

WZB

Berlin Social Science Center



Matej Avbelj

What Future for the European Union?

Discussion Paper

SP IV 2017–802

July 2017

Center for Global
Constitutionalism

WZB 

Research Area

International Politics and Law

Department

Center for Global Constitutionalism

WZB Berlin Social Science Center
Reichpietschufer 50
10785 Berlin
Germany
www.wzb.eu

Copyright remains with the author(s).

Discussion papers of the WZB serve to disseminate the research results of work in progress prior to publication to encourage the exchange of ideas and academic debate. Inclusion of a paper in the discussion paper series does not constitute publication and should not limit publication in any other venue. The discussion papers published by the WZB represent the views of the respective author(s) and not of the institute as a whole.

Wissenschaftszentrum Berlin für Sozialforschung (2017)

Matej Avbelj

What Future for the European Union?

Discussion Paper SP IV 2017–802

Affiliation of the authors other than WZB:

Matej Avbelj

Graduate School of Government and European Studies, Predoslje 39, SI-4000
Kranj, Slovenia

Abstract

What Future for the European Union?

by Matej Avbelj

Stimulated by the European Commission's White Paper on the Future of Europe, this article engages critically with the Commission's five scenarios. Driven by a normative ambition of equipping the EU with adequate constitutional, institutional and socio-political means for coping with its many crises, the article argues in favour of the reformist vision of the EU's future. It claims that a new constitutional process for European integration should be launched. On its basis the EU would be reconstituted as a union, a special federal constitutional form, embedded in the normative spirit of pluralism. The article presents the arguments in favour of such a scenario and flashes out the reasons for which the many constitutional actors in the EU, as well as the latter as a whole, could benefit from it. It concludes that in the following few months there might emerge a historical window of opportunity for a qualitative reformist leap in the process of European integration. While the way back to the glorious days of the nation state is effectively closed off and the present status quo in the EU is plainly unsustainable, the article sketches a theoretical framework for the reformed European Union of tomorrow.

Key words: European Union, European Commission, Future, Constitution-making

I. The Existential Crisis of the European Union

The European Union is an existential crisis. This is an outcome of more than a decade long spiral of crises whereby one crisis, instead of being resolved, has spilt over into another. The constitutional crisis of 2005 generated a political crisis. Before this could have been resolved, and in its midst, the financial crisis broke out. This was largely imported from the USA, but it has soon been domesticated in the EU, in its fertile material conditions as an endogenous economic crisis.¹ The attempts to resolve the economic crisis have led to a new political crisis. This has in several member states given birth to a new authoritarian, populist political class,² which has soon provoked a crisis of the rule of law and democracy.³ The outbreak of the humanitarian crisis, reflected in the inability of the EU and its member states first to control and then to manage the, admittedly unprecedented, migratory currents⁴ have aided the populist cause and deepened the political crisis further.⁵ The unprecedented terrorist attacks by Islamic extremists in a number of EU member states have added a security dimension to the crisis and strengthened the impression that our way of life is fundamentally under threat.⁶ Last but not least, under the impact of the chain of crises just described, the majority of British citizens voted in

¹ W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso, 2014).

² M. Goodwin, *Right Response: Understanding and Countering Populist Extremism in Europe* (Chatham House Report, 2011); for a conceptual treatise on populism see J. W. Müller, *What is Populism?* (University of Pennsylvania Press, 2016).

³ V. Orban speech, July 26, 2014 <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592>; F. Zakaria, 'The Rise of Illiberal Democracy' (1996) 76 *Foreign Affairs* 22-43; J. W. Müller, 'The Problem With "Illiberal Democracy"' <https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01?barrier=true>;

P. Marczewski, 'Poland's Turn to the Right: On the Limits of the "Liberal Consensus"' Eurozine.com; T. Konciewicz, 'Farewell to the Polish Constitutional Court' *VerfBlog*, 2016/7/09, <http://verfassungsblog.de/farewell-to-the-polish-constitutional-court/>; B. Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands-in-between" Democracy and Authoritarianism' (2015) 13 *International Journal of Constitutional Law* 219-245.

⁴ A. J. Menendez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration' (2016) 2 *European Law Journal* 388-416.

⁵ C. Mudde, 'Europe's Populist Surge' (2016) 95 *Foreign Affairs* 25-30.

⁶ J. King, Commissioner for the Security Union: 'Terrorists don't target one member state or another. They target our way of life, our openness, our future.' available at: http://europa.eu/rapid/press-release_IP-16-3367_en.htm.

favour of Britain's departure from the European Union.⁷ The project of European integration is thus, for the first time in its history, witnessing a disintegration.

The EU has been thus going through difficult times. The cornerstones of the integration: its fundamental values, the political stability, mutual trust and commitment to the overall process, the economic foundations and last, but certainly not least, security, are undermined and under strain. In these circumstances, the prospects of the European integration come into question. What future is there for the EU and how to bring it about? In a response to this question, the European Commission has recently published a White paper on the Future of Europe.⁸ Therein it has outlined five possible answers. The purpose of this article is to engage critically with the Commission's proposals, evaluate them for their potential capacity for remedying the present crises of the integration, and to the extent this turns out to be insufficient, put forward our own suggestions.

The argument will be developed through five sections. Section two will describe, in some detail, each of the five scenarios the European Commission has put on the table. The next section will subject them to a critical analysis from the perspective of their actual or potential contribution to remedying the existing crisis so to ensure the viability of the integration in the longer run. It will be argued that most of the Commission's scenarios fall short of that goal. To ensure its viability the Union would need to develop into a veritable economic, security, defence, and hence also a political union. If so, the central question then becomes how to reach this goal. How to create a suitable constitutional framework, a workable institutional structure and, in particular, the necessary socio-political conditions for a Union that could meaningfully respond to the empirical challenges it has been faced with? Section four will claim that this could be achieved by launching a new constitutional process which would endow the integration with a new constitutional form permeated by the normative spirit of pluralism. Section five will conclude.

⁷ R. A. Miller (ed), 'Brexit Supplement' (2016) 17 German Law Journal 1-142.

⁸ European Commission, 'White Paper on the Future of Europe', available at: https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27_en

II. Five Scenarios for the Future of the European Union

In March 2017 the European Commission published a White Paper on the Future of Europe.⁹ It has sketched five possible scenarios for the development of the Union in the following decade. While all scenarios share a starting point, according to which 27 member states will move forward together,¹⁰ they outline quite different images of the future. The first scenario, tagged 'Carrying on', is essentially about the preservation of the status quo. As its title suggests, it is not the least but also not the most ambitious scenario for the future of the Union. It stays faithful to the Union's present political incrementalism. Accordingly, the problems are addressed as they arise and in response to them the legislative and political agenda is set and, not infrequently, also upgraded.¹¹ Under this scenario, the economic crisis is addressed by strengthening the single market, by investing into infrastructure and by further ring-fencing the euro against external and internal shocks.¹² The humanitarian and the security crises, on the other hand, are to be primarily approached by the member states alone, with little assistance coming from the EU. This scenario, ultimately, depends on the political willingness of each and every member state to push the integration further. This also explains why in this scenario the Commission refrained from mentioning the political crisis and the rule of law and democracy dilemmas. These, apparently, stand in the way of reaching the prerequisite consensus and therefore ought to be better swept under the carpet rather than addressed and potentially resolved.

The second scenario: 'Nothing but the single market' is a step back from the status quo just described. Here the Commission proceeds from the assumption that due to divergences between the member states no consensus will be found to tackle the monetary, fiscal, security and other more encompassing political challenges.¹³ The member states shall thus focus on what they presumably have in common and that is the single market. The EU will launch a policy of deregulation, so that again an increasing number of competences beyond the single market will be exercised by the member states individually or in a more or less co-ordinated cooperation between them. This could potentially, the Commission

⁹ Idem.

¹⁰ Idem at 15.

¹¹ Idem at 16.

¹² Idem.

¹³ Idem at 18.

predicts, create negative consequences for the euro and the area of freedom security and justice whose externalities might, eventually, also work at the detriment of the single market itself.¹⁴ Therefore, while the single market could more easily deepen with regard to non-human factor related economic freedoms, it is not unforeseeable to witness its slowing down with regard to the free movement of workers and services.¹⁵

Scenario number three takes the existing differences between the member states seriously and allows the more ambitious among them to do more as the others stay behind, limiting their participation to the core policy areas shared by all. Pursuant to the Commission, under the scenario 'Those who want more do more' the coalitions of willing could develop in the policy fields beyond the present status quo to respond to the monetary, fiscal, security and defence challenges.¹⁶ These new policy fields would require new legal instruments to be devised and enforced by an upgraded institutional structure of the Union for which a supplementary budgetary scheme would need to be set-up.¹⁷ However, the position of the less ambitious member states would need to remain unaffected by this enhanced co-operation scenario. The non-participating member states could join in the future under the objectively prescribed conditions equally open to all.¹⁸

In the fourth scenario the Commission envisages that the Union would do less, but more efficiently. This scenario too closely tracks the existence of a national consensus and forecasts that due to growing divergences between the member states the EU will gradually limit its focus to the policy fields in which it can achieve the outcomes more efficiently than the member states individually. Accordingly, the EU would enhance its role in the fields of innovation, trade, security, migration, the management of borders and defence, as well as the euro.¹⁹ On the other hand, the EU would do less with regard to the regional development, public health and social policies which do not bear directly on the functioning of the single market.²⁰

¹⁴ Idem.

¹⁵ Idem.

¹⁶ Idem at 20.

¹⁷ Idem.

¹⁸ Idem.

¹⁹ Idem at 22.

²⁰ Idem at 22.

Finally, the scenario number five is the most ambitious one. The Commission has labelled it as 'Doing much more together'.²¹ Its point of departure is that currently neither the EU as a whole and as it presently stands nor the member states individually can effectively tackle the growing empirical challenges they are faced with. Therefore, they shall decide to 'share more powers, resources and decision-making across the board.'²² The European defence union would be accordingly created. The EU's single foreign policy would be strengthened. The single market in the field of energy, digital, services and capital would be completed. The EU would grow into a veritable economic union, both fiscal and monetary, with fiscal transfers at hand to alleviate the internal or external economic shocks shall they occur.²³

The five scenarios about the future of the European Union can be, depending on their attitude to the EU's present shape and ambitiousness about its future, divided into three groups: the status quo vision, the status quo ante vision and the reformist vision of the Union. The first and the third scenario are part of the status quo vision of the EU. According to the latter, the EU should, as much as possible, stay as it is. The first scenario obviously belongs here. This is apparent already by its name: 'Carrying on.' However, the third scenario, despite its differently suggesting denomination, is a version of a status quo too. For those member states, which want more integration, can have more integration only as long as this does not affect those member states who are less keen to integrate. The past and present of differentiated integration in the European Union is a testimony to the fact that a hence envisaged enhanced co-operation does not work.²⁴ To the extent that it exists, it remains exceptional, instrumental to the status quo maintained by the unwilling member states whose unaffected status is set in the Treaty stone.²⁵

On the other hand, it is central to the status quo ante vision of the integration that the existing competences of the Union should be repatriated to the member states. The extent of the repatriation, however, varies among different scenarios. The scenario 'Doing less more efficiently' is the most reserved about back-scaling of the integration. Not unlike the

²¹ *Idem* at 24.

²² *Idem*.

²³ *Idem*.

²⁴ M. Avbelj, 'Revisiting Flexible Integration in Times of Post-Enlargement and the Lustration of EU Constitutionalism' (2008) 4 *Croatian Yearbook of European Law and Policy* 131-150.

²⁵ M. Avbelj, 'Differentiated Integration – Farewell to the EU-27?' 14 (2013) *German Law Journal* 191-212.

subsidiarity principle, it announces the sharpening of the Union's focus on what it is really efficient at – and leaving the rest of the competences to the member states. However, it is clear from the Commission's description of the scenario that the fields of competences where the EU is believed to be more efficient are much more numerous than those which the member states should take over again. For this reason, the 'Doing less more efficiently' scenario does not really deliver what it formally announces and therefore does not fit well into the status quo ante group. Instead, it lends itself to a double interpretation. It could be seen as a continuation of the tradition of the integration by stealth,²⁶ and hence forming part of the status quo. Or, alternatively, it could be perceived as a reformist agenda, as a sign of EU's determination to upgrade and make more efficient its present range of competences. In this case, this scenario is part of the reformist vision of the Union.

At the same time, there is no doubt that 'Nothing but the single market' scenario is part of the status quo ante vision. Its object and purpose is to shrink the present scope of competences to those of the single market only, conceding that even that would be, incrementally, reduced to the single market in goods and capital. Under this scenario, the scope of the rolling back of the integration is already quite considerable. Nevertheless, it still cannot be compared to the political proposals coming from the political fringes in several member states. These political voices have called for a fully-fledged status quo ante: the creation of the situation before the integration had come into existence. In other words, the EU should be broken apart. In so doing, it is hoped, the member states would regain their full sovereignty and with it the capacity, presently hindered by the integration process, to address the many crises in a truly effective and therefore satisfactory manner.²⁷

Finally, the fifth scenario: 'Doing much more together' is part of the reformist vision of the integration. It rejects the status quo ante vision as an unfeasible alternative and insists on moving decisively beyond the present status quo by deepening the integration in its economic, security, defence and therefore also political sphere. The White Paper, admittedly, remains rather elusive as to how far the deepening of the integration should go. What is clear, however, is that the envisaged deepening is not an end in and of itself,

²⁶ For an overview, see, G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2009).

²⁷ This has been a central message of the electoral campaign by Marine Le Pen in France, see Engagements Presidentiels Marine 2017, <https://www.marine2017.fr/programme/>.

but a means for an effective response to the present crises of the integration and, hence, to ensure the EU's viability in the longer run. It is in light of this benchmark that the next section evaluates the three presented visions of the future of the European Union for their persuasiveness and normative attractiveness.

III. Critical Analysis of the Visions of the Future of the European Union

a) The Status Quo Vision

To what an extent can the three visions of the EU's future help resolving the ongoing crises of the integration and contribute to its viability in the longer run? This is a question that each of the three visions will be subject to in this section. Their crisis solving capacity and viability ensuring potential will be analysed along the economic, security and defence as well as the political dimension of the EU functioning. The latter, of course, includes the rule of law and democracy. Beginning with the status quo vision first, it must be observed that the status quo cannot be a solution to any of the crises of the integration. It is their source instead. The main reason for that lies in the half-built constitutional structure of the integration. The latter is caught between the worlds of an international organization and a sui-generis constitutional polity. These has had negative consequences for the integration both in symbolic as well as practical terms.

The European Union acts, for indeed needs to act, as a constitutional polity of sorts, but it continues to (re)present itself to its citizens via member states as an international organization. This false or at least disingenuous self-representation creates an identity crisis on the national and supranational level, which fuels a democratic illusion in the peoples of Europe. Over the last sixty years of integration more and more competences, literally in all the fields of social life, including those that have traditionally been considered as essential and exclusive to the functioning of the state, have been exercised by the supranational institutions. On the other hand, the political life, the democratic self-awareness and the vibrant public sphere have largely remained confined to the national level. While power has thus migrated to the supranational level, its democratic control

stays bound to the national level.²⁸ The popular democratic self-imagination has not caught up with the political power reality. The majority of citizens continue to understand and practice democracy as if the latter was still exercised exclusively in a self-contained nation state. In so doing, they participate in a democratic illusion, in a national democracy whose actual content has been much slimmed down and whose representatives no longer take the decisions for which they are, however, still held responsible in the popular imagination.

This mismatch between the political power and its democratic legitimation affects the Union's actual capacity to act. The symbolical problem causes a practical one. Due to its half-built constitutional structure, the EU is trapped into a paradox of having too many and too few competences at the same time. The history of crises in the last decade or so has revealed that the Union apparently lacks competences to tackle efficiently its economic, security, defence and political challenges. The member states have either been reluctant to transfer the competences necessary for the efficient functioning of the Union or, when these have been transferred, they have blocked their exercise out of a concern for their more particular national interests. At the same time, however, these same member states have proven themselves unable to respond to the crises efficiently because of the competences they have already transferred to the Union. The scope of the competences transferred, in a combination with the external transnational environment, has de facto prevented the member states to act.²⁹

This development has left the EU in a double handicap.³⁰ The supranational level is handicapped because it has received too few competences, whereas the national level is handicapped since it has transferred too many of them. As a result, neither side can act when this is really required. The result is a decrease in the output legitimacy. Furthermore, the insufficient social embeddedness of the supranational democracy hinders a legitimate and efficient exercise of the existing supranational competences and effectively prevents the transfer of new competences to the Union, irrespectively how much they are needed for its successful functioning. Moreover, the described division of

²⁸ J. Habermas has long worked on this phenomenon and called for democratization of the supranational politics, the emergence of EU public sphere etc. For a more recent work, see, J. Habermas, *Im Sog der Technokratie* (Edition Suhrkamp, 2013).

²⁹ F. Scharpf, 'Monetary Union, Fiscal Crisis and the Preemption of Democracy' (2011) 11 *Max Planck Institute for the Study of Societies Discussion Paper*.

³⁰ See, also, M. Avbelj, 'Integral Pre-emption of Democracy in Economic Crisis under Transnational Law' (2015) 4 *Cambridge Journal of International and Comparative Law* 242-267.

competences also often leads to the avoidance of responsibility for the inaction and for blaming each other for the absence of positive outcomes and/or for producing the negative ones. This frustrating finger pointing, mutual accusations and EU bashing typically occurs when it is the least needed and when a joint action would be required most. That is in the time of crisis. It is then when the above described democratic illusion breaks apart.³¹ The crisis tends to heighten the popular awareness of how the system really works and this, combined with the inevitable search for a scapegoat, provokes a rebellion against the 'Brussels bureaucracy' which has, allegedly, usurped the powers that ought to belong to the member states and their people.³²

In short, the gap between the supranational power and national democracy obstructs the present functioning of the European Union and blocks its capacity to address the existing and new challenges in the future. One of such challenges is certainly the economy. A half-made European house has turned out as economically unviable. The single market, as the economic heart of the Union, is not just about free trade in the four economic factors of production, but it is also a source of social, redistributive and political effects, which go way beyond the exclusively economic nature of the single market and call for its democratic underpinnings. These are, however, missing. Furthermore, a truly functioning single market, requires a monetary union, a single currency to avoid the distortion of competition. As it has turned out, in the absence of a fiscal union there can be no meaningful monetary union. But, at the same time, there can be no fiscal union without a prerequisite democratic underpinning typical of a political union. In short, the economic integration goes hand in hand with a political integration – or not. In the absence of one, the other cannot emerge or function either.

A half-made EU house is also incapable of ensuring security, both internally as well as externally. This has been proven by the recent migration crisis, which has basically resulted in the collapse of the Schengen system. The individual member states simply lack the capacity of responding to the current waves of migrations. However, they have simultaneously been unwilling to transfer sufficient competences or to take joint

³¹ See, eg. J. Habermas, 'Democracy, Solidarity and the European Crisis' (lecture delivered at KU Leuven, 26 April 2013) accessed 4 July 2017, observing that the output legitimacy, as long as it lasted, was the principal way of democratic legitimation in the EU.

³² For a recent illustration see the speech of the Polish Minister of Foreign Affairs Waszczykowski, arguing that: 'Brussels bureaucracy usurping various privileges and Central European states – our part of Europe, rooted in the respect of our rights.', available at: <https://poland.pl/politics/foreign-affairs/minister-waszczykowski-road-healing-eu-runs-through-respect-memb/>

decisions on the supranational level, which would enable the latter to develop its own supranational security apparatus, meaningful forces for border control, a coast guard as well as the European army. Instead, walls and barbed-wires were erected on the internal borders of the European Union, splitting the EU from the inside.

Finally, the EU has been unable to stop, let alone to revert, the regression of the rule of law and democracy in several of its eastern member states.³³ Being stuck in the status quo, whose functioning inherently depends on the consensus of all the member states, the EU has been busy harnessing this fragile equilibrium and has, hence, been politically reluctant to approach the constitutional backsliding seriously.³⁴ Moreover, the way to proceed differently, even if there was political willingness, is to a certain extent closed. The EU lacks democratic legitimacy to interfere with the internal constitutional functioning of these member states in order to turn them into well-ordered polities, observing the foundational values of the Union.³⁵ The half-built European constitutional structure, its competence handicap, legitimacy deficit and the democratic illusion in which the citizens of the member states partake apparently allow the latter to get away even with the violations of the most basic values of the Union. As a result, the status quo vision of the EU, following which the latter would stay more or less the same, appears to be unsustainable in practice and hence normatively unattractive.

b) The Status Quo Ante Vision

What about the status quo ante vision? The latter has grown in its prominence with the deepening of the crises in the integration and has established itself as an alternative to the presently unsustainable status quo. Its message is clear and simple. The EU is not the solution, it is part of the problem.³⁶ The solutions for the loss of national competences, for a democratic deficit, for the malfunctioning economy as well as for the growing security crisis ought to be sought not in pooling more sovereignty, as has traditionally been the case, but in claiming the powers back from the Union. The integration should have been

³³ See, for example, G. Halmai, 'Second-Grade Constitutionalism: The Cases of Hungary and Poland' (2017) 1 CSF - SSSUP Working Paper Series.

³⁴ D. Kelemen, M. Blauburger, 'Introducing the Debate: European Union Safeguards against Member States' Democratic Backsliding (2017) 24 Journal of European Public Policy 317-320.

³⁵ M. Avbelj, 'Pluralism and Systemic Defiance in the European Union' in Jakab, Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017).

³⁶ M. Brodin, *A State of Independence: Why the EU is the Problem not the Solution?* (Endeavour Press, 2016).

rolled back, rather than deepened and strengthened. The nation state should again play its original role. Since the EU member states, as we have seen above, have transferred too many competences to the supranational level, they have deprived themselves of the instruments for a successful governance. The competences should thus be repatriated and the political power should travel back into the hands of national institutions.³⁷

In so doing, the gap between the exercise of actual powers and their democratic legitimation would be gradually closed and the perpetual dilemma associated with a European democratic deficit would be soon off the table. The people of the member states and their national parliaments would be in charge again. The national democracies would be refilled with content and what is now a democratic illusion, it would become a reality once more. The need for, ultimately unsuccessful, social engineering destined to generate a supranational democracy and supranational public sphere would become redundant. And, so would the attempts at creating a European identity on the top or even in place of the national one. Instead, the latter should be boosted again. What is more, by way of re-domestication of a democratic political life, the conditions for ensuring the economic prosperity would be recreated.

With the re-nationalization of politics, the EU political union would be, of course, ruled out. Without the political union, there can be no fiscal union and in its absence the monetary union, as the crisis has demonstrated, cannot function either. The single currency should thus be abandoned. This would permit the economically weaker member states to regain their competitiveness. It would free them from the economic yoke of the northern member states, in particular from the German hegemon³⁸ that has been producing undemocratic and above all socially unequitable results. The member states should again focus primarily on creating favourable conditions for the flourishing of their own national economies. A whole range of protectionist measures, if need be, should thus be adopted. In particular, the domestic work force should be protected from the foreign competition, which requires limiting or even halting the free movement of workers and services. Eventually even the single market should be scaled back, reducing it merely to a free trade area. Last but not least, cutting down on the economic migration would also benefit the

³⁷ This appeal came both from the academic side, see Streeck n 1, as well as from the politicians. Recently Le Pen n 27; and earlier David Cameron who's Conservative Party have launched this narrative in their 2010 Election manifesto.

³⁸ W. E. Paterson, 'The Reluctant Hegemon? Germany Moves Centre Stage in the European Union' (2011) 49 *Journal of Common Market Studies* 57-75.

security interests. This would go hand in hand with the reinstatement of border controls, which and only which could ensure a proper control of migrations. In so doing, the dysfunctional Schengen regime, which now poses a threat to the national security, would be eventually removed. The states would thus again seize a full control over their own security.

The just presented arguments in favour of a status quo ante, which favour the conditions that existed prior to the establishment of the European Union, are part of a wider anti-EU integration narrative. The Commission's scenario 'Nothing but the single market' is only a shy reflection of it. The radical right and left wing political parties across the Union are its main proponents.³⁹ The Brexit decision serves them as a proof that their political ambitions can indeed materialize. However, the rising popularity of the status quo ante vision is not a measure of its viability in practice. The implementation of the Brexit decision of the British voters in the next few years will make this plainly visible. The normative expectations of those who would like to re-vindicate the nation state will hit against the wall of the blunt empirical reality.⁴⁰ The way back to a self-contained and self-sufficient nation state is namely empirically blocked and thus objectively impossible.

An idealized nation state, which is pursued by the advocates of the status quo ante vision, might have never even existed in history. It certainly does not exist today and even if it did, it would not be viable. An isolated nation state was clearly unviable already at the beginning of the 20th century, but especially after the WWII. After all this was also the main reason for which the European integration was launched in the first place.⁴¹ To rescue the European nation states⁴² whose political and economic isolationism provoked mutual hostilities that eventually resulted in the loss of millions of lives amid an overall destruction. The Schuman declaration, which provides the normative leitmotif for the European integration, sought to make an explicit break with this practice and to pave the way for a genuine co-operation between the member states. These were to draw their resources for the attainment of their singular benefits as well as for the benefit of the

³⁹ In particular, Le Pen in France, de Wilders in The Netherlands, Farage in the UK, Orban in Hungary, AfD in Germany.

⁴⁰ For the opposite view, see, T May, 'Global Britain Brexit Speech' <http://www.independent.co.uk/news/uk/home-news/full-text-theresa-may-brexite-speech-global-britain-eu-european-union-latest-a7531361.html>.

⁴¹ J. Monnet, *Memoirs* (Doubleday & Company, 1978).

⁴² A. Milward, *The European Rescue of the Nation State* (Routledge, 1999).

common whole, resting on the normative foundations of actual practice-driven solidarity.⁴³

If it was clear to the founding fathers of European integration already in the 1950s that a self-contained nation state is unable to survive let alone prosper, the same conclusion is even more pertinent today. In the globalized world of the 21st century, the states no longer occupy either an exclusive or a central position in ruling the world, but compete with a variety of public, hybrid and private transnational non-statist actors.⁴⁴ These, and among them especially the financial markets and transnational corporations, can act almost entirely independently from the states, while simultaneously, indeed decisively, affecting their functioning.⁴⁵ As again the financial crisis has demonstrated, not only the member states appeared helpless in the hands of global rating agencies, but even the European Union, the biggest trading block in the world, was for a long time unable to convince the global financial markets that it can economically save its member states and thus ensure its own economic viability.⁴⁶ In the absence of the access to funding, which was dependent on the global financial markets willingness to lend, the states could have remained completely sovereign and absolutely democratic, but this kind of sovereignty and democracy – absent of a veritable self-determination in practice – could amount to nothing more and nothing less than a dead letter.⁴⁷ As we have known for a long time, the state is sovereign to the extent it can actually exercise its sovereignty in practice, if need be, and usually, in co-operation with other states.⁴⁸ The same is true of democracy.

This fact demonstrates that the normative expectations of the supporters of the unravelling of the integration are simply empirically unfounded. The interests of the nation state in the 21st globalized century can be only protected in broader associations of states, where these pool their resources to meet the challenges that exceed their individual capacities of addressing them efficiently. Most of the present crises of the

⁴³ Schuman Declaration, https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.'

⁴⁴ For an overview, see, T. C. Halliday, G. Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015).

⁴⁵ See, also, M. Avbelj, 'Transnational Law between Modernity and Post-modernity' (2016) 7 *Transnational Legal Theory* 406-428.

⁴⁶ See, for example, M Avbelj, *The European Union under Transnational Law: A Pluralist Appraisal* (Hart, forthcoming 2018), Ch. 5.

⁴⁷ Avbelj n 30.

⁴⁸ Case of the S.S. "Wimbledon", Britain et al. v. Germany, (1923) PCIJ Series A01.

European Union have been caused not because there was too much Europe Union, but since 'there was not enough union in the Union.'⁴⁹ To insist that a state can ensure its economic welfare through protectionist policies runs against the decades of research and practical evidence that protectionism can only work in the shorter run, but it is always economically fatal in the middle and certainly in the longer run.⁵⁰ Stipulating that the re-adoption of the national currencies can strengthen the national economies by increasing their competitiveness through currency manipulation can again work only in the shorter run.⁵¹ Competitiveness based on currency manipulation is merely artificial. It is a sign of weakness of a state and is hence unsustainable in a global competitive environment.

Globalization has, similarly, shrunk distances and compressed time. The role of a territory, of physical borders has changed.⁵² With an increased mobility of population, facilitated not just by the modern and increasingly affordable technologies, but also caused by huge demographic and wealth disequilibrium in the world, migrations are a fact. They cannot be stopped. They can only be managed and controlled.⁵³ However, this control can no longer be exercised efficiently by member states individually. They simply lack, as the recent EU migration crisis has demonstrated, technical resources and personnel to address the problem in all of its dimensions.

Moreover, a great majority of EU member states are due to negative demographic trends in need of economic migrations, encompassing skilled and less-skilled workers, to ensure the viability of their economies, and especially the sustainability of their health and social protection systems.⁵⁴ The single market and the single currency, based on the sound monetary and therefore also fiscal and political union, that the promoters of the status quo ante vision oppose, turn out to be indispensable for the survival of the nation states in Europe. The same conclusion applies to security. This can be much better (perhaps only) achieved by creating a veritable and operational common European area of freedom,

⁴⁹ J. C. Juncker, 'State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends' http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm.

⁵⁰ D. A. Irwin, *Free Trade Under Fire* (Princeton University Press, 2015), 77 ff.

⁵¹ H. W. Platzer, *Rolling Back or Expanding European Integration* (Friedrich Ebert Stiftung, 2014), at 3 <http://library.fes.de/pdf-files/id/ipa/10527.pdf>

⁵² S. Sassen, 'Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights' (2008) 1 *Ethics & Global Politics* 61-79.

⁵³ See, for example, J. Ritzén, M. Kahanec, 'A Sustainable Immigration Policy for the EU' in Ritzén (ed), *A Second Chance for Europe* (Springer, 2017) 155-181.

⁵⁴ See, for example, P. Demeney, 'Europe's Two Demographic Crises: The Visible and the Unrecognized' (2016) 42 *Population and Development Review* 111-120.

security and justice, by drawing the national and supranational resources to fight the rising terrorist and other security threats together. The retreat behind the national confines with an aim of ensuring security when those posing security threats are in no lack of mobility, undermines security instead of strengthening it.

The proponents of the 'less Europe' are aware of that and have therefore called for a single security and/or defence union.⁵⁵ However, in so doing, they are guilty of a huge paradox. By calling for a European security and defence union they are, in fact, arguing in favour of the most Europe, while being simultaneously against more Europe. They are, apparently, oblivious to the fact that the EU as a security and defence union would require a robust supranational political community in whose democratic decision-making processes the security and defence issues need to be nested. However, the emergence of such a community is something that they bitterly oppose. In so doing, they are, however, practically defying the objective for which they nominally strive.

On the basis of the above discussion, it can be concluded that the promoters of the status quo ante vision, which should result in the (incremental) unmaking of the European Union, are prescribing a remedy that will not only break the EU apart, but it will, in so doing and explicitly contrary to their intentions, ultimately lead to a decline of the European nation states too. If we couch this in the language of proportionality, we can conclude that the promoters of the status quo ante vision have chosen the wrong means for the achievement of their ends, which are, on the presently available empirical premises, anyhow unattainable.

c) The Reformist Vision

If the present status quo in the European Union is unsustainable and if the unmaking of the integration is not just a normatively incoherent project, but one that is practically infeasible at least in the long run, then we are left with the reformist vision. As we have seen, the European Commission has worded its reformist scenario in that the member states should do much more together. It is submitted that the Commission is right. It has pointed its finger in the right direction. However, its proposal lacks ambition, concretization and it fails to centre on the question which is of a real importance. Our

⁵⁵ Reuters, Hungarian PM Orban calls for joint European army, <http://www.reuters.com/article/us-europe-hungary-defence-idUSKCN11116J>

critique of the status quo and the status quo ante visions of the future of Europe has already demonstrated that the viability of the integration in the following decades does not call just for a quantitative change, in form of more competences being transferred to the Union. What is required, in fact, is a qualitative leap. The EU should become a fully-fledged economic, security and defence as well as a political union. In this way, it would acquire the overall constitutional, institutional and, perhaps most importantly, socio-political means to tackle the existing and impending crises.

As an economic union,⁵⁶ the EU would possess not just the monetary but also the necessary fiscal means to provide for a smooth functioning of the completed single market and to compensate for the redistributive externalities that the free movement and the undistorted competition cause. With fiscal competences the EU would be able to raise supranational taxes, which would trickle into a more encompassing supranational budget. This could be used for financing not just the day to day operation of the institutions, but the supranational structural programs for remedying the national economic imbalances. As a fiscal union, the EU would, of course, also function as a transfer union, subject to the supranational and national political willingness, so that a genuine European social policy would gradually develop. The completion of the banking union would also lead to a better regulated and hence sounder financial sector in the EU. Having adopted all these economic measures, the EU would be much better constitutionally equipped to respond to the internal and external economic shocks as they arise.

The reformed European Union would also round up its presently scattered security and defence potentials.⁵⁷ As a security and defence union the EU would create a supranational police force, a supranational prosecutorial office, a supranational coast guard and a supranational army. All these institutions would be, initially, much less staffed than their national counterparts. Their role would be to complement and not to replace the national security and defence institutions. They would be, in principle, competent to act in the affairs, which affect the interests of the supranational institutions and of the union as a whole. The running and operation of the Schengen regime, in particular the defence of the

⁵⁶ For more concrete proposals by the Commission, following the publication of the White Paper, see European Commission, Reflection Paper on the Deepening of the Economic and Monetary Union, (European Commission, 2017); for an earlier account see The Five Presidents' Report, Completing Europe's Economic and Monetary Union, (European Commission, 2015).

⁵⁷ For a European Commission's own, more concrete account, see European Commission, Reflection Paper on the Future of European Defence (European Commission, 2017).

EU external borders, would make the core competence of the EU security and defence union. This would, necessarily, entail that the conditions for entry into the Union would need to be the same in all member states. As a corollary a genuinely single European asylum, visa and migration policy would need to be established. The supranational security and armed forces could, however, be also deployed in the matters not exclusively of a supranational concern upon the initiative from and subject to the corresponding financial contributions by the interested member states.

However, the economic, security and defence union cannot come into existence without the prerequisite democratic underpinning. They, eventually, require a political union. The political powers, which have travelled and still will travel to the supranational level, have to be accompanied by a simultaneous supranational democratic political awareness and actual practices of supranational democratic legitimation. In particular the resolution of the humanitarian crisis, which entails a fundamental reform of the existing asylum system, requires a high degree of inter-statal solidarity. This cannot be (or ideally should not be) forced on anyone. It must come about through an inclusive democratic political deliberation on the supranational level. Therefore, the EU humanitarian crisis cannot be successfully resolved in the absence of a genuine EU political union. The same conclusion applies to the security crisis. The badly needed EU internal and external security forces, the EU police, the coast-guard and the army, cannot come into being and can even less function without being situated in and constrained by a European, eg supranational, democratic political and legal framework. Finally, the EU cannot meaningfully contribute to the strengthening of democracy and the rule of law in its rogue member states when it is itself suffering from a rule of law and democratic deficit. The EU is in need of a sufficient democratic legitimacy for interfering with the constitutionally back-sliding member states.

The EU as a political union could ensure this basis of democratic legitimation. However, to do so it would need to feature a vibrant supranational public sphere. That would translate into high participation in the transnational European elections, resulting in a more representative composition of the European Parliament. Contrary to what has been the case so far, its competences would not be only formally enhanced. The European Parliament would be also socially much more embedded in the EU democratic life. The latter would be made possible by the civic engagement of EU citizens. The EU citizenship,

as a second, complementary layer of a fundamental status of every individual in the Union would be eventually internalized by the majority of Europeans. Such a *de jure* as well as *de facto* democratically deepened European Union would possess the legitimacy for upholding the economic, security and defence union. The EU would be better equipped to address the humanitarian crisis as well as its internal crisis of the rule of law and democracy.

The reformist vision of the future of the European Union, along the lines sketched above, therefore appears to offer exactly what the integration requires for the resolution of its crises and securing its long term viability. Others have acknowledged that too, but have simultaneously rejected the vision as unrealizable, as a constitutional fantasy,⁵⁸ and have forecast an ugly future for Europe instead.⁵⁹ I disagree. The challenge for turning the reformist vision into a reality is indeed huge. It might indeed never work in practice, but this we will not know unless it is tried. Trying it, however, means answering the following question: How to bring about a suitable constitutional framework, a workable institutional structure and, in particular, the socio-political conditions for a European Union to exist and function as a fully-fledged economic, security and defence as well as a political union? This is the question that the next section is going to address.

IV. The New Hardware and Software for the European Union

The argument is this. The EU requires a constitutional form, by which it would move beyond its present hybrid, ambiguous *sui generis* character that has proven unable to attract the peoples' imagination, let alone their political and civic support. The negative *sui generis* definition of the Union's character, whose essence is that the EU is neither a state nor an international organization, should give way to an affirmative conception. This ought to state clearly what the EU is or should become, instead of stressing what it is not and should not become. In other words, what the EU needs in structural constitutional terms is a constitutional form, an identity conferring structure, a container, in a nutshell:

⁵⁸ J. W. Müller, 'Constitutional Fantasy' (2017) 39 *London Review of Books* 9-12.

⁵⁹ A. Moravcsik, 'Europe's Ugly Future: Muddling through Austerity' *Foreign Affairs* Nov/Dec 2016, <https://www.foreignaffairs.com/reviews/review-essay/2016-10-17/europe-s-ugly-future>.

a new hardware, which could sustain the EU as an economic, security, defence and political union. This hardware, of course, ought to be equipped with software that will make it operational. And, above all, the way of creating this new hardware and software must be identified too.

The three-pronged claim that will be defended in what follows is therefore this. First, the EU should embark on a new constitutional process. Second, this should re-constitute it as a union - a special federal constitutional form. Third, this new constitutional form would function on the basis of the normative prescriptions of pluralism. In other words, the launching of the constitutional process is an act of foundation. The union is a constitutional form, the hardware, resulting out of the newly launched constitutional process. The normative spirit of pluralism is the software which makes the integration's functioning possible and, hopefully, viable too.

To begin with the proposal of launching a new constitutional process for the EU, it needs to be explained why the EU should be again investing into constitutionalism and, above all, what kind of constitutionalism should that be. In my previous work I have, admittedly, been rather sceptical of constitutionalism beyond the state and, especially, of its application in the European Union. The constitutional language has been used in an uncritical, indiscriminative and inflationary manner.⁶⁰ This has also been one, perhaps not the most important, reason for the failure of the Treaty Establishing the Constitution for Europe.⁶¹ Another reason was that the EU launched the process of documentary constitutionalization at an inappropriate time. The enlargement was a success. The Euro was a strong currency. The economic growth was high, in some member states it was skyrocketing. There was optimism everywhere, among individuals and on the stock markets. In short, these were good times. Good times, however, are no good for constitution-making. As we know, modern constitutionalism is about discontinuity.⁶² It is about a rupture with the past. As an onwards looking discourse, modern constitutionalism is about bringing progress, about overcoming the inglorious past and present, which are to be

⁶⁰ M. Avbelj, Questioning EU Constitutionalisms, (2008) 9 German Law Journal 1.

⁶¹ S. B. Hobolt, S. Brouard, 'Contesting the European Union? Why the Dutch and the French Rejected the European Constitution?' (2011) 64 Political Research Quarterly 309-322.

⁶² J. Tully, *Strange Multiplicity – Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) at 64.

replaced by a better order of things – a new polity.⁶³ There is thus no need to pursue discontinuity with times of prosperity. This was a lesson learned in 2005.

However, today, when the EU is in an existential crisis, we must continue learning from the same lesson. The contemporary EU is in need of a sharp discontinuity with its *modus operandi* of the last decades. We need a new constitutional process for the European integration to create the necessary discontinuity. A new constitutional form must be introduced and the old should be left behind. Constitutionalism, as its name suggests, is about constituting such new forms through the provision of an imaginary framework in support of which those living under it, its subjects, can be mobilized. Of course, I am drawing here almost on the thinnest conception of constitutionalism, understanding it as a process of a common search for a common good.⁶⁴ Constitutionalism is, accordingly, conceived of as mobilization of the constituent power of the European Union consisting of the EU citizens in their dual, national and supranational, capacity; the member states and the supranational institutions. They are to determine, after an inclusive democratic deliberation, how much (more or less) they want to do and achieve together.

This new constitutional process is envisaged as a litmus test to identify the depth and breadth of the commitment to the European common good. As explained above, the overwhelming scope of empirical challenges to the EU calls for a correspondingly deep commitment to the European cause. However, if this is found lacking – and the constitutional process will be there to attest this – it cannot be forced top down on the unwilling member states and their people. The lack of commitment to the common EU good will simply need to be acknowledged and translated into a new, structurally differentiated configuration of the European Union. However, this is a point to which we shall return later.

At this stage, it is important to put forward a constitutional form which could enjoy the support of the greatest number of constitutional actors in the EU and which could, at the time of foundation as well as later on in its quotidian operation, help garnering the prerequisite commitment to the European common good. It is submitted that such a

⁶³ On the relationship between constitutionalism and the idea of progress, see U. K. Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Humanities Press, 1995) 33-37; D. Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006) at 23; and also Tully, *supra* n 59 at 67.

⁶⁴ M. Cahill, 'The Constitutional Success of Ratification Failure' (2006) 7 *German Law Journal* 947-966.

constitutional form can be provided by the concept of a union.⁶⁵ The union is an example of a federalist constitutional form, which on a federal continuum⁶⁶ occupies the middle ground between a confederation, which is an entity under international law, and a federation, which is a state.⁶⁷

The union is a three level entity.⁶⁸ The national level is made of the member states, which are preserved as sovereign entities, autonomous legal orders and self-standing political communities. The supranational level, the union *stricto sensu*, is represented and governed by the (mostly) Brussels based supranational institutions. The supranational level is also sovereign, albeit in a functional sense. It exists as an autonomous legal order and a corresponding supranational political community that draws its legitimating force from the EU citizens. The national and the supranational levels ultimately exist side by side to each other, in a non-hierarchical manner as part of the third level of the union: the EU as a common whole. This common whole spans the national and supranational levels without consuming their autonomy.⁶⁹

What are the advantages of the union as a constitutional form that could turn the proposed new EU constitutional process into a success rather than into another failure? The union is, foremost, attractive since it provides a framework for optimizing the interests of all the constitutive entities involved. If the member states are insufficient in and of themselves to tackle the contemporary challenges, and if, equally, the supranational EU of Brussels cannot act alone, without the member states, what is obviously needed is a constitutional form, a system of government, a legal and political entity that preserves both. The member states remain sovereign states. The supranational level obtains and secures its autonomous stature, with sufficient competencies; while they both exist inside a common whole that requires preserving the two in the necessary equilibrium. In this way, they can

⁶⁵ M. Avbelj, 'Theory of European Union' (2011) 36 *European Law Review* 818-836; M. Forsyth, *Unions of States* (Leicester University Press, 1981); C. Schönberger, 'Die Europäische Union als Bund, zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas' (2005) 129 *Archiv des öffentlichen Rechts* 81; S. Fabbrini, *Compound Democracies* (Oxford University Press, 2007); O. Beaud, *Theorie de la Fédération* (PUF, 2009); A. Glencross, *What Makes the EU Viable?* (Palgrave Macmillan, 2009); R. Schütze, *From Dual to Cooperative Federalism* (Oxford University Press, 2009).

⁶⁶ D. Elazar, *Federalism and Political Integration* (Turtledove, 1979).

⁶⁷ Forsyth n 62, at 1-16.

⁶⁸ The union should not be mixed up with a federal state and this article, therefore, does not call for the establishment of the United States of Europe. For such a proposal see Guy Verhofstadt, *Europe's Last Chance* (Basic Books, 2017).

⁶⁹ Avbelj, n 65.

optimize their respective interests. They reinforce each other in pursuing their mutual objectives and, in so doing, contribute to the union's long-term viability.⁷⁰

However, the union is attractive also from the citizens' and democratic political perspective. It provides an utile, inclusive imaginary framework. We can finally say what the EU is, rather than sticking to some amorphous *sui generis* identification. Meanwhile the union also permits its citizens to preserve themselves as the citizens of member states, to cherish their existing national identity, while complementing it with a supranational, pan-European identity. By avoiding the traditional zero-sum approach, according to which a supranational identity is parasitic on the national identity (and vice versa), the union provides a conceptual framework for making the two not just compatible, but actually mutually reinforcing. In so doing, the union could facilitate the development of a genuine EU political community, which would not come at the expense of the national communities. The idea is to preserve the civic identity that individuals as citizens of the member states presently have and to simultaneously upgrade it and complement it with an additional supranational layer, which is required for supranational legitimating purposes. In so doing, socio-political grounds would be laid for the emergence of transnational solidarity that is required for the establishing and functioning of the fully-fledged economic, security, defence and the political union.

The hence conceived of constitutional process would need to be started bottom-up. It would take the form, just like suggested by Emmanuel Macron, of citizens' conventions in all the member states.⁷¹ This, initially, national process of constitutional deliberation on the future of the EU would provide a mandate for the national governments and would be, in a second step, taken up on the transnational level. An EU citizens' convention would be called for, joining an equal number of representatives from all the member states. This transnational forum of EU citizens would establish a constitutional mandate for the supranational institutions, in particular the European Parliament and the Commission. On the basis of a dual citizens' mandate⁷² a first draft of the future EU constitution would be produced. This would be deliberated upon by the European Constitutional Convention,

⁷⁰ *Idem.*

⁷¹ E. Macron, Programme, <https://en-marche.fr/emmanuel-macron/le-programme>

⁷² J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible', (2015) 21 *European Law Journal*, 546–557, at 554 referring to 'a doubled sovereign'.

which would consist of 100 delegates. There would be 27 representatives of the member states, 27 representatives of the national citizens' conventions and 27 representatives of the EU citizens' convention. The European Parliament and the Commission would send five delegates each. The Council, the European Council, the Court of Justice and the Central Bank would be represented by one delegate. The Committee of Regions would send two delegates and the Economic and Social Committee three delegates. The final text of the EU Constitution would be adopted by the European Constitutional Convention with a qualified majority of $\frac{3}{4}$ of its delegates. The new EU constitution would enter into force when ratified by all member states in accordance with their constitutional requirements.

It is worth stressing that a hence adopted constitution would not be the constitution of the EU common whole, a kind of supra-federal constitution which would exhaust the autonomous constitutional character of the member states. The constitution resulting out of this EU constitutional process would be the constitution of the supranational level.⁷³ It would regulate the functioning of the supranational level and – from its vantage point – the relationship between itself and the national level. The member states on the national level would adjust their constitutional relationship to the supranational level in accordance with the outcome of the EU constitutional process. The constitutional relationship struck between the national and the supranational levels, underpinned by a democratic input of the national and EU citizens, would provide a point of departure for the functioning of the common whole. Its viability would be ensured best, however, if the entire process of European integration was conducted in the normative spirit of pluralism.⁷⁴

The normative spirit of pluralism, as the union's software, is about the recognition of plurality, of the fact that the member states and the supranational level are autonomous legal orders and distinct political communities. It is essential to pluralism that this distinctiveness is not just preserved, but nourished and encouraged.⁷⁵ The distinctiveness is namely an expression of autonomy, both individual and collective, which stems from the recognition of equal human dignity as a license for diversity.⁷⁶ By way of an equal

⁷³ N. Walker, 'Constitutional Pluralism Revisited' (2016) 22 *European Law Journal* 333–355, at 346.

⁷⁴ For a more in depth discussion, see M. Avbelj, 'Can European Integration be Constitutional and Pluralist – both at the Same Time?', in Avbelj, Komarek (eds), *Constitutional Pluralism in the EU and beyond* (Hart Publishing, 2012).

⁷⁵ Avbelj n 46, chapter 2.

⁷⁶ *Idem*.

human dignity, everyone has an equal right to self-fulfilment in her own chosen way within the limits of an equal right of everyone else. The individuals, who, as social beings, always live in their specific communities, are therefore different and their respective communities are marked by diversity too.⁷⁷ Pluralism, as a sign of a respect for human dignity, insists that this is good and ought to be so preserved.

However, pluralism, other than recognizing plurality in a way just described, also requires the connection, the linking of a variety of entities making up the plurality. Pluralism, as a normative framework for an ordered plurality⁷⁸ and as applied to the political communities inside the EU, requires the emergence of a dialectic open self. This stands for a committed, but self-critical attitude to one's polity; a critical consideration of the claims made by other polities and, finally, a simultaneous commitment to the transcending common European whole.

The common whole, as a *distinctio specifica* of a union, is made of structural principles, rules, practices and underlying socio-political commitments between the national and supranational level of the union conducted in the just described normative spirit of pluralism. It is thanks to the latter that the EU as union could, as it indeed should, function in a heterarchical, rather than a hierarchical manner; as internally pluralist, rather than a monist structure. This kind of functioning will, however, never be exclusively harmonious. To claim that would amount to denying that the constituent entities of the EU are distinct entities among which disagreements do reign, sometimes to the point of irreconcilability.

Pluralism does not deny that. On the contrary, it does not just confirm, it even affirms the existence of such deep disagreements.⁷⁹ Rather than concealing them, brushing them under the carpet, or extinguishing them by a monist imposition of an agreement top down on the disagreeing parties, pluralism insists that disagreements and conflicts must be taken seriously. They must be engaged with as much as possible, but if and when it turns out that they are irreconcilable, that they touch on the core of the identities of the polities involved and that they cannot be overcome, then the solutions must be found to agree to

⁷⁷ J.H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights', in Nüewahl, Rosas (eds), *The European Union and Human Rights* (Martinus Nijhoff, 1995).

⁷⁸ M. Delmas-Marty, *Le pluralisme ordonné* (Seuil, 2006) at 13.

⁷⁹ More on this type of epistemic pluralism see N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317-359.

disagree in a productive manner. In the specific context of launching the new constitutional process for European integration this means that the latter should not strive for the consensus by all means and neither should it result in the merciless imposition of the will of the qualified majority on the minority. Normative spirit of pluralism encourages creative constitutional solutions for deeply diverging interests of the different actors involved in the constitution-making process.

One of such constitutional means is the idea of a differentiated integration. The European Union has been no stranger to it, but at the same time the different faces of differentiated integration in the EU have always been considered rather exceptional,⁸⁰ as a departure from the overall uniformity principle. Perhaps the time has come to recognize that certain differences among the member states of the EU are so deep and so persistent that they are in fact structural in nature.⁸¹ If so, they would need to be acknowledged as something normal and should be built into the constitutional structure of the integration. The constitutional form of the union provides a convenient platform for that. The union could be conceived of as a common whole consisting of several concentric circles characterized by different intensities of integration. The core EU would be made by the present Eurozone countries. This would be a veritable economic, security, defence and political union that this article has called for. However, beyond it the intensity of integration would be decreasing all the way down to the membership in the single market or even just customs union, where the interests in the integration's project by Britain, Turkey, Ukraine and the Western Balkans states could be accommodated too.

V. Conclusion

Stimulated by the European Commission's White Paper on the Future of Europe, this article has engaged critically with the Commission's five scenarios to argue in favour of the reformist vision of the EU's future. We have called for a new constitutional process for

⁸⁰ For an overview see, B. De Witte, D. Hanf, E. Vos, *The Many Faces of Differentiation in EU Law* (Intersentia, 2001).

⁸¹ See also J. C. Piris, *The Future of Europe: Towards a Two-Speed EU* (Cambridge University Press, 2012).

European integration, which should establish, provided that there is a popular and institutional support for such a scenario, the EU as a union embedded in the normative spirit of pluralism. The article has presented the arguments in favour of such a scenario and it has provided reasons for which the many constitutional actors in the EU, as well as the latter as a whole, could benefit from it. The article has been driven by a normative ambition of equipping the EU with adequate constitutional, institutional and socio-political means for coping with its many crises. However, how likely is it that the proposed constitutional relaunching of the integration actually takes place in practice? As Niels Bohr reportedly said: 'It is hard to make predictions, especially about the future.' We should therefore shy from this temptation and limit ourselves just to the evaluation of the present. By so doing, the following can be observed.

The EU is in an existential crisis. There is thus a strong pressure to act. Something needs to be done. What will be actually done, admittedly, in many respects depends on the political will in the biggest EU member states. The election results in the Netherlands and, in particular, in France, where Macron openly campaigned on the EU reformist agenda, suggest that after the German elections there might be a rare, indeed historical window of opportunity for a qualitative reformist leap in the process of European integration. The civil society, which has made its transnational pro-European voice heard more than ever before;⁸² the academics⁸³ as well as a growing number of the national and EU political class have apparently realized that while the way back to the idealized times of the nation state is essentially empirically closed off, the existing status quo is also plainly unsustainable. The present article has drawn a map of just how this impasse in the process of the integration might be overcome.

⁸² See, for example, The Ljubljana Initiative <http://chr.si/>; <http://www.marchforeurope2017.eu/academic-community-launches-appeal-in-support-to-the-march-for-europe/>; The Rome Manifesto <https://www.united-europe.eu/uncategorized/the-rome-manifesto-proposals-by-the-next-generation/> etc.

⁸³ See, the draft Constitution for the European Union, authored by Peter Jambreč, [http://www.predsednik.si/uprs/uprs.nsf/cc1b0c2e0c8f0e70c1257aef00442bbd/6e9c355dcac33036c12580a0004d8dc2/\\$FILE/Predlog%20nove%20evropske%20ustave%20The%20new%20draft%20treaty%20for%20the%20constitution%20of%20the%20European%20Union.pdf](http://www.predsednik.si/uprs/uprs.nsf/cc1b0c2e0c8f0e70c1257aef00442bbd/6e9c355dcac33036c12580a0004d8dc2/$FILE/Predlog%20nove%20evropske%20ustave%20The%20new%20draft%20treaty%20for%20the%20constitution%20of%20the%20European%20Union.pdf).

Discussion Papers of the Research Area International Politics and Law 2017

Department: **Center for Global Constitutionalism**

Yoon Jin Shin

SP IV 2017–801

Contextualized Cosmopolitanism: Human Rights Practice in South Korea

Matej Avbelj

SP IV 2017–802

What Future for the European Union?

All discussion papers are downloadable:

<https://www.wzb.eu/en/publications/discussion-papers/trans-sectoral-research>