Court of Justice has **radically altered the substance of European constitutional law**. In particular, the right to private property and entrepreneurial freedom (as operationalized through the four economic freedoms and the principle of undistorted competition) have been assigned an abstract and a concrete constitutional weight that places key public policies (social policies, tax policies, regulatory policies) off the realm of what is constitutionally possible. As a result, some of the collective goods at the core of the Democratic and Social Rechtsstaat have become extremely vulnerable.[*209]

With regard to the social state, Maria Tzanakapoulou's finding that domestic constitutional principles of social justice have been rendered 'virtually void of content' was mentioned in Chapter 5, and Fritz Scharpf's concerns about destruction of the social state through CJEU negative integration case law were noted in Chapter 6. As a side remark, this area also illustrates a somewhat distorted EU law dynamic whereby national protection – here of social rights – is first dismantled by one set of EU measures, being then gradually shifted to the EU level. This then triggers compliance monitoring through European Commission annual reports and, in many areas, is backed up by the threat of EU enforcement proceedings. Informally, many scholars have grumbled about how the European Commission officials can do this with a straight face, especially following the treatment of Greece. In any event, this also seems to be an example of the operation of the neofunctionalist 'spillover' dynamic[*210] in the field of fundamental rights, in that, on a closer look, a very large proportion of scholarly publications in EU law tend to focus primarily on the question of the extent to which the protection of fundamental rights has shifted from the national constitutions to the EU Charter, rather than what is the actual standard of protection.

With regard to alterations in the general principles of law, a Spanish scholar notes through an article title that legal certainty is 'A Missing Piece of European Emergency Law', and observes that in financial crisis adjudication 'legal certainty and legitimate expectations have succeeded in ... some Constitutional Courts and in the European Committee of Social Rights, but the European Court of Justice appears still to remain rather impervious to them'.[*211]

Observations by Estonian scholars and lawyers about profound changes to Estonian material constitutional law caused by EU law have been collated in the book chapter 'Estonia: From Rules to Pragmatism'. These include extensive concerns expressed by nine dissenting judges with regard to the effects of the large financial liabilities imposed under the ESM Treaty on the social-democratic state based on the rule of law,

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208 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, pp 17ff. The respective adjudication in different Member States in each respective area is synthesised in the forthcoming *Comparative Study*, supra note 6.

209 Agustin Menéndez, 'Constitutional Review, Luxembourg Style: A Structural Critique of the Way in Which the European Court of Justice Reviews the Constitutionality of the Laws of the Member States of the European Union' 2017 9(2) Contemporary Readings in Law and Social Justice, p 116. – DOI: http://dx.doi.org/10.22381/CRLSJ9220178. Emphasis added.

210 For 'spillover' in EU fundamental rights, see Herwig CH Hofmann and Morgane Tidghi, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks' (2014) 20(1) European Public Law pp 147-148, 162. – DOI: https://doi.org/10.54648/euro2014011.

211 Pablo M Rodríquez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) 12(2) European Constitutional Law Review pp 265ff, 282. – DOI: https://doi.org/10.1017/s1574019616000158.

the far-reaching effects of the change towards 'criministrative law' that have evoked parallels with Soviet law amongst leading lawyers, and the profound reinterpretation of the principle of legitimate expectations.[*212] One might recall that for the neofunctionalist EU law epistemic communities, all such issues tend to blur into 'obstacles to integration' and protection of sovereignty and national constitutional identity.

The displacement of comparative (continental) European constitutional protections is perhaps most plainly evident in the field of criminal law where several sharply worded manifestos have been published by the more classically oriented criminal law scholars about the deeply problematic practical effects of EU criminal law measures. Indeed, in an 'Alternative Draft for a European Criminal Law', eleven German criminal law professors, led by Professor Bernd Schünemann from the University of Munich, have expressed concern that 'the rule of law as well as the indispensable democratic fundamentals underlying the criminal law' were principles 'developed as early as during the period of Enlightenment, but have been disregarded in the prevailing discussion on EU criminal law' and that '[o]ne must put one's illusions aside and acknowledge that, in the area of criminal justice, Europe is presently in the process of undermining much of the rule of law'.[*213] Ester Herlin-Karnell has written that in EU criminal law co-operation, 'important values once recognised within the nation state are lost in the transition to the European level' and, especially pre-Lisbon, 'in the pursuit of substantive changes at the EU level even basic concepts such as fair trial and legality, which traditionally are recognised in national criminal law, seem to be forgotten'.[*214] An academic group of fourteen criminal law professors from ten Member States, in their joint 'Manifesto on the European Criminal Policy', have expressed concern about 'alarming tendencies' with 'increasingly repressive acts'; they write that '[i]f the entailed risks are not acknowledged in time, we fear to be confronted with criminal laws that contradict our fundamental principles'.[*215]

In the light of the ongoing Kuhnian paradigm shift postulated in Chapter 4, it seems that **EU criminal law also represents neofunctionalist as well as neoliberal legal thinking**, as the focus is on 'Europeanisation' of criminal law in the meaning of a shift of regulation to the EU level, and with orientation towards effectiveness – including of effective and repressive sanctions and wider criminalisation; there is blindness to, and disappearance of, the classic (continental) European constitutional values and safeguards for the individual.[*216]

In what follows in this chapter, I will add to the existing research observations about why the EU Charter does not resolve many of the fundamental rights issues. These include the fact that the EU Charter and the surrounding discourses about fundamental rights are also grounded in the above-mentioned paradigm of autonomous EU governance, predicated on neofunctionalism, neoliberalism and the other new foundational ideas for public power. Since national constitutions are reduced in these to matters of national identity, this also means that manifold advanced aspects and nuances in continental European constitutional protection of fundamental rights have been displaced and lost, as they do not arise if the normative point of reference shifts from the national constitutions to the EU Charter of Fundamental Rights; indeed, many measures which under national constitutions would be deemed unconstitutional are considered perfectly legal if assessed under the Charter. In the next chapter, this will be illustrated with the example of the case of Neeme Laurits.

Returning to Birgit Aasa's thesis and the question of what should be the baseline, Aasa shows that after the *Zarraga* case, the CJEU has placed the epistemic base for trust in the EU Charter. That is, mutual trust must be adhered to, without further judicial review, on the basis of 'the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights'.[*217] On the one hand, Aasa rightly finds that the CJEU's assumption of fundamental rights compliance is flawed because the reality on the ground is different. On the other hand, Aasa identifies the essence of the flaw in the view, which is also prevalent in EU discourses, that fundamental rights protection generically is deficient

212 Hent Kalmo and Anneli Albi, 'Estonia: From Rules to Pragmatism' in Griller, Papadopoulou and Puff, supra note 71; the chapter is available open access at <http://ssrn.com/author=1246144> (accessed 30 August 2022).

213 Bernd Schünemann, 'Alternative-Project for a European criminal law and procedure' (2007) 18(2) Criminal Law Forum pp 243-244. – DOI: https://doi.org/10.1007/s10609-007-9031-z.

214 Herlin-Karnell, 'The Integrity of European Criminal Law Co-operation', supra note 41, pp 238, 240.

215 'Manifesto on the European Criminal Policy', supra note 183, p 715.

216 That EU criminal law is neoliberal, see also Walsh, below note 236 and the accompanying text.

217 Case C-491/10 PPU *Zarraga*, ECLI:EU:C:2010:828, para 70, as cited and discussed in Aasa, supra note 2, pp 162ff.

in several, especially new Member States from Central and Eastern Europe, in particular after the illiberal turn in Hungary and Poland. Whilst this is accurate in some respects (eg as regards recent illiberal developments, as well as prison conditions), what is missing in Aasa's thesis, and typically in the broader EU discourse, is that the countries of Central and Eastern Europe (including, before the illiberal turn, Hungary and Poland), along with the post-totalitarian and post-authoritarian countries in Western Europe, have in cases of deprivation of personal liberty given heightened protection to a range of classic fundamental constitutional rights, which have been sidelined in EU mutual trust cases. These include *nulla poena sine lege*, the presumption of innocence, parliamentary reservation of law in criminal law matters, and the classic (continental) European rule of law safeguards requiring maximum precision and certainty in criminal law, as well as interpretation in favour of the individual (the principle of *in dubio pro mitiore*). Crucially, irrespective of whether a Member State generically grants a high level of fundamental rights protection, there is a subjective, individual constitutional right to judicial protection (eg Art 15 of the Estonian Constitution, as also pointed out in a remark by the Chancellor of Justice of Estonia below in Chapter 9). More than fifty cases and numerous institutional inquiries regarding the impact of the EU mutual trust regime on these and other constitutional fundamental rights and rule of law safeguards in different Member States are synthesised in the above-mentioned, forthcoming *Comparative Study*, showing that in most cases, supremacy and effectiveness of EU law have eventually been prioritised.

There are many further dimensions regarding the differences in fundamental rights protection under the EU Charter and under the post-totalitarian and post-authoritarian constitutions in particular, which have equally been entirely overlooked in the EU discourse. Examples of aspects that have been lost in the shift in the normative point of reference from national constitutions to the EU Charter include that the fundamental rights provisions in the EU Charter are much more laconic, generic and limited in scope than those found in many – especially post-totalitarian and post-authoritarian – constitutions.[*218] Further dimensions of fundamental rights protection in post-totalitarian and post-authoritarian constitutionalism include that fundamental constitutional rights are directly applicable and justiciable, the limitation of rights is subject to stringent, cumulative conditions, including the rule of parliamentary reservation of law, and that fundamental rights are protected *qua* binding rules rather than as general principles which are subject to greater discretionary balancing in the light of the proportionality principle. This last point, with reference to the work of the pre-eminent Professor Robert Alexy, has been subject to fascinating discussion between Estonian legal scholars Hent Kalmo and Madis Ernits; however, to illustrate the structural issue of 'disconnect' in the EU discourse that was mentioned earlier, these legal issues have been virtually unknown outside Estonia.[*219] Indeed, in another publication, a broader shift in Estonian constitutionalism from binding constitutional rules to pragmatism through EU integration has been postulated.[*220]

The combined constitutional protections are ultimately based on **human dignity**, which is the foundation of the value order especially in post-totalitarian and post-authoritarian constitutionalism, modelled on the German Basic Law. Furthermore, constitutions of this type typically include provisions providing that the authorities and the courts have a constitutional duty to protect fundamental rights.

The overall system is well captured by the doctrine of 'guarantism' in Italy, which is used to denote the constitutional guarantees for individual liberty and for collective freedoms against potential arbitrary activity by public authorities, with a central role held by guarantees in the penal process for the prevention of arbitrariness in the exercise of political and judicial power, in particular in the context of emergency legislation.[*221]

The CJEU requirement of mutual trust by and large has the broader effect of disabling and displacing much of the above constitutional protections, in line with the 'Integration through Law' and the 'negative integration' doctrines that seek to eradicate national differences, as was outlined in Chapter 6.

218 For examples, see Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, p 15.

219 On the protection *qua* binding rules, see the academic debate in Estonia between Madis Ernits and Hent Kalmo, as summarised in Madis Ernits, 'Constitutional Review in the Age of Balancing' in *The 6th International Scientific Conference 'Konstitucionālās vērtības mūsdienu tiesiskajā telpā I' ['Constitutional Values in the Modern Legal Space I'], Riga 10-11 November 2014* (Riga: University of Latvia Press 2016) p 127.

220 Kalmo and Albi, supra note 212.

221 See Giuseppe Martinico, Barbara Guastaferro and Oreste Pollicino, 'The Constitution of Italy: Axiological Continuity between the Domestic and International Levels of Governance?' in Albi and Bardutzky, *National Constitutions*, supra note 7, sect 2.3.5.3.

A further disquieting development that emerged from several national reports in the *National Constitutions* book is that the European Commission, in its evaluation reports on national implementation, has specifically criticised countries that provide greater protection of fundamental rights under the national constitution or legislation than what is allowed under the European Arrest Warrant Framework Decision (eg Ireland, Cyprus, Italy). Crucially, several countries have narrowed down the 'human rights' clause and/or judicial protection in the context of the European Arrest Warrant merely to a clause on **non-discrimination on the grounds of nationality, race and ethnic origin** (eg Cyprus, Austria).

Regarding mutual trust and the European Arrest Warrant system, there is another important dimension that has been overlooked in the mainstream EU discourse. It is that whilst there has been considerable focus on harmonisation to improve the standards of defence rights in those Member States where they may be lacking, and exceptions have in more recent CJEU case law been allowed in relation to prison conditions and general rule of law deficiencies in individual Member States, very little attention has been given to the **intrinsic, compounded difficulties for individuals who have to defend themselves in a foreign legal system**.[*222] This involves linguistic barriers, unfamiliarity with other legal systems, and more generically what Valsamis Mitsilegas has described as the 'journey into the unknown'.[*223] These intrinsic difficulties would seem to necessitate enhanced, rather than minimal judicial review in cross-border cases. In the UK, concern has been expressed that defendants and their defence rights may 'vanish down the cracks that exist between different national systems'.[*224] Dermot Walsh, on the basis of a study of Irish EAW cases, has raised the question whether the system of mutual recognition will 'contribute to miscarriages of justice which will be more difficult to detect and remedy'. He highlights a range of constitutional rights that have seen a reduced or even 'anaemic' level of protection, and finds that courts are taking 'a more purposive, and even a teleological, approach' to the application of criminal law legislation.[*225]

This is also a context where the idea of the EU as a single legal order seems particularly starkly out of touch with the realities on the ground, especially given the harsh effects of the compounded difficulties for individuals who have to defend themselves in a foreign legal system. Criminal law is one of the areas of law that has the most drastic consequences for the individuals, with custodial sentences entailing 'the eradication of the citizen's social existence'.[*226] Indeed, this is in clearest terms an area where in the underlying quest to dismantle the nation-state and its sovereignty, numerous advanced aspects of constitutional protection for citizens by the state and its institutions have also come to be dismantled.

In the light of these issues and proceeding more generally from the perspective of the broader comparative (continental) European understanding of constitutional law, I have suggested in the 'Erosion of Constitutional Rights' article that at least partial judicial review ought to be restored in the courts of the country of residence of the person affected, which are typically the most accessible and comprehensible to them. I also referred to a report of the UK House of Lords, which called for extradition to be made 'an instrument of last, rather than first, resort'.[*227]

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222 See Anneli Albi, 'The European Arrest Warrant, Constitutional Rights and the Changing Legal Thinking: Values Once Recognised Lost in Transition to the EU Level?' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds) *The European Union as an Area of Freedom, Security and Justice* (Routledge, 2016) pp 137-175. – DOI: https://doi.org/10.4324/9781315738284-15.

223 Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43(5) Common Market Law Review p 1309. – DOI: https://doi.org/10.54648/cola2006074.

224 Andrew Sanger, 'Force of Circumstance: The European Arrest Warrant and Human Rights' (2010) 6(1) Democracy and Security p 25. – DOI: https://doi.org/10.1080/17419160903535301, citing John Spencer, 'European Criminal Procedure – Fantasy or a Fact?' (2003) (Issue 4) *Archbold News* p 5.

225 Dermot PJ Walsh, 'The European Arrest Warrant in Ireland: Surrendering Our Standards to a European Criminal Law Area' in Ivana Bacik and Liz Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Dublin: First Law 2009), see especially pp 13, 22, 33.

226 Schünemann, supra note 213, pp 230ff.

227 House of Lords Select Committee on Extradition Law,'Extradition: UK Law and Practice' (10 March 2015) <www.publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/126.pdf> (accessed 7 July 2015) p 8.

9. The case of Neeme Laurits as emblematic of the paradigm shift – and the role of the lawyers and journalists who brought the case to wider attention

All of the above constitutional issues are well exemplified by the case of Neeme Laurits, which was brought to wider public attention by '*Pealtnägija*', the investigative journalistic programme of the Estonian public broadcaster ETV.[*228] In hindsight, it is also clearly an **emblematic case of the ongoing paradigm shift**. Mr Laurits had claimed his innocence and had compelling alibis, and yet was extradited to Finland without judicial review. After being held in a Finnish prison for nine months, losing his job and his wife and seeing his health deteriorate, Mr Laurits was eventually found innocent. Given the high standards in Finland, the concern here was not about the prison conditions.

Instead, the concern was about **the neglect of human dignity through arbitrary deprivation of liberty, without judicial review and with disregard of the constitutional duty of the courts and state institutions to protect fundamental rights**. Indeed, in the investigative TV report, the perplexed Mr Laurits drew parallels with the forced deportation of Estonians to Siberia during the Soviet occupation.

The absence of judicial protection, which led to unnecessary suffering that could have readily been avoided, clearly illustrates a key difference in the treatment of individuals in the two paradigms. Classic (especially continental) European constitutionalism has, since the Enlightenment, been marked by the commitment in the 1789 French Declaration of the Rights of Man and of the Citizen to avoid 'all harshness not essential'. Furthermore, post-totalitarian and post-authoritarian constitutionalism are founded on human dignity. The Nordic countries go even further by seeking to achieve a high level of social equality and integration. For example, the focus in Sweden is on prisoner rehabilitation and relatively short sentences, with the goal of getting offenders 'back out into society in better shape than they were when they came in' and addressing the underlying issues, such as drugs, alcohol and psychiatric problems.[*229]

By contrast, scholars have observed that autonomous EU governance, which has its foundations in market integration and is oriented towards neoliberalism, in different ways entrenches an approach that treats individuals as competitive market actors or *homo economicus* – workers as commodified means of production, entrepreneurs, investors or consumers.[*230] Even EU citizenship has been observed to denote apolitical, passive individuals who delegate increasingly sensitive matters to the EU to decide, not only as language and other practical barriers prevent meaningful political debate and participation, but also as they are too busy to competitively pursue their individualistic life goals.[*231] In the Greek report in the *National Constitutions* book, the criminal law expert writes that it is not acceptable that 'fundamental liberties and rights [...] at stake in criminal law matters', and criminal court decisions, 'have to be assimilated to freely circulating consumer goods'; orders pertaining to deprivation of freedom are 'inherently resistant to any kind of commodification'.[*232] What is more, according to the national report on Germany, German commentators have expressed concern that whereas EU market liberalisation and laws on the free movement of goods usually contain exceptions in order to respect considerations of the '*ordre public*' of the Member States, such reservations are missing in the field of criminal law.[*233] As an aside, the provision on human dignity in the EU Charter has not changed such 'commodification'.

228 ETV program 'Pealtnägija' ['Eyewitness'], summarised by Sven Randlaid, 'Narkoparuniks tembeldatud eestlane pisteti 9 kuuks Soome vanglasse' ['An Estonian who was labelled a drug baron sat in a Finnish prison for 9 months'] *ERR* (1 February 2012) <www.err.ee/363810/narkoparuniks-tembeldatud-eestlane-pisteti-9-kuuks-soome-vanglasse> (accessed 30 August 2022).

229 Erwin James, 'Prison is not for punishment in Sweden. We get people into better shape' *The Guardian* (26 November 2014) <www.theguardian.com/society/2014/nov/26/prison-sweden-not-punishment-nils-oberg> (accessed 07 September 2015).

230 Fusco and Zivanaris, supra note 30, pp 369-372, citing in footnote no 15 Rafał Manko's observations about '*homo oeconomicus passivus*'. See also Somek, *Individualism*, supra note 38, eg p 219; Wilkinson, 'The Reconstitution', supra note 79, p 22; in global governance, see Anghie, supra note 113 and the accompanying text. On neoliberalism, see supra note 166-167 and the accompanying text.

231 Somek, *Individualism*, supra note 38, eg p 219; Fusco and Zivanaris, supra note 30, pp 369-372.

232 Xenophon Contiades, Charalambos Papacharalambous and Christos Papastylianos, 'The Constitution of Greece: EU Membership Perspectives' in Albi and Bardutzky, *National Constitutions*, supra note 7, sect 2.3.5.1.

233 H Satzger, as summarised by Tobias Reinbacher in Dieter Grimm, Mattias Wendel and Tobias Reinbacher, 'European Constitutionalism and the German Basic Law' in Albi and Bardutzky, *National Constitutions*, supra note 7, sect 2.3.5.1.

Additionally, as the EU legal order is oriented towards replicating the US constitutional order, it should be recalled that the US criminal justice system has been described as 'harsh' compared to the justice systems of (continental) Europe.[*234] I would add that the case of Neeme Laurits also exemplifies a profound change in the understanding of the rule of law, from the post-totalitarian *Rechtsstaat* approach that is protective of the individual's fundamental rights, especially in the event of coercive use of public power, towards an orientation of enforcement, effectiveness and formalism that marks the EU approach to the rule of law.[*235]

The eminent Irish professor Dermot Walsh has summed up the effects of the various aspects of EU criminal law on national law as '**expanding of the coercive powers of the State and recalibrating procedural requirements to make it easier and faster for the State to secure convictions**.' Walsh finds that this is part of instilling neoliberal ideology to criminal law, thus replacing classic rules that have protected the individual vis-à-vis public power and have been applied for the last 150 years.[*236]

A further important dimension of the Neeme Laurits case concerns the issue of how to raise constitutionally problematic issues in a context where the EU legal order requires correct implementation, backed up by the threat of European Commission enforcement proceedings, rules on state liability and corresponding hefty fines. In the above-mentioned TV documentary, Neeme Laurits explained that **he had written numerous letters to various institutions both in Estonia and Finland, which all responded that they were unable to assist him due to the mutual recognition rules**. This seems to exemplify the concern expressed by Gareth Davies that the EU has become 'a tool for infantilisation' of the Member States and their institutions, since in so many fields of law and policy their only task is compliance and implementation of EU law, which admits no compromise.[*237]

In the view of the present writer, a profoundly important legacy to the Estonian and wider European constitutional discourse on the role of courts has been left by the following individuals and organisations who chose not to remain silent or complicit: the team of journalists who took the trouble to investigate Laurits' claims and bring the case to public attention; defence attorney Kaido Pihlakas, who subsequently pointed out in the daily *Postimees* that such cases are common and that extradition decisions are 'rubber-stamped' by judges;[*238] defence attorney Siim Roode, who raised similar issues in the context of mutual trust in administrative proceedings in the case of Aivo Piirsoo;[*239] the Estonian Bar Association which subsequently asked the then Chancellor of Justice to initiate a wider inquiry into respect of fundamental rights in European Arrest Warrant proceedings; and the then Chancellor of Justice, Indrek Teder, who indeed initiated such formal review. Chancellor of Justice Teder emphasised, inter alia, the above-mentioned individual right to judicial protection: even if it could be assumed that rights protection is endangered only in exceptional cases, 'it is the obligation of the state to guarantee a fair trial to everyone. The true aim of the right to be heard and its impact on the decision taken in surrender proceedings is also relevant'.[*240] These proceedings were eventually discontinued though by the new Chancellor of Justice.

The concerns expressed in public by these conscientious Estonian lawyers, journalists, institutions and organisations, as well as articles published in the UK and European media by lawyers from Fair Trials International about numerous UK cases where innocent individuals had been extradited automatically without the possibility to provide evidence of their innocence in the domestic court, led the present writer to identify a broader change in the role of courts. This was initially noted in the 'Erosion of Constitutional Rights' article; subsequently such concerns were systematically collated and documented from all Member States through the above-mentioned 'Role of Constitutions' project. The present' writer's concern

234 See JQ Whitman, supra notes 158-160 and the accompanying text.

235 For an outline of the key differences, see Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 295-299. See also Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34(1) Yearbook of European Law, pp 74ff. – DOI:10.1093/yel/yev009.

236 Dermot PJ Walsh, *Walsh on Criminal Procedure* (2nd Edition, Round Hall 2016), p ix. Emphasis added.

237 Gareth Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in Dimitry Kochenov, Graínne De Búrca and Andrew Williams (eds) *Europe's Justice Deficit* (Hart 2015) pp 272, 274. – DOI: https://doi.org/10.5040/9781474201193.ch-018.

238 'Advokaat: Eesti täidab Euroopa vahistamismäärusi liiga püüdlikult' ['An attorney: Estonia fulfils European Arrest Warrants too eagerly'] *Postimees* (29 February 2012) <www.postimees.ee> (accessed 17 April 2015).

239 'Saksamaa nõuab eestlaselt miljoneid kroone' ['Germany demands millions of kroons from an Estonian']. *Postimees* (4 November 2009) <www.postimees.ee> (accessed 17 April 2014).

240 As cited in Madis Ernits, Carri Ginter, Saale Laos, Marje Allikmets, Paloma Krõõt Tupay, René Värk and Andra Laurand, 'The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law' in Albi and Bardutzky, *National Constitutions*, supra note 7, sect 2.3.1.2.

that trust is not part of the role of courts in classic European constitutionalism was subsequently noted, and developed further, by Birgit Aasa, whose doctoral thesis demonstrates that the CJEU requirements for mutual trust are systemically unsuitable in the courtroom. It is heartening to see that both of these scholarly works have been recognised by awards from the Constitutional Law Foundation of the Estonian Academy of Sciences; in the view of this author, the individuals who first brought the problematic cases to public scrutiny deserve some form of formal recognition. Their contribution is of particular importance for three reasons.

First, the mainstream EU discourses, as well as national judges and scholars, especially of the younger generations, have increasingly come to operate within the mindset of autonomous EU law and governance – with keywords such as effectiveness, uniformity, trust and teleological interpretation. In Kuhnian paradigm shift terms, they simply do not 'see' the problem,[*241] and are not attuned to the underlying classic constitutional protections; they regard these as something that is part of old-fashioned sovereignty or parochial, idiosyncratic national constitutional identities, as the understanding of comparative (continental) European constitutional law has been fading away. Thus, the issues can only be raised by those who still understand classic European constitutional law and criminal law. This is a dwindling community of lawyers: the reduction of the duration of the undergraduate law degree curriculum to three years in the aftermath of the so-called Bologna Process has in Estonia led to public discussion about the fact that younger generations of lawyers now lack a basic understanding of the fundamentals of law, and of a more integral and systemic understanding of the Estonian legal system and its core values and features.[*242]

Secondly, raising critical concerns with regard to EU law requires a considerable dose of conscience and courage. In the 'Erosion of Constitutional Rights' article, I have extensively documented how those national judges and institutions who expressed concerns with regard to the European Arrest Warrant in the earlier years were extensively rebuked as Eurosceptics or as deviant, which can be very discouraging for the individual. Indeed, often the criticism is directed against the individual scholar or individual national judge, instead of engaging with their substantive concerns. This has been exacerbated in the recent climate of illiberal turns and the rise of anti-establishment parties, whereby it is even harder to avoid the conflation of critical analysis of EU law with general populism, nationalism, etc.

The third reason why the contribution of these lawyers and journalists is important is that they have enabled others to identify and corroborate that a broader problem does indeed exist, not only from the perspective of the Estonian but also the broader comparative (especially post-totalitarian and post-authoritarian) European understanding of constitutionalism. This, in turn, allows debate to be initiated about whether and how a corrective redirection could be brought about in the EU rules, to which we will turn next in the final chapter.

10. The need for a joined-up, inclusive discussion about the role of courts – along with the paradigm shift in European constitutionalism – as part of the debate on the future of Europe

Whilst this article critically explores the way in which EU law has changed the role of courts from the perspective of Estonia and the wider post-totalitarian and post-authoritarian constitutional area, it is important to emphasise that Estonians have been highly appreciative of EU membership, and have been keen to be 'good Europeans'. In another publication, it was shown that in terms of constitutional adaptations, Estonia has taken one of the most exemplary approaches to the full application of EU law, as the national constitution has by and large been suspended in areas that fall within the scope of EU law, and the courts have granted EU law exceptionless primacy. However, this has come at a considerable cost to the country's constitutional system: a profound but largely undiscussed shift from the binding rules of the post-totalitarian

241 Cf eg Kuhn, supra note 74, p 149.

242 'Eesti õigushariduse ja juristikutse probleemidest ning võimalikest lahendustest' ['Problems and potential solutions to Estonian legal education and the profession of lawyers'], Report by the Supreme Court, prepared by Villu Kõve, Ivo Pilving and Ene Andersen, 2021 <www.riigikohus.ee> (accessed 30 August 2022).

constitutional *Rechtsstaat* to pragmatism was postulated. In that publication, it was suggested that one constructive way forward would be to put the concerns about the far-reaching effects of EU law on national constitutions – including about their obsolescence – on the agenda of the debate on the future of Europe.*[243] Here I would add that the question of what ought to be the role of courts in European constitutionalism also ought to be included in the debate on the future of Europe. This, in turn, cannot meaningfully be done without a discussion about the merits and demerits of the ongoing paradigm shift.

Indeed, what is needed is wider acknowledgement that due to the structural issues in the EU discourse, which have been highlighted throughout this article, a fundamentally misguided legal thinking has come to prevail in the mainstream EU scholarly and public discourses, whereby Europe's national constitutions have erroneously been reduced to idiosyncratic and emotive national identities, overlooking the fact that they establish advanced, democratically agreed systems for the exercise of public power, with carefully fine-tuned formal, institutional, procedural and substantive constitutional rules, including complex requirements around democracy, fundamental rights, the rule of law, separation of powers, the social state, judicial protection and constitutional review. Furthermore, through treating individual national constitutions as idiosyncratic, what has happened on the panoramic picture is that advanced, widely shared achievements of substantive comparative European constitutional law have come to be radically altered or are disappearing, most visibly in the post-totalitarian and post-authoritarian constitutional tradition which is adhered to by more than half of the Member States. 'European' law has increasingly come to denote autonomous, functionalist, neofunctionalist and neoliberal EU law, and overall an eclectic and 'somewhat rudimentary legal system'*[244] where keywords such as effectiveness, uniformity, direct effect, enforcement and the market trump all other considerations. Autonomous EU governance is a new and very different system of public power that is distinctly top-down, coercive, and market and debt oriented, and, indeed, increasingly seen by scholars of law and economics as entrenching 'authoritarian neoliberalism'. The individual is reduced to market actor or a *homo economicus* who has to live in coercively competitive conditions and has no real chance to shape decision-making centralised to Brussels. In scholarly, legal, judicial, policy and other discourses, any attempts to retain national constitutional protections – which are very often part of shared, classic European constitutional rules and tenets – require careful pleading and explanation, imposing an onerous burden of justification, as the 'norm' has shifted to the epistemic thinking in the paradigm of autonomous, neofunctionalist EU law and governance. The reduction of the national constitutional orders to particularistic national identities, the need to justify any deviant national rules, and the disappearance of comparative research and understanding of European law may in fact be a replication of key aspects of (neo-)colonial administration, as seen in Chapter 4.

These issues are harder to raise since Poland and Hungary instated illiberal regimes; however, a corrective redirection needs to be brought about to avoid national constitutions becoming ever more associated with nationalism and populism. Special responsibility has to lie with mainstream lawyers and scholars in those Member States that have not backslided, and where the legal education and legal thinking are still predominantly grounded in classic European constitutionalism, especially in post-totalitarian and post-authoritarian constitutional systems. Indeed, impressionistically, the scholars who have raised sharp concerns about EU constitutionalism often tend to have legal educational grounding in Germany, Italy, Greece, Spain, Portugal or Central and Eastern Europe but work, in the main, in the English language and on EU law in universities in the United Kingdom, the Netherlands or other 'centre' countries.

On a point about the decision-making process, such immensely profound questions about a shift to an entirely different system for the exercise of public power cannot in a sufficiently informed way or indeed legitimately be decided by randomly selected citizens as part of the European Citizens' Panels established to decide on the future of Europe. Indeed, in order to make it possible to have a meaningful, joined-up, informed and inclusive debate on the future of Europe, there is a need to first rectify the numerous structural issues in the mainstream EU discourse on national constitutions, which, as seen, include the orchestration of a shift from comparative law to autonomous, self-referential EU law, the scarcity of publication and funding opportunities for critical and comparative research on EU law, and the 'disconnect' between EU and national discourses. Their compounded effects mean that large parts of the national scholarly and legal communities have by and large been excluded from discussions on shaping the EU legal order. This is

243 Kalmo and Albi, supra note 212.

244 For the quote on 'rudimentary legal system' see Kochenov, 'EU Law without the Rule of Law', supra note 235, p 75, with further references to literature.

simply no longer tenable, as the EU legal order was designed in the historical context of the 1950s and 60s by a narrow group of lawyers with background predominantly in international law, for a single market, and possibly with replication of some operating methods originating from colonial administration, as noted in Chapter 4. In recent decades, EU law has been extended to virtually every area of law, often with profound changes that are causing particularly acute problems to the classic (continental) European approach to constitutionalism, as well as to criminal law, the social state and beyond.

Whilst many would respond that any such discussion would mark the end of the EU – the sort of dramatic language that has been used since the early days in 1960 as per Vauchez' historical accounts[*245] – one should bear in mind that the existing direction of travel has also been leading to ever-wider discontent among voters across Europe. Indeed, in the United Kingdom, which has meanwhile left the Union, one salient theme in the media debates leading up to Brexit was that of 'a slow and invisible process of legal colonisation, as the EU infiltrates just about every area of public policy'.[*246] The marginalisation of national constitutions and corresponding democratic and judicial procedures in the quest to shift to autonomous EU governance is also likely to be one of the deeper, underlying reasons for Brexit and the wider turn of citizens to anti-establishment parties all over Europe, and may even pose a risk to the future of Western liberal constitutionalism. Indeed, there has been an emerging backlash against all 'juristocracy', without differentiating between those scholars and lawyers who uphold classic constitutional values – which are ultimately based on a national constitutional social contract and which can be democratically changed – and those scholars and lawyers who have in a top-down and somewhat instrumentalised manner been super-imposing a new legal order the ultimate objectives of which are not entirely clear, which may be based on flawed foundational assumptions, and the merits and demerits of which cannot readily be debated.

To conclude with some possible alternative visions for the future of Europe, a growing number of scholars have called for retaining the broader classic, comparative European understanding of constitutional law. For example, Agustín Menéndez finds that the euro crisis may be an opportune time to 'reconstruct European constitutional law with the help of 'classical' democratic constitutional theory, as developed for decades in national Social and Democratic *Rechtsstaats*'.[*247] Matej Avbelj has suggested that the dominant constitutional narrative, which equates the constitutionalisation of the EU with US-style federalism, has been transplanted in a misconceived way that is unsuited to the European constitutional landscape, and that 'work must begin' on the EU's 'own, genuine and authentic constitutional theory' that would be oriented towards a pluralist legal entity with twenty-eight autonomous legal orders.[*248] Alexander Somek has put forward a vision where the states may, under their national constitutions, legitimately brace themselves against the negative effects of the international economic governance and retain responsiveness to their residents and their social freedom; this would be subject to submission to 'international peer review' in human rights protection, along with a strong protection against discrimination on the grounds of nationality.[*249] The present writer has elsewhere propounded the concept of 'substantive co-operative constitutionalism', in which the aim would be to uphold the established standard of protection of fundamental rights, the rule of law and other constitutional values, and also to retain the diversity of national constitutional orders, instead of transition to autonomous, self-referential, uniform sets of EU norms in all areas of law.[*250]

Based on subsequent panoramic, comparative research on the basis of the 'Role of Constitutions' project, through which a large-scale disappearance of widely shared, advanced formal and substantive rules of comparative European constitutional law was identified, I would add that the direction of travel ought to be to stay, in the main and especially beyond the single market, within the paradigm of the broader classic understanding of European constitutionalism, including in the role of courts, and to retain the Member States' social-democratic constitutional orders. Instead, a conversation needs to be started about reforming

245 Vauchez, '"Integration-through-Law", supra note 181, p 18.

246 Boris Johnson, 'There is only one way to get the change we want – Vote Go' *The Daily Telegraph* (22 February 2016) p 18. The word 'colonisation' has been used with regard to EU law in the work of a number of leading UK EU law scholars.

247 Agustin Menéndez, 'Editorial: A European Union in Constitutional Mutation?' (2014) 20(2) European Law Journal p 140. – DOI: https://doi.org/10.1111/eulj.12080.

248 Avbelj, 'The Pitfalls of (Comparative) Constitutionalism', supra note 186, pp 4ff, 15ff, 23, 24.

249 Somek, *The Cosmopolitan Constitution*, supra note 16, p vii, 25, 26, 33-35.

250 Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, sect VIII ff.

the EU legal order with a view to making it more attuned to the comparative European constitutional landscape and substantive values. Whilst Russia's war against Ukraine shows the importance of the EU as a strong global actor, it should be possible to develop defence co-operation without eradicating the national constitutional orders. As a final practical remark, the Estonian and other national legal communities can only feasibly seek to bring about such reforms of the EU if the respective peoples remain the ultimate holders of public power, the national constitutions remain the ultimate sources of authority and the individual states remain in existence.

Corrigendum

The author has made the following correction to the above article. On page 35, line 3, 'measure' has been replaced by 'directive'. Thus, the corrected sentence reads as follows:

'The widely contested EU Data Retention Directive was only the second ever directive to be annulled by the CJEU – in 2014 – on fundamental rights grounds; this came in a second challenge following extensive national constitutional contestation.'

The article has been updated to reflect this.

The author apologises for the error.