

## LEGAL CULTURE IN THE EUROPEAN UNION IN THE LIGHT OF EU CONSTITUTIONALISM

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**Abstract.** The aim of the article was to assess the legal culture in the European Union during the crises plaguing Europe in the 21st century. It focuses on a case study of the Covid-19 pandemic crisis. Although legal culture develops over a long period of time, it seems that in recent years the process of its change has accelerated, which is very clearly visible on the example of EU constitutionalism. The assessment of legal culture during the pandemic crisis was thus analyzed in relation to EU constitutionalism. The most important research questions included: (i) Have the most important constitutional values of the EU been transformed due to the crisis? (ii) Have the procedures for changing constitutional law been maintained?, (iii) Has appropriate democratic control and accountability been maintained throughout the process of these changes?, and finally (iv) What was the role of politics in the processes of EU constitutionalism?

**Keywords:** EU constitutionalism; legal culture; Covid-19 crisis; centralization; federalization

“If there is no demos, there cannot be a well-functioning democracy”  
[Weiler 1997, 115]

### INTRODUCTION

Legal culture is defined as the totality of habits and values related to the acceptance, evaluation, criticism and implementation of applicable law [Podgórecki 1966, 179-80]. The above-mentioned definition emphasizes the perception of law in society, as well as its application, i.e. compliance with legal norms, which can also be referred to as the rule of law. Another aspect of legal culture is legislating and thus changing legal norms. Here, the key importance is, among others: whether such changes are carried out in accordance with existing procedures, i.e. in a lawful manner, or in violation of existing rules. Respect for constitutional norms and procedures is particularly important. The issue of basic values, which are most often found in basic laws, is also extremely important for legal culture.

The article will focus on the most important constitutional norms and values in the European Union (EU). I ask whether they are changing,

especially under the influence of subsequent crises plaguing this organization. The next research question concerns the preservation of existing procedures for amending constitutional law, and thus whether the entire process can be considered lawful. The next question concerns the role of democratic values in the processes of shaping EU constitutionalism. Is there adequate democratic control and accountability over the process of changing constitutional norms? Politics is also of key importance for legal culture. Therefore, in the study I raise the issue of the institutions responsible for constitutional changes in the EU, their methods and scope of politicization, as well as other manifestations of the influence of politics on the entire process. In research on legal culture, there is often a distinction between the systems of civil law and common law. Hence, the next question concerns the role of these two legal cultures in EU constitutionalism. Finally, the issue of changes to the most important constitutional norms in the EU will be analyzed. By asking all these questions and research issues, I hope to obtain a lot of information about the legal culture functioning in the European Union in the 21st century.

The main research problem concerns changes in the legal culture in the EU as a result of crises. I hypothesize that although legal culture develops over a long period of time, in recent years the process of changing this culture has accelerated, which is very clearly visible in the example of EU constitutionalism. The research methodology is based on an analysis of the literature on EU constitutionalism and then an assessment of a case study of the functioning of this constitutionalism during the Covid-19 pandemic crisis. The theoretical basis of the study will be institutional theory [Dacin, Goodstein, and Scott 2002, 45-56; Faundez 2016, 373-19], which not only focuses on changes in institutions or legal norms, but also on the dominant values of legal culture. This theory will be complemented by concepts regarding the functioning of political and legal systems in emergency situations (so-called emergency politics) [Schmidt 2022, 979-93].

## 1. EU CONSTITUTIONALISM

European constitutionalism – or to be more precise constitutionalism in the European Union – can be divided into two currents. The first is the national, which embraces the constitutional systems of the Member States. The second is EU constitutionalism, meaning that which has a supranational and federalist tendency in the EU [Stein 1981].

Until now a fundamental dimension of EU constitutionalism has been the creation of European treaties, that is, law that is of a constitutional character for the EU. This took place through unanimous decision by all Member States, which meant the decision not only of governments, but also

of national parliaments, in accordance with the countries' ratification procedures. In some countries, consent for a new treaty had to be granted directly by the electorate through a referendum. Such a thorough procedure for approving new treaties, even if they were only agreements of a revisionary nature, resulted from the necessity for national democratic communities and sovereign states to transfer new competences to the EU. After all, the European Union should not exercise power in areas that have not been transferred to it by sovereign political communities, meaning all the Member States. This is precisely why the "Masters of the Treaties" are the states, which have to agree unanimously on the constitutional norms in the EU. Therefore the supremacy of European constitutional law thus understood over national law applies solely and exclusively to those powers transferred to the EU. In this view, European institutions are not authorised to expand their authority by themselves beyond the powers granted to them. Therefore, they cannot go beyond the competences transferred to them by the Member States.

At the same time EU constitutionalism – in this classic understanding – did not in principle embrace the supremacy of European Union law over national constitutions or over the rulings of national constitutional courts. After all, that which had a constitutional dimension for the EU itself did not carry the same meaning or supremacy over the constitutional systems in Member States. This was clear from the wording of Article 4 of the Treaty on European Union (TEU), in which the EU was obliged to respect the fundamental political and constitutional structures of Member States. Such a stance was expressed by at least a few national constitutional courts, including that of Germany, the constitutional courts of France, and also those in Italy, Poland, Romania and Hungary.

The most important example of EU constitutionalism in its traditional guise was the pursuit of passing the Treaty establishing a Constitution for Europe in 2004 [Christiansen and Reh 2009, 14]. This was supposed to be a breakthrough in many respects. Above all it meant the introduction of a European constitution by name, thus paving the way for a European federation. Because of this, the adoption of this treaty was described by academics as a "constitutional moment" in Europe [Nicolaidis 2019, 41-50]. In addition, the intention was to explicitly include the supremacy of EU law over national law in the said treaty; that could have led to acknowledging the supremacy of the EU constitution over the basic laws of Member States.

As we know, the "constitutional moment" in the EU collapsed due to referendums held for ratifying the treaty in the Netherlands and in France (in 2005) failing to deliver. This came as a genuine shock to the political elites aspiring for a European federation. The attempt to base the European Union's constitutionalism on the traditional treaty procedure, passed through unanimous decision by all Member States, had failed. And this

failure became an impetus for seeking new forms of accomplishing the political ideas connected to the EU's centralisation and federalisation, as expressed in the shaping of an alternative formula for EU constitutionalism. Creative ways of establishing constitutional rules in the EU were sought, meaning a departure from the traditional revision of treaties through the unanimous consent of Member States.

It is worth drawing attention to the fact that EU constitutionalism referred not only to the treaties as constitutional law, but also to the jurisprudence of the EU courts, treated as constitutional courts in the European Union. In this second iteration, constitutionalism in a way dethroned the Member States as the sole "Masters of the Treaties", and established European judges as the final instance in the resolving of constitutional disputes and the interpretation of the treaties [Alter 1998]. This kind of constitutionalism placed the emphasis not so much on the treaties themselves as constitutional law as it did on the jurisprudence of the Court of Justice of the European Union (CJEU) being the chief source of constitutionalism [Rasmussen 1986; Weiler 1997, 100, 112; Stein 1981]. This enabled continuation of the processes of integration in Europe even without the consent of all Member States. It constituted the basis of an alternative approach to constitutionalism, and was therefore extraneous to the traditional formula used for Member States to enact treaties. As an example, the activism of EU judges introduced such important constitutional principles as the doctrine of direct effect and the supremacy of European law. Such an approach gave rise to multiple disputes, including on the scope of jurisdiction of the CJEU (for example, whether it embraced only competences that had been transferred, or also all other matters), as well as the reach of the principle of supremacy (whether it should also cover national constitutions or not).

The crux of the dispute between national constitutional courts and the EU Commission and the CJEU was whether the EU was a union of sovereign states, and thus whether European institutions should respect their constitutional orders or not [Grimm 2020, 945]. If so, there could be no talk of the supremacy of EU law over national constitutions, or in relation to competences that had not been transferred to the EU. This is precisely why the national constitutional courts took the position that they had the right to determine whether EU law complied with their basic laws. Moreover, they could also ascertain whether the activities of EU institutions overstepped the treaties, that is, went beyond the powers transferred to them by the Member States. Germany's constitutional court had kept a check on these restrictions to the EU's powers since the famous *Kompetenz-Kompetenz*<sup>1</sup> ruling of 1993, concerning the Maastricht Treaty [Weiler 1997,

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<sup>1</sup> Verlautbarung der Pressestelle des Bundesverfassungsgerichts, Pressemitteilung No. 39/1993 vom 12. Oktober 1993, Urteil vom 12. Oktober 1993 – 2 BvR 2134/92, 2 BvR 2159/92.

124-25]. In this particularly ruling, the German court recognised the European Union as a community of sovereign states (in German: *Staatenverbund*), which acts solely on the basis of competences expressly provided for in the treaties, and whose democratic legitimacy rests with the Member States, through their national parliaments.

The ruling of the German court of 5 May 2020 was also in this vein. The Karlsruhe court then found that the CJEU could not authorise the actions of the European Central Bank (ECB) in one of its Sovereign Bond Purchase Programs, since both institutions were operating outside of their treaty-given powers (*ultra vires* in Latin).<sup>2</sup> Poland's Constitutional Tribunal later ruled in a similar fashion.<sup>3</sup> The European Commission (EC) initiated the procedure used for violation of EU law in regard to the rulings by both the above national courts, although in Germany's case the request to the CJEU was withdrawn after some time. This example proves that officials in Brussels applied standards of one kind in relation to the process of defending constitutional autonomy in Germany, and of another kind for Poland. The latter has, since 2015, been used as the "scapegoat" of EU rule of law, or the narrative meant to legitimise the changes taking place in the European Union's systemic structure. In addition, the above example indicates that European constitutionalism was hammered out in the rivalry between expansive EU institutions and national courts defending their own powers [Weiler 1997, 107-108]. EU constitutionalism was also created in constant tension between the culture of common law and the culture of civil law.

The aim of this paper is to examine the political culture in the EU on the example of the development of EU constitutionalism during the first decades of the 21st century, that is, following the fiasco of the Treaty establishing a Constitution for Europe, and during the period of permanent

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<sup>2</sup> The Federal Constitutional Court found that the CJEU had exceeded its competences because it has not taken all significant factors into account in its analysis of proportionality, and applied too lenient a standard of review over the ECB's activities. The Court also argued that the Public Sector Purchase Programme violated the EU treaties, because the ECB had not justified it sufficiently. Cf. BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15, paras. 1-237, [http://www.bverfg.de/e/rs20200505\\_2bvr085915en.html](http://www.bverfg.de/e/rs20200505_2bvr085915en.html) [accessed: 27.05.2023].

<sup>3</sup> Poland's Constitutional Tribunal stated that if EU bodies act beyond the limits of the competences transferred to them by the Republic of Poland in the treaties, and in addition question the Constitution as the supreme law of the Republic of Poland, with priority in legitimacy and application, this is incompatible with Articles 2, 8 and 90(1) of the Constitution of the Republic of Poland. Cf. *Ocena zgodności z Konstytucją RP wybranych przepisów Traktatu o Unii Europejskiej*, Constitutional Tribunal, case no. K 3/21, 7 October 2021, <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> [accessed: 27.05.2023].

crises afflicting the EU. It departed from the traditional formula of treaties being passed by the unanimous consent of Member States, and relied instead on alternative methods for creating new constitutional principles in Europe. The research goal is therefore to show both these alternative methods and the new constitutional principles, as well as the directions in the European Union's systemic makeup. They were of key importance for the evolution of legal culture in the EU.

## 2. NEW TRENDS IN EU CONSTITUTIONALISM

According to some scholars, the failure of the constitutional treaty meant in practice that it was impossible to establish a constitution in the EU. Thus it should have been acknowledged that this organisation had created a political system without formal constitutional authority (*pouvoir constituant* in French) [Grimm 2015; Craig 2001; Kumm 2006]. However, constitutional politics abhors a vacuum. Faced with the difficulties of enacting EU treaties, there was an intensification of the process of alternative constitutional lawmaking in the EU, meaning without the formal amendment of treaties by the Member States, which pursuant to their democratic procedures could entrust the EU with certain powers. This alternative process was based on arbitrary actions of EU institutions, especially the European Commission and the European Parliament, as well as on the judicial activism of the CJEU. It stemmed from the guiding principle behind European integration, meaning the aspiration for an ever closer union between the nations of Europe, originating from as far back as the preamble to the Treaty of Rome (1957). Such powerful historical roots of the aforementioned aspirations not only legitimised the process of increasing integration, but also encouraged decision-makers to make out-of-the-box attempts to go deeper, especially when national governments showed no will to revise the treaties. Therefore the constitutional tendencies outlined here were not entirely new developments in the history of integration [Grosse 2019]. Nevertheless, following the failure of the constitutional treaty, the appetite for seeking alternative paths for the development of EU constitutionalism – versus the traditional method of passing treaties – distinctly increased. This was also due to the “incomplete” or “unfinished” process of shaping the European Union's political system.

This is why political scholars name the structural setup of this organisation an “open political system” or a system “under construction” [McNamara 2018], while lawyers refer to it with the term “underconstitutionalism” [Kasim 2023; Delledonne 2014]. Its principal feature was the numerous systemic dysfunctions such as the imbalance between specific EU institutions, the insufficient formal powers that certain institutions had in relation to their

political mandate (an example being the relatively small Treaty-based powers of the European Council and the European Parliament). Another problem was the absence of a clear division between the legislative, executive and judicial powers, as well as an insufficient system of accountability and review over the power of EU institutions. An example of the latter tendency is the far-reaching arbitrariness of proceedings by the Commission, but also by the CJEU. Topping all this was the growing politicisation of EU institutions, including both technocratic and judicial. In other words, the political system following the Lisbon Treaty was in many respects dysfunctional, out of balance, or ineffective – and especially so in urgent situations.

And it is precisely successive crises that have constituted another factor for constitutional change. They have been exceptional situations frequently demanding rapid and non-standard action, breaking with the procedures or division of powers existing formally. In a way, the crises justified EU institutions overstepping their mandate (and the powers entrusted to them by Member States). This is precisely why the almost permanent period of crisis in the EU, which began with the eurozone problems after 2010, became a special opportunity for EU constitutionalism [Voltolini, Natorki, and Hay 2020]. It was accompanied by the practice of taking measures defined by academics as “emergency rule” [Goetz 2014]. The extraordinary situation facilitated the phenomenon of “competence creep”, a slow but steady expansion of powers, in EU institutions [Garben 2019]. And this constituted an opportunity for the violation of national constitutions and the hitherto binding treaty arrangements.

This was why scholars recognised that a time of crisis is conducive to undermining rule of law in Europe [Scicluna 2014, 546], above all through the violation of treaty principles, and as such the constitutional order of the EU [Auer and Scicluna 2021]. This was also related to an erosion of the previously binding standards of democracy, especially in accountability and review over the EU executive [White 2015b]. Some scholars added that the European Union was developing based to an ever greater degree on fear and the whip of necessity [Wilkinson 2013, 528]. The crisis period was also referred to as a state of exception, signifying a departure from the legal order functioning during normal times, an increase in the discretionary and arbitrary action of the technocracy, and the suspension of democratic rights and freedoms [Kilpatrick 2015; Scheppele 2010]. For this reason, scholars have come more and more often to recognise that crisis management in the EU resembles authoritarian rule, and even that this is becoming a permanent systemic feature of this organisation [Kreuder-Sonnen 2016; Joerges 2014b; Somek 2015]; a feature that could even be described as constitutional, that is, possessing very significant and overriding practical importance [Kreuder-Sonnen and Zangl 2015]. The frequency

of crises thus led to a recurrence of “emergency rule”, together with its departure from rule of law, and with authoritarianism. Simultaneously the crises became an opportunity for applying a specific method of advancing integration, including the modification of its most important constitutional principles.

The authoritarianism of EU institutions consisted not only in the violation of the rule of law, but even more so in the curtailing of national constitutionalism, which – as opposed to that of the EU – was based on real democracy. In keeping with the words of Joseph Weiler – if there is no *demos* (i.e. no political nation), there can be no operating democracy [Weiler 1997, 115]. This is why EU constitutionalism has displayed an inherently undemocratic tendency. All the more reason why it should not seek methods for transferring powers from Member States to the EU that are an alternative to the democratic ways. Neither should it restrict constitutional systems in national democracies.

Lacking a *demos*, the European Union had no constitutionality for defining which political values were constitutional (that is, fundamental to the EU) other than unanimous decision by its Member States. Judicial protection of fundamental rights in the EU should therefore apply in principle only to values thus established. Thus the judges did not have adequate authorisation to broaden or narrow, with their judgments, the normative choices of the EU’s members.<sup>4</sup> This is of enormous legitimising importance, since the expansion of the CJEU’s constitutional power was based precisely on the fundamental rights and values, supposed, as it were, to offset the democratic deficit of the “alternative” EU constitutionalism.

All this led to steadily increasing tension between formal and traditional constitutionalism, based on treaties, and the political practice of EU institutions and European elites (both supranational and those originating mainly from the largest countries of Western Europe) [Auer and Scicluna 2021, 24]. These were tensions between the culture of civil law and the culture of common law, between democratic culture and the culture of technocratic order and judocracy. EU judges and officials created successive precedents, oftentimes justified by the necessity to react to crises. This was a challenge for traditional EU constitutionalism, understood as adherence to the treaties and the rule of law [Kreuder-Sonnen and White 2022, 956; Scicluna and Auer 2019; Scicluna 2018; Kreuder-Sonnen 2016; Joerges 2014a; White 2015a]. At the same time it laid the foundations for a different type of constitutionalism, one forged through practice and under the influence of political

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<sup>4</sup> Another consequence of the lack of a *demos* was that the EU’s intergovernmental institutions should not apply majority voting for taking decisions, since the democratic outvoting of minorities can only take place within a particular political nation. Cf. Weiler 1997, 117.



rivalry, since new interpretations of constitutional principles had been introduced, or power had in fact been redistributed between specific EU institutions, as well as between the European Union and Member States. In the latter case the biggest countries of Western Europe maintained and sometimes even increased their influence, while all other countries tended to lose their ability to influence European politics.

This meant in practice that a feature of the alternative constitutionalism was the extraordinary activeness of EU institutions, which were overstepping their own powers or even the treaties, in doing so shaping a new structural quality in European integration. The *de facto* amendment of the treaties as a result of political practice or judicial interpretation was therefore not perceived as violating the rule of law; it was valued positively, because it was acknowledged to be activity furthering the resolution of crises and the advancement of integration.

An important feature of non-traditional constitutionalism was how the activities of individual institutions were based on far-reaching discretion and politicisation. It was related to these institutions' own political vision of the development of integration, a vision most often inextricably linked to granting themselves further powers, and thereby greater authority in the European Union. Another aspect of the politicisation was the shaping of the narrative intended to justify unconventional measures, including the broadening of their own powers. The next dimension of this politicisation was the pursuit of public opinion and the preferences of the most influential countries in Western Europe [Blauberger, Heindlmaier, Kramer, et al. 2018]. This was particularly true of the behaviour of the European Commission and the CJEU. The processes in question led to the gradual centralisation of power, or the competence creep in the European Union. The latter was also the result of the blurred division of tasks between the EU level and member-state level, exemplified by the so-called shared competences. This was conducive to the EU systematically encroaching into the domain of the Member States, thereby violating in an ongoing manner the said states' constitutional order, while also restricting their national democracy.

The alternative method for furthering integration was therefore not only politicised and forged through inter-institutional rivalry; it was also, by its very nature, unlawful, and at the same time not very democratic, not to say authoritarian [White 2019, 199-202]. As I have mentioned, it was based on fundamental values, above all on human rights [Williams 2007]. It referred directly to the constitutional role of fundamental rights in the political system, rights that were supposed to legitimise the EU constitutionalism among experts as well as the nations of Europe.

It is worth noting that this was also born from the stance taken by the national constitutional courts, and was therefore a result of dialogue

or even rivalry with national institutions. Back in 1974, Germany's constitutional court ruled in the *Solange I* case that the legal acts of the European Communities and the case law of the European Court of Justice had to be assessed for their compatibility with German provisions on fundamental rights for as long as there was no effective system for the protection of these rights at the European level.<sup>5</sup> As such, the judgment suggested to EU judges that they give a greater role to the protection of fundamental citizen rights if they want to avoid disputes with national constitutional courts.

At the same time, interpretation of the aforementioned rights by EU courts was quite flexible and depended on the political requirements of Western Europe's largest countries. This was so in the case of growing economic pressure being put on Western Europe by the citizens of new Member States after 2004, as well as the economic crises post 2010, and resulted in the reduced significance of fundamental rights in the social sphere and in employment [Grosse 2020; Everson 2015, 480; Beck 2014, 540-50]. Bearing in mind the instrumental treatment of fundamental rights by EU institutions, as well as the systemic violation of the treaties at times of crisis, the promotion of EU constitutionalism in the second decade of the 21st century was all the more surprising in regard to the rule of law, allegedly violated by certain states of Central Europe.

As I wrote earlier, an additional aspect of EU constitutionalism was the activism of European judges. A key objective was the pursuit of establishing the supremacy of European law and CJEU judgments over national constitutions and the rulings of national constitutional courts. The CJEU was not an impartial court in this matter, and neither was it apolitical [Grosse 2022b]. It was neither upholding the treaties nor protecting, in particular, the treaty-based division between EU and national competences. It was interested rather in extending its own authority and in the federalisation of the legal system in the EU, and as such was guided by its political vision of the European Union's ultimate system, based on legal federalism in the EU. It was a party actively engaged in increasing the powers of EU institutions, and by doing so legitimised the competence creep as well as all other informal attempts by the EU to appropriate national competences [Sci-cluna 2018; Grimm 2020]. It was most definitely not an advocate of the treaty principle of respecting Member States' constitutional order, since it was *de facto* seeking to dismantle national constitutional systems and subordinate these states' judicial systems to the supremacy of EU law.

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<sup>5</sup> BVerfGE 37, 271 2 BvL 52/71 *Solange I*-Beschluss, 29 May 1974.

### 3. EU CONSTITUTIONALISM IN PRACTICE

The Covid-19 pandemic was a period when “emergency rule” was put into practice. It was also an opportunity for developing alternative constitutionalism in the EU, the most prominent example of which was the establishing of the European Reconstruction Fund, later named Next Generation EU (NGEU). Although its designers referred to the existing treaties, they were highly flexible in the way they did so. It was a rather creative expansion of the treaty basis for establishing a fund based on joint debt. After all, Article 122 of the Treaty on the Functioning of the European Union (TFEU) concerning financial solidarity, and Article 175 of the TFEU laying down the rules for cohesion policy, were made use of. Apart from the above, Article 311 concerning the EU’s own resources, and Article 312 of the TFEU on multiannual financial frameworks, were also referred to [Fabbrini 2022, 194]. These provisions do not mention the possibility of the European Commission incurring debt guaranteed by Member States and the EU multiannual financial framework. Neither do they address the option of introducing a non-budgetary special fund created solely for a defined period and which can be financed from new taxes and payments that increase the EU’s so-called own resources.

Another aspect of the NGEU’s introduction was the consent of all Member States to the new financial arrangements, together with ratification by national parliaments of the EU’s new own resources. The procedure resembled the approval of new treaties, and was intended to ensure political legitimacy for ground-breaking changes leading in the direction of fiscal federalism, changes de facto implemented without the respective revision of treaty law.

Another important element accompanying the NGEU was the introduction of an elaborate system of conditionality, making the receipt of funds conditional on the fulfilment by national governments of numerous conditions set by the European Commission. With over 3,500 “milestones” presented for Member States to fulfil, the powers, discretionary authority, and arbitrariness of EU officials’ activity were significantly broadened. In many cases it was an elaborate process of competence creep, the European Commission encroaching into the domain of national powers [Baraggia and Bonelli 2022, 151]. It was also a systemic violation of national constitutionalism. After all, funds could be blocked if governments were to violate European rule of law, including through challenging CJEU rulings or the principle of supremacy of EU law over national constitutions.

As a result, the EU’s system was modified in a non-treaty yet simultaneously fundamental way, since the growth of fiscal federalism as well as a radical centralisation of power in the EU was thereby sanctioned.

A manifestation of this systemic trend was the strengthening of the European Commission's authority over certain Member States, especially those with less influence in the EU or politically stigmatised due to the alleged violation of EU values or the rule of law. This narrative, defending so-called European values, was aimed at legitimising the systematic encroachment by the EC into national competences, i.e. the competence creep. A number of other systemic rules were also brought into political practice, led by the supremacy of EU law and CJEU rulings over national constitutions and the jurisprudence of national constitutional courts.

The alternative EU constitutionalism thus practiced violated the hitherto treaty principles of the European Union, thereby altering earlier systemic norms. After all, in practice the Next Generation EU instrument was a departure from the principle of equality of Member States under Article 4 TEU, as net contributor states were treated differently to beneficiaries of EU funds [Bieber and Maiani 2014, 1057, 1073]. Sanctions resulting from non-compliance with the Commission's expectations could be much more severe for beneficiaries than for net contributors who, by paying surplus funds into the EU budget, tended to have a greater informal say in the actions taken by EU officials. As such, they did not have to be so worried about the European Commission withholding their funding, and could even persuade the EC to place greater importance on holding other countries to account. The EC's growing discretion and arbitrariness, linked to its ever greater politicisation, thereby created informal opportunities of influence primarily for the richest countries. They were able to use their resources to influence, via the European Commission, poorer countries or those in greater need of EU support.

This exacerbated the differences between EU states, especially the largest countries of Western Europe and the beneficiaries of EU funds in Central Europe. Another element increasing this disparity was that the European Commission was able to withhold cohesion policy funds allocated for countries and regions experiencing weaker development. In other words, the EC was able to push countries not developing as well "up against the wall" more effectively, taking advantage of their more difficult economic situation, and thus increasing their economic distance behind the richest and more highly developed countries.

It is hard to understand how all this corresponded with the treaty norms that were invoked during the introduction of the NGEU, meaning Article 122 TFEU on solidarity, and Article 175 TFEU on cohesion policy. The extensive conditionality introduced by the NGEU reinforced the hierarchy of power between the central and peripheral states of the EU [Baraggia and Bonelli 2022, 151] more than the solidarity between them. It was

a departure from both the goals of the cohesion policy and from the treaty principle of equality between Member States.

According to Antonio Baraggia and Matteo Bonelli [2022, 153] a change in the constitutional culture of the EU was taking place. Hitherto treaty norms, such as the principles of loyalty, solidarity, equality of Member States and mutual trust between them, were losing their relevance. As a result of the NGEU, the culture of conditionality was gaining ground, while “coercive Europeanisation” was also being practiced increasingly against smaller and politically weaker states, based on financial sanctions [Biermann 2014]. Thus the hierarchy of central states in Western Europe over the peripheral states (in economic and political terms) was becoming the supreme principle of constitutionalism. It was, in essence, power of the net contributors to the EU budget over its beneficiaries. As a result, mutual distrust within the EU has also grown.

The change in constitutional culture paved the way for centralisation of the political system and fiscal federalisation, while simultaneously making technocratic and judicial institutions increasingly subject to politicisation, or in other words informal influence exerted by the largest countries of Western Europe. This did not resemble a democratic federation, but rather had more and more of the systemic features of technocracy and judocracy. At the same time the European Union was drifting towards an asymmetric organisation, with a very sharply defined hierarchy of power between the dominating states of Western Europe and the rest. The supranational structure, or institutions of a technocratic and judicial super-state, served largely to further the exercising in practice of this hierarchy of power between the central states and those under this domination, to a large degree deprived of their own sovereignty. This dominance also enabled the realization of ambitions and interests of the supranational elite concentrated in Brussels.

The preference for new political values in the EU, viewed as constitutional values and the most important human rights, was related to the change in constitutional culture. This referred nominally to Article 2 TUE and the Charter of Fundamental Rights of the European Union, but in political practice was to an ever greater degree based on left-wing and even Marxist axiology [Grosse 2022a]. The ideological foundations of EU constitutionalism were of great significance, since they revised the main systemic principles, in particular concerning democratic order in the EU. The leftist interpretation of values rejected political pluralism in practice and the axiology of other political trends (for example conservatism and that of the Christian Democrats). This was a major deviation from the standards of democracy hitherto practised in the Member States. Moreover, left-wing politicians and officials at the EU level largely questioned

or at least limited the democratic community of citizens at the national level. Sometimes they treated it as a threat to European integration, and particularly so when parties with political values or views differing from the liberal or left-wing majority among the supranational elites came to power. Essentially, such governments and their electoral bases were a threat to the alternative EU constitutionalism that, as I outlined above, had been growing rapidly particularly since the fiasco of the constitutional treaty.

A growing number of voters and elites in the Member States were perceiving the excessive centralisation and competence creep as a threat. In addition, EU constitutionalism in its new guise was recognised as a threat to nation states and their constitutional systems. In other words, there was a deepening mutual hostility and distrust between the two political camps in the European Union. On the one hand there were the supranational elites, politicians and voters with left-wing and liberal leanings, as well as supporters of the centralisation of the EU's system harking from the largest countries of Western Europe. On the other was the right-wing and conservative electorate, as well as a large portion of the national elites, demanding greater respect for state sovereignty and the self-determination of national democracies, usually from smaller or less influential EU countries. This latter social group seemed to be acquiring ever greater importance in the EU, but it was divided internally, and in addition weakened or corrupted by Brussels. Financial sanctions were the main instrument of coercion or bribery. Another tool of pressure was the stigmatising rhetoric, accusing political opponents of being anti-European, of not abiding by the rule of law, of populism and authoritarianism.

## CONCLUSIONS

We can notice two legal cultures in relation to EU constitutionalism. One is related to the civil law culture, i.e. the unanimous consent of Member States to revise treaties, and the other refers to the common law culture, i.e. it mainly refers to judicial activism and judicial interpretation of treaties or even the creation of new constitutional norms. When Member States found it difficult to agree on the revision of treaties, the common law culture gained in importance. However, unlike in the Member States, the practice of developing case law at the EU level did not have adequate democratic legitimacy.

Development of the common law culture was additionally strengthened by subsequent crises affecting the EU, which were also an opportunity for the expansion of EU competences in accordance with the concept of competence creep. During crises, both EU judicial and technocratic institutions, but even the European Parliament, exceeded their own powers

or the political mandate resulting from treaty law. Therefore, the legal culture of the EU during the crises became less and less law-abiding. This phenomenon was manifested in particular by EU institutions encroaching on the competences of Member States, which not only deviated from the applicable treaty provisions, i.e. EU constitutional norms, but could also violate constitutions in Member States and reduce the prerogatives of national democracies.

Under the influence of the crises, democratic control and accountability over EU decision-makers introducing an alternative formula of EU constitutionalism were also weakening. In other words, the process of constitutional change in the EU has become less and less democratic. This created an incentive for increasing arbitrariness among decision-makers in the EU, as well as flexible and discretionary application of legal norms depending on political needs. One may even be tempted to conclude that the EU legal culture increasingly accepted the politicized application of law, depending not only on the crisis situation, but above all on the political will of EU decision-makers. This group includes EU officials and judges, as well as influential politicians from the European Parliament and the largest Western European countries. Constitutional law in the EU ceased to be a framework for the political game, and increasingly became an instrument for achieving political goals and was quite instrumentally subordinated to political power.

It is therefore hardly surprising that legal relativism in the EU was increasing, including with regard to the most important constitutional norms, and at the same time, the leading constitutional values and principles in this organization were changing more and more rapidly. This included, among others: moving away from the principle of equality of states towards hierarchical relations between central and peripheral countries in the EU political system. Previous constitutional values, such as solidarity and loyalty of Member States, were disappearing. However, the culture of conditionality, legal and financial coercion in the EU was becoming stronger, which resulted directly from the hierarchization of relations between Member States. In such a situation, distrust between them also grew. Additionally, left-wing values or the interpretation of existing EU constitutional norms in line with left-wing axiology became increasingly dominant. All this had a huge impact on the legal culture in the EU.

To sum up, EU constitutionalism in times of crises was based increasingly on systemic changes introduced without an appropriate revision of the treaties by a unanimous decision of the Member States. It involved the centralization of power by EU institutions, fiscal and legal federalism, as well as the appropriation of national competences that were not transferred to the EU (i.e. the phenomenon of competence creep). This was done with the support of the largest Western European countries.

The above-mentioned changes were legalized most often by the judgments of the CJEU and the pro-European narrative of supporters of such legal culture.

Therefore, a crisis of this constitutionalism seems inevitable in the long run. There must be a conflict between the possessive constitutionalism of European judges and the defense of constitutional orders in the Member States. As EU constitutionalism has increasingly targeted national democracies, it is likely that they too may rebel against non-treaty political changes occurring in the EU. All the more so because scholars emphasized that the EU was far from a democratically constitutionalized community to exercise such great power over European nations [Auer and Scicluna 2021, 29].

#### REFERENCES

- Alter, Karen J. 1998. "Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice." *International Organization* 52, no. 1:121-47.
- Auer, Stefan, and Nicole Scicluna. 2021. "The Impossibility of Constitutionalizing Emergency Europe." *Journal of Common Market Studies* 59, Annual Review, 20-31.
- Baraggia, Antonia, and Matteo Bonelli. 2022. "Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges." *German Law Journal* 23(2):131-56.
- Beck, Gunnar. 2014. "The Court of Justice, the Bundesverfassungsgericht and Legal Reasoning during the Euro Crisis: The Rule of Law as a Fair-Weather Phenomenon." *European Public Law* 20, no. 3:539-66.
- Bieber, Roland, and Francesco Maiani. 2014. "Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?" *Common Market Law Review* 51, no. 4:1057-1092.
- Biermann, Rafael. 2014. "Coercive Europeanization: the EU's struggle to contain secessionism in the Balkans." *European Security* 23, no. 4:484-508.
- Blauberger, Michael, Anita Heindlmaier, Dion Kramer, et al. 2018. "ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence." *Journal of European Public Policy* 25, no. 10:1422-441.
- Christiansen, Thomas, and Christine Reh. 2009. *Constitutionalizing the European Union*. London: Palgrave Macmillan.
- Craig, Paul. 2001. "Constitutions, Constitutionalism, and the European Union." *European Law Journal* 7, no. 2:125-50.
- Dacin, Tina M., Jerry Goodstein, and Richard W. Scott. 2002. "Institutional Theory and Institutional Change: Introduction to the Special Research Forum." *The Academy of Management Journal* 45, no. 1:45-56.
- Delledonne, Giacomo. 2014. "The European council after Lisbon: A review article." *Perspectives on Federalism* 6(3):126-48.
- Everson, Michelle. 2015. "An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht." *European Law Journal* 21, no. 4:474-99.



- Fabbrini, Federico. 2022. "The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic." *Journal of Common Market Studies* 60, no. 1:186-203.
- Faundez, Julio. 2016. "Douglass North's Theory of Institutions: Lessons for Law and Development." *Hague Journal on the Rule of Law* 8:373-419.
- Garben, Sacha. 2019. "Competence Creep Revisited." *Journal of Common Market Studies* 57, no. 2:205-22.
- Goetz, Klaus H. 2014. "A Question of Time: Responsive and Responsible Democratic Politics." *West European Politics* 37, no. 2:379-99.
- Grimm, Dieter. 2015. "The Democratic Costs of Constitutionalisation: The European Case." *European Law Journal* 21, no. 4:460-73.
- Grimm, Dieter. 2020. "A Long Time Coming." *German Law Journal* 21, 944-49.
- Grosse, Tomasz G. 2019. "Pozatraktatowe metody rozwoju integracji: przykład Wspólnej polityki bezpieczeństwa i obrony." *Studia Polityczne* 47, no. 1:93-112.
- Grosse, Tomasz G. 2020. "A Social Europe or a more protectionist one? The single market in the aftermath of the crises." In *A 'Social Turn' in the European Union? New trends and ideas about social convergence in Europe*, edited by Jacek Kubera, and Tomasz Morozowski, 33-54. London-New York: Routledge.
- Grosse, Tomasz G. 2022a. "A left-wing offensive in the European Union, Christianity – World – Politics." *Journal of the Catholic Social Thought* 26:86-113. <https://czasopisma.uksw.edu.pl/index.php/csp/article/view/11169/10387>.
- Grosse, Tomasz G. 2022b. *Sovereignty and the political. A Study of European Integration*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości.
- Joerges, Christian. 2014a. "Europe's economic constitution in crisis and the emergence of a new constitutional constellation." *German Law Journal* 15(5):985-1027.
- Joerges, Christian. 2014b. "Three Transformations of Europe and the Search for a Way out of its Crisis." In *The European Crisis and the Transformation of Transnational Governance. Authoritarian Managerialism versus Democratic Governance*, edited by Christian C. Joerges, and Carola Glinski, 25-46. Oxford: Oxford Hart Publishing.
- Kassim, Hussein. 2023. "The European Commission and the COVID-19 pandemic: a pluri-institutional approach." *Journal of European Public Policy* 30, no. 4:612-34.
- Kilpatrick, Claire. 2015. "On the Rule of Law and Economic Emergency: The Delegation of Basic Legal Values in Europe's Bailouts." *Oxford Journal of Legal Studies* 35, no. 2:325-53.
- Kreuder-Sonnen, Christian, and Bernhard Zangl. 2015. "Which Post-Westphalia? International Organizations between Constitutionalism and Authoritarianism." *European Journal of International Relations* 21, no. 3:568-94.
- Kreuder-Sonnen, Christian, and Jonathan White. 2022. "Europe and the transnational politics of emergency." *Journal of European Public Policy* 29, no. 6:953-65.
- Kreuder-Sonnen, Christian. 2016. "Beyond integration theory: The (anti-)constitutional dimension of European crisis governance." *Journal of Common Market Studies* 54(6):1350-366.
- Kumm, Mattias. 2006. "Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called." *American Journal of Constitutional Law* 54, no. Fall, 505-30.

- McNamara, Kathleen R. 2018. "Authority Under Construction: The European Union in Comparative Political Perspective." *Journal of Common Market Studies* 56, no. 7:1510-525.
- Nicolaidis, Kalypso. 2019. "The EU's Constitutional Moment: A View from the Ground Up." In *The Rise and Fall of the European Constitution*, edited by Nicolas W. Barber, Maria Cahill, and Richard Ekins, 41-50. Oxford: Hart Publishing.
- Podgórecki, Adam. 1966. *Prestiż prawa*. Warszawa: Książka i Wiedza.
- Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Boston: Martinus Nijhoff.
- Scheppele, Kim L. 2010. "Exceptions That Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life." In *The Limits of Constitutional Democracy*, edited by Jeffrey Tulis, and Stephen Macedo, 134-43. Princeton: Princeton University Press.
- Schmidt, Vivien A. 2022. "European emergency politics and the question of legitimacy." *Journal of European Public Policy* 29, no. 6:979-93.
- Sciicluna, Nicole, and Stefan Auer. 2019. "From the rule of law to the rule of rules: Technocracy and the crisis of EU governance." *West European Politics* 42(7):1420-442.
- Sciicluna, Nicole. 2014. "Politicization without democratization: How the Eurozone crisis is transforming EU law and politics." *International Journal of Constitutional Law* 12, no. 3:545-71.
- Sciicluna, Nicole. 2018. "Integration through the disintegration of law? The ECB and EU constitutionalism in the crisis." *Journal of European Public Policy* 25(12):1874-891.
- Somek, Alexander. 2015. "Delegation and Authority: Authoritarian Liberalism Today." *European Law Journal* 21, no. 3:340-60.
- Stein, Eric. 1981. "Lawyers, Judges and the Making of a Transnational Constitution." *American Journal of International Law* 75, no. 1:1-27.
- Voltolini, Benedetta, Michal Naturski, and Colin Hay. 2020. "Introduction: the politicisation of permanent crisis in Europe." *Journal of European Integration* 42, no. 5:609-24.
- Weiler, Joseph H.H. 1997. "The Reformation of European Constitutionalism." *Journal of Common Market Studies* 35, no. 1:97-131.
- White, Jonathan. 2015a. "Authority after emergency rule." *The Modern Law Review* 78(4):585-610.
- White, Jonathan. 2015b. "Emergency Europe." *Political Studies* 63, no. 2:300-18.
- White, Jonathan. 2019. *Politics of Last Resort: Governing by Emergency in the EU*. Oxford: Oxford University Press.
- Wilkinson, Michael A. 2013. "The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union." *German Law Journal* 20, no. 2:527-60.
- Williams, Andrew. 2007. "Respecting Fundamental Rights in the New Union: A Review." In *The Fundamentals of EU Law Revisited*, edited by Catherine Barnard, 70-107. Oxford: Oxford University Press.