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THE PITFALLS OF (COMPARATIVE) CONSTITUTIONALISM FOR EUROPEAN INTEGRATION

Matej Avbelj

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Editor in Chief
Jan Komarek
Jan.Komarek@some.oxon.org

Abstract

The purpose of this paper, in contrast to the mainstream EU scholarship, is to expose the other, much less studied and potentially darker side of the EU constitutionalism. It therefore asks a question about the constitutional pitfalls for European integration. Relying on a social constructionist approach following which the current state of EU legal affairs is a product of the dominant constitutional narrative, it examines whether and to what an extent constitutionalism as a dominant narrative is itself a source at least of some of the problems that haunt the integration. The paper thus proceeds on a hypothesis that if practices of integration do not deliver as they should, this must be due to the guidance of the dominant narrative. For any practice that is based on the wrong narrative can not be but self-defeating. To prove this hypothesis the contours of the dominant constitutional narrative will be examined first. It will be explored how the integration appears in the light of the constitutional narrative and why and where the constitutional narrative has emerged from. The answers to these questions will subsequently reveal the central, unique and peculiar role that comparative constitutionalism has played in the emergence of the EU constitutional narrative. It will be demonstrated and explained how and why a constitutive dependence of the EU constitutional narrative on a very specific comparative constitutional experience actually created two at present major legal and political problems of integration. Finally, by the way of conclusion, the paper will assess why and whether the present EU constitutional narrative, in spite of its numerous drawbacks, should and could be reformed so that the very idea of European constitutionalism could be salvaged and that integration could continue its constitutional journey, albeit following a different track.

Keywords

European Integration, Comparative Constitutional Law, EU Constitutionalism, Primacy, Democratic Deficit, Social Constructionism

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The Pitfalls of (Comparative) Constitutionalism for European Integration

Matej Avbelj*

I. The Socio- legal Construction of European Integration

The social world that encircles us is a creation of human beings. It is a construction of our ideas, intellectual engagement, of our legal, political and economic wants that we strive to materialize in the 'real world out there' through our deeds and actions. As we are social beings we associate and engage in discursive interactions with our fellows. With a lapse of time discursive interactions connect the individuals with the same or similar visions in groups of mutually shared beliefs. Mutually shared beliefs of a sufficient number of people that, in pursuit of and following their beliefs, exert influence in social area[1] are then the narratives through which our social world and its constituting phenomena are described, explained and constituted. Our social world is thus the world of narratives and so it is a social reality of European integration.

The European integration, as we know and practice it today, has resulted from intersection of various narratives that have attempted to shape and guide its nature. There has been an international law narrative following which the integration is yet another familiar process under international law, a web of relationships between sovereign member states and international organization.[2] Its opposite is a statist narrative that sees the present, but certainly postulates the

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* PhD Researcher, European University Institute, Florence, LL.M. NYU School of Law. I would like to thank the participants of the Comparative Constitutionalism workshop at the 23rd IVR World Congress for their insightful comments. Comments are welcome at Matej.Avbelj@eui.eu and the usual disclaimer applies.

[1] B.Z. Tamanaha, 'A Non-Essentialist Version of Legal Pluralism', *Journal of Law and Society* (2000), at p. 319. Or as Cover has put it: *'Law is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on that line.' See* R. Cover, Nomos and Narrative, 97 *Harvard Law Review* (1983), at p. 1604.

[2] T. Schilling, 'Who in the Law is the Ultimate Umpire of European Community Law, Jean Monnet Working Paper 10/1996, www.jeanmonnetprogram.org/papers/96/9610.html, visited 13 August, 2007; A. Pellet, 'Les fondement juridique internationaux du droit communautaire', in Academy of European Law ed., C*ollected Courses of the Academy of European Law*, (Vol. V, Book 2, 1994), at p. 204; C. Leben, 'A propos de la nature juridique des Communautés Européennes', *Droits* 14 (1991).

future of integration in a form of a state of a more or less decentralized character.[3] Both of these narratives are then rejected as inadequate by a group of the so called autonomous *sui generis* narratives that perceive the integration as a novel legal and political phenomenon which is distinct both from the state as well as from the international organization and therefore requires a different approach, which was originally baptized as supranationalism. The supranational narratives, again, have many faces. They conceive of integration, following the ordo-liberal ideals, exclusively as a common market,[4] or contrastingly as a regulatory entity charged with supplementing the member states' declining regulatory capacity;[5] or as a supranational polity with constitutional-like features that would not shy away from the classical policies and objectives of the state and yet it would simultaneously remain distinct from it.[6]

This sheer number of narratives is a logical reflection of European pluralist political, economic and overall social environment. As the narratives are born out of conflicting economic and political interests and they want to shape them in return as well, their aim is to translate their normative visions about European integration in a material reality to the greatest extent possible. All the narratives want to leave a concrete, actual and practical mark on the process of integration, but only some of them have managed to achieve that to an appreciable, if still unequal, degree. For a narrative to shape a reality it has to win the hearts and minds of the (right) people. It has to become the dominant narrative, because it is ultimately through the dominant narrative that we learn about European integration, we practice its law accordingly and in that way, through our deeds and actions, its nature gradually evolves.

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[3] *See* W. Hallstein, *Der Unovllendete Bundesstaat* (Econ Verlag, 1969); G. F. Mancini, 'Europe: The Case for Statehood', *European Law Journal*, (Vol. 4, No.1, 1998).

[4] W. Mussler, *Die Wirtschaftsverfassung der Europäischen Gemeinschaft im Wandel*. Von Rom nach Maastricht (Baden-Baden 1998), at p. 58, quoted in C. Joerges, ' "Economic Order" – "Technical Realization" – "The Hour of the Executive": Some Legal Historical Observations on the Commission White Paper on European Governance', Jean Monnet Working Paper No.6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, http://www.jeanmonnetprogram.org/papers/01/012201.html, visited 13 August 2007.

[5] G. Majone, 'The European Community as a Regulatory State', in Academy of European Law (ed.), Collected Courses of the Academy of European Law, (Vol. V:1, Martin Nijhoff, 1996); and for a more refined approach: G. Majone, 'Delegation of Regulatory Powers in a Mixed Polity', *European Law Journal* (Vol. 8, No 3, Sept 2002.)

[6] P. Pescatore, *The Law of Integration*, (Leiden 1974), K.D.Borchardt, *The ABC of Community* Law, (Brussels, ECSC-EEC-EAEC, 3rd edition, 1991), at p. 9; R. Kovar, 'The Relationship between Community Law and National Law', in Commission of the European Communities, Thirty Years of Community Law, (Luxembourg 1983), at par. 17.

At present there can be little doubt about the dominant narrative of European integration. Only a brief look at the burgeoning literature and taking into account the explicit political attempt to endow the integration with a fully fledged documentary constitution suffice to understand that it is the constitutional narrative that has acquired a dominant position. Not only has constitutionalism become a dominant currency of present debates on European integration;[7] its presence is almost ubiquitous. The constitutional language has been used widely and indiscriminately so that its tag has been attached to almost everything – ranging from the Treaty as a constitutional charter to the constitution of external relations[8] and even to the constitutionalism of comitology.[9] The constitutional thesis about the nature of European integration has thus won a broad agreement across the entire ideological spectrum.[10] Its alleged potentials for providing the integration with a necessary unity and coherence, have been widely emphasized and praised alongside with its other virtuous contributions, whereas critical reflections about the potential constitutional pitfalls for integration, save for the *a priori* rejection of the constitutional approach,[11] have been largely absent.[12]

This paper, in contrast to the mainstream EU scholarship, therefore wants to expose also the other, much less studied and potentially darker, side of the EU constitutionalism. It wants to point to the pitfalls of constitutionalism for European integration. Relying on a social constructionist philosophy following which the current state of EU legal affairs is a product of the dominant constitutional narrative, it questions, what might be in fact a logical reflex, whether and to what an extent constitutionalism as the dominant narrative is itself a source at least of some of the problems that haunt the integration. There are at least two domains of EU integration: the

[7] M. P. Maduro, 'How Constitutional Can the European Union Be? The Tension Between Intergovernamentalism and Constitutionalism in the European Union', in Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, http://www.jeanmonnetprogram.org/papers/04/040501-18.html, visited 13 August 2007.

[8] M. Cremona, 'The Union's External Action : Constitutional Perspectives' in G. Amato, et al. (eds.), Genèse et Destinée de la Constitution Européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d' avenir, (Editions Bruylant, 2007).

[9] C. Joerges, ' 'Deliberative Supranationalism' – a Defence', *EIoP* (Vol. 5. 2001),

[10] Curtin, hence, claimed in 1995 that 'virtually right across the ideological spectrum there is agreement on the fact that further amendments to the TEU must take the format of a Constitution.' See D. Curtin, 'The Shaping of a European Constitution and the 1996 IGC: Flexibility as a Key Paradigm?', 50 *Aussenwirtschaft* (1995), p. 237-251.

[11] *See*, for example, P. Kirchhof, 'The Legal Structure of the European Union as the Union of States', in von Bogdandy, Bast (eds.), Principles of European Constitutional Law, (Hart Publishing, 2006), and P. Kirchof, 'Der deutsche Staat im Prozess der europaischen Integration', in Isensees, Kirchhof (eds.), Handbuch des Staatsrechts (Heidelberg, CF Mueller vol. 7, 2003).

[12] N. Walker, 'The Idea of Constitutional Pluralism', *The Modern Law Review*, (Vol. 65, 2002).

contested structural principles of integration better known as the EU constitutional conflicts and the proverbial democratic deficit that have been extremely obstinate and have endured in spite of years-long search for appropriate constitutional solutions available within the dominant narrative. The fact that solutions have not arrived might show that they have not been sought at the right place. But this question: the question of searching at the right place – has not been asked because the right place, namely the constitutional narrative, has been taken for granted as part of the dominant narrative. The dominant paradigm, if not for anything else, then for the sake of preserving its difficultly won domination, does not question itself. We will claim that if it did, practices of integration could be put in a better light. They could take a different direction than that which the dominant constitutional narrative has been so obstinately steering them to.

This can be, however, only achieved once we are able to step out of the dominant narrative's box and take an external and hence critical attitude to its teaching. It goes without saying that this is not an easy task, for as European integration is constituted by the dominant narrative, so it is our knowledge about it, and in that part we ourselves are determined by it. Escaping its bonds consequently entails questioning the very grounds on which the relationships between us and the integration stands. It requires a revision of our own very knowledge, which just because it is our own we are quite hesitant to doubt into it. Nevertheless, the challenge is equally not insurmountable. It should be part of every intellectual activity to question the established truths and critically analyze the concepts, principles, institutions, methodological truisms and overall established practices advocated by the dominant narratives in all spheres of our lives.[13] The time has come to do that with the dominant narrative of European integration.

The arguments of the paper will be unfolded in the following way. By following a social constructionist approach the paper will proceed on an hypothesis according to which the present malfunctioning of the European integration, whose most notorious, if not the most acute, examples are the constitutional conflicts and the democratic deficit, must have its roots in the dominant narrative. If the practices of integration do not deliver as they should, this must be due to the guidance of the dominant narrative. For any practice that is based on a wrong narrative can

[13] C.G. Prado, *Starting with Foucault, An Introduction to Genealogy*, (Westview Press 1995), at p. 152.

not be but self-defeating.[14] To prove this hypothesis the contours of the dominant constitutional narrative will be examined first. We will explore how the integration appears in the light of the constitutional narrative and why and where the constitutional narrative has emerged from. These will be the questions that will subsequently lead us to comprehend the central, unique and peculiar role that comparative constitutionalism has played in the emergence of the EU constitutional narrative. It will be demonstrated and explained how and why the constitutive dependence of the EU constitutional narrative on a very specific comparative constitutional experience actually created two at present major legal and political problems of integration. Finally we will try to answer the questions why and whether the present EU constitutional narrative, in spite of all of its drawbacks, should and could be reformed so that the very idea of European constitutionalism could be salvaged and that integration could continue its constitutional journey, albeit following a different track.

II. The Contours of the EU Constitutional Narrative

We suggest approaching the EU constitutional narrative in three steps. First we are going to examine how European integration appears in the light of the constitutional narrative. This is the so called what question: pursuant to the constitutional narrative what does the integration stand for? Secondly we are going to inquire into the reasons for the emergence of the constitutional narrative. This is the why question: why has the narrative emerged? Finally, we are going to stop by the whence question, where is the constitutional narrative coming from?

II.1. The What Question

What does European integration, pursuant to the constitutional narrative, stand for? This question can be answered best by focusing on three premises of integration: the structural, the judicial and the substantive premise. The structural premise relates to a legal nature of the relationships between the member states and the European Union.[15] The judicial premise touches upon the relationships between the European Court of Justice and the courts of the member states. The

[14] C. Taylor, *Philosophy and the Human Sciences, Philosophical Papers 2,* (Cambridge University Press, Cambridge 1985), at p. 109.

[15] Term European Union encompasses here both Community and the Union, however, in full awareness of the oversimplifications this approach entails.

substantive premise addresses the substance of the aforementioned relationships and their objectives.

As to the structural premise, the constitutional narrative submits that legal relationships between the member states and the European Union have undergone a substantial transformation.[16] From the relationships governed by the traditional international law they evolved into fully fledged constitutional relationships. The originally international law-based founding treaties of the Union have been constitutionalised. Their constitutional character thus nowadays stands beyond doubt[17] and the overall relationships between the member states and the European Union are indistinguishable from analogous legal relationships in the constitutional federal states.[18]

> '*There is an allocation of powers, which as has been the experience in most federal states has often not been respected; there is the principle of the law of the land, in the EU called direct effect; and there is the grand principle of supremacy every bit as egregious as that which is found in the American federal constitution itself.*'[19]

This has important consequences for the position and status of the member states as sovereign states. Provided that sovereignty as a concept preserves any relevance, the member states have by the transfer of their sovereign rights to the Union significantly diminished theirs, if they retain it all.[20]

Alongside with the transformed structural premise the judicial premise of integration has seen a similar evolution. The European Court of Justice, as a constitutional court of the integration, has been credited for its key and heroic role in the process of constitutionalization. Its judicial doctrines of supremacy, direct effect, implied powers and pre-emption, reliance on the teleological interpretation uncharacteristic of the international law adjudication, and above all a construction of a direct link with the individuals whose rights the Court's jurisprudence has been

[16] J.H.H. Weiler, 'The Transformation of Europe', 100 *YALE L.J.* (1991). at p. 2403.
[17] K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *American Journal of Comparative Law* 205 (1990).
[18] J.H.H. Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg', in Nicolaidis (ed.), The Federal Vision, Legitimacy and Levels of Governance in the United States and the European Union, (OUP 2001), at p. 56.
[19] Id. and J.H.H. Weiler, 'European Neo-constitutionalism: in Search of Foundations for the European Constitutional Order, *Political Studies* XLIV (1996), at p. 517
[20] I. Pernice, 'Multilevel Constitutionalism in the European Union', *European Law Review* 27 (5) (2002), at p. 514.

designed to protect, have been the piecemeal judicial achievements that in the eyes of the constitutional narrative together contribute to a complete constitutional mosaic of integration. In judicial terms the latter essentially depends on a co-operation between the European Court of Justice and the national courts, which are presented as equals, but with a clear tendency of the European Court of Justice being more equal than the municipal courts. The decisions of the former are namely postulated as an infallible benchmark that requires an unconditional compliance in all cases and against which Euro-friendliness or pro-Europeaness of the national courts is measured. Any potential divergence of national jurisprudence from the ECJ's judicial orthodoxy, be it for a whatsoever reason, is accordingly regarded by the constitutional narrative as unfortunate,[21] regrettable,[22] aberrational or sometimes even pathological.[23]

In substantive terms, following the constitutional narrative, the European integration has a double-layered constitution. The first and more developed layer is the economic constitution,[24] a type of European *Wirthschaftsverfassungsrecht*,[25] which encompasses the European common market with four fundamental freedoms based on constitutional principles of prohibition of discrimination and distortion of competition. It is here that the constitutional narrative, above all, emphasizes the role of the ECJ's constitutional doctrines in safeguarding the uniformity and efficiency of Community law conceived as the indispensable means for preserving viability of a truly common market. Without supremacy, denoting hierarchy of norms whereby Community law as the law of the land trumps conflicting national norms,[26] direct effect and the doctrine of pre-emption the common market would inevitably result in an uncontrolled fragmentation and the economic constitution would be lost.[27]

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[21] J-V. Louis, *The Community Legal Order*, (European Commission, 3rd Ed., Lux 1993) at p. 169.
[22] G. Bebr, 'How Supreme is Community Law in the National Courts?', 11 *Common Market Law Review* (1974).
[23] M.P. Maduro, 'Contrapuntcual Law: Europe's Constitutional Pluralism in Action', in WALKER ed,, Sovereignty in Transition (Hart 2003), at 503.
[24] M.P. Maduro, *We the Court, The European Court of Justice and the European Economic Constitution, A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, Oxford – Portland Oregon 1998) and J.B. Cruz, *Between Competition and Free Movement, the Economic Constitutional Law of the European Community*, (Hart Publishing, Oxford – Portland, Oregon 2002).
[25] Kamiel Mortelemans, Community Law: More than a Functional Area of Law, Less than a Legal System, Legal Issues of European Integration (1996), at p. 35.
[26] *See* Weiler, *supra* note ?, at 57, C. Timmermans, 'The Constitutionalization of the European Union', *Yearbook of European Law* 21 (2002), at p. 3.
[27] D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', *Common Market Law Review* 30, (1993), at p. 46; also: C. Lyons, 'Flexibility and the European Court of Justice', in de Burca, Scott (eds.),

The second constitutional layer is the EU's political constitution in the making. The European Union is more than a mere economic integration, more than an international agreement on free trade, it is a constitutional polity which is not structured just around economic imperatives of a common marketplace, but it possesses its own political identity and values. The political constitution thus addresses the democratic credentials of European integration at whose core are the individuals as the citizens of the European Union, rather than mere economic operators or the factors of production which would be instrumentally related to the objectives of the common market.[28] This requires the institutions of the Union to be designed in a manner in which a full representation of the interests of its citizens and transparent governance fulfilling their needs will be ensured. The institutional organization of a state based on the separation of powers between the legislative, executive and judicial branch serves as a role model. Only in that way, provided there is an appropriate policy of fundamental rights in place, the European Union's legitimacy as a polity could be achieved.[29]

II.2. The Why Question

Now, when we have seen how European integration appears in the eyes of the dominant constitutional narrative it is necessary to make a step back and inquire into the reasons for which the integration vested itself in the constitutional garments. These reasons can be, however, fully grasped only if we know what had been going on narrative-wise before the constitutional narrative emerged. Its evolution namely did not occur in an uncharted terrain, but in one which was already crowded with the other narratives.

The beginnings of constitutional narrative can be traced back to the very early days of integration. Already in the 1960s the Treaty of Rome was looked upon as a constitutional

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Constitutional Change in the EU: From Uniformity to Flexibility (Hart 2000), at p. 109: '[…]uniform law[…]constitutes the uniqueness of the supranational system[…]'.

[28] This is the idea of 'Civis Europeus sum' espoused by AG Jacobs in Case C-168/91 Christos Konstantinidis, March 30, 1993, Par. 45-46 of his opinion, which has subsequently won a broad endorsement in the EU scholarly literature as well as in, by today well advanced, judicial practice of the ECJ concerning citizenship.

[29] P. Alston and J.H.H. Weiler, 'An 'ever closer union in need of a human rights policy: The European Union and Human Rights', Harvard Jean Monnet Working Paper 1/99, http://www.jeanmonnetprogram.org/papers/99/990101.html, visited 13 August 2007.

instrument, as the first chapter in a constitution for Europe [30] - a view that was at the time endorsed not just by various scholars[31] but even by the Italian Constitutional court.[32] However, these early years of integration did not manage to get beyond the occasional emergence of constitutional terminology. This was namely still the era of the supranational narrative that was striving and finally also managed to distinguish the integration from the general international law and to present it as a novel, *sui generis*, supranational phenomenon.

But, in the beginning of the 1980s the supranational narrative faced a sudden and a deep change of a paradigm. The novel legal practices of European integration: the principles of primacy, direct effect, human rights protection, implied powers and others that the supranational narrative conceived of as *sui generis*, supranational in nature and held them as profoundly different from the international law were now simply baptized as fully constitutional. Subsequently attention turned away from showing how different Community law was from the international law to emphasize how constitutional in nature it has and it still should become. The constitutional language thus spread like fire and that even before the European Court of Justice had ever used the word constitution which would be anyhow in vain sought in the text of the founding Treaties.[33]

This brief discussion shows that constitutional narrative emerged from the battlefield between the supranational and international law narratives. The former seemed to have defeated the latter and European integration was established as a *tertium* – as a novel phenomenon between the state and international organization. This being so, why was it then necessary to convert the integration's supranational character in a fully fledged constitutional one? Three theses, by no means mutually exclusive, offer themselves to answer this question.

[30] W. Hallstein, 'First General Report', point 28, quoted in Commission of the European Communities, *supra* n. 6.
[31] A. W. Green, *Political Integration by Jurisprudence*, (Leyden, 1969); W. Feld, *The Court of the European Communities*, (The Hague: Nijhoff, 1964).
[32] Italian Constitutional Court: Frontini v. Ministero Delle Finanze Case 183/73 [1974] 2 CMLR 372, *see* also Ophüls, 'Die Europäischen Gemeinschaftsverträge als Planungsverfassungen', in Kaiser ed., Plannung I, at p. 299; and H.J.Hahn, *Funktionenteilung im Verfassungsrecht Europäischer Organisationen*, (1977); Pescatore, *supra* n. 6.
[33] It was only in 1986, followed by the decision in 1991, that the Court explicitly proclaimed the Treaty the basic Constitutional charter of the Community. ECJ C-294/83 Les Verts, par. 23 and Opinion 1/91 [1991] E.C.R. I-6079; [1992] 1 C.M.L.R. 245.

The first is the reinforcement thesis. It explains the institutionalization of constitutional narrative as a calculated strategic move expected to bolster the integration and (in a more cynical version) the interest groups associated with it. The supranational narrative intensively promoted the argument that the very existence of European integration is inherently contingent on the obedience to the EU law. This was not a coincidental strategy, rather a deliberate choice in all due awareness of the role of law in the European social environment. The supranational narrative was cognizant that the law creates and enjoys a special habit of obedience and if the fate of integration was tied to it, then ensuring the obedience to law, which was supposed to be inherent to the law itself, would foster the integration.[34] Every pro-integrationist move would be then considered as being in line with and justified by the law, whereas any non-compliance with the integrationist mantra would be perceived as against the law and as such unacceptable. The integration would be thus heading exclusively one way towards an ever closer union.[35]

For this very reason the supranational narrative also labored so hard to sever the EU law from the international law's embrace. It was well aware that different types of laws produce different habits of obedience. Since the international law has always been considered as a foreign law whose *de facto* application depends on the domestic law which comes with a correspondingly lower degree of compliance,[36] the supranational narrative coined the concept of supranational law to reinforce the integration's cause. But this move soon appeared not to be enough. While the integration was saved from the international law's embrace, albeit not completely, the political limbo following the empty seat politics and the concurrently not perfect compliance of the national highest courts with the ECJ's doctrines, created an impression that something more than an amorphous concept of supranationalism[37] would be necessary. It appeared that the supranational narrative and a related conceptualization of a integration as a *tertium* would not suffice to preserve its overall viability and especially the autonomy of Community law.

Therefore the shift to constitutionalism was necessary. Since the latter proved to be a key factor for ensuring unity of a nation state it was on the basis of its know-how and related normative,

[34] Weiler, *supra* n. 16, at p. 2422.
[35] Curtin, *supra* n. 26, at p. 67.
[36] Weiler, *supra* n. 16, at. 2422.
[37] J.H.H. Weiler, 'The Dual Character of Supranationalism', 1 *Yearbook of European Law* 267 (1981), at p. 268.

even ideological, appeal expected to be the best guarantee for the successful performance of this task in the supranational environment as well. As one commentator plastically observed, constitutionalism was therefore primarily employed in the European integration to prevent the States from evading the interests of the broader European Community whenever such interests conflicted.[38] Following the reinforcement thesis, the constitutional narrative was thus adopted as a means for ensuring the viability of integration, preventing it from returning to the international law's embrace and to strengthen it on a longer run.

The two other theses do not dispute that constitutional narrative emanated from the supranational narrative and against the international law narrative, but they try to shed a different light on why the transition to constitutional narrative actually occurred. Following the inevitability thesis the shift to constitutionalism was not a strategic move emboldening the integration and serving the corresponding supranational interests, it was rather a necessity, an inevitable act. Accordingly, the constitutional narrative is a discourse of imagination and conceptualization,[39] which is in its capacity simply constitutive and therefore indispensable for any polity – European integration included. Hence, there can be no polity without constitutionalism, since it can not constitute itself otherwise, and there can not be constitutionalism without a polity, without a site where the constitutional discourse can take place, constitute and reshape it.[40]

The lacuna thesis, again, explains the reasons for the emergence of the constitutional law narrative differently. It links the constitutional narrative with the epistemological gap. The European integration as it has developed through a legal and political interaction between the EU and national institutions admittedly, no matter how worn out this sounds nowadays, does not fit exactly into any of the pre-established categories of social organization. It is an unidentified political object.[41] The ECJ made a claim that Community constitutes a new, autonomous legal order, independent both of the Member States as well as of the international law and the national

[38] Maduro, *supra* n. 7, at p. 6.
[39] Id.
[40] Walker, *supra* n. 12, referring to J.H.H. Weiler, Constitution of Europe, (CUP 1999) at p. 223.
[41] As it was called once by Jacques Delors.

highest courts accepted it as plausible.[42] This led to an unique situation in which an autonomous, albeit not statist, legal order co-existed with the Member states' legal orders independently of the international law – the situation that neither clearly resembled that of a state or of an international organization. In the circumstances where the epistemic resources which would confer theoretical and practical order on integration were low, which in a combination with the reinforcement thesis explains the demise of supranationalism, the natural reaction and the most convenient way out of the epistemic gap was to seize those epistemic resources that were at hand. As the Community and the national judicial practice evolved so that Community law was recognized as distinct from the international law, logical conclusion flowing from the binary entrapment between the international and constitutional law, in which our Westphalian world is inevitably caught, was to use the constitutional language.

Among these three theses the inevitability thesis stands on the shakiest grounds. Inevitably it has a problem with its inevitability. While it makes clear that once a choice for a polity is made it is already a constitutional choice (and vice versa: the choice for constitutionalism is also a decision to build a polity) and while this might be a perfectly plausible proposition, it fails to explain why *that* choice should be made in the first place. In other words, the inevitability of the inevitability thesis is about the inevitable interdependence of a polity and constitutionalism and not about the inevitable emergence of the constitutional narrative. The latter, as everything in our lives, emerged for a reason, but the inevitability thesis does not provide for it and thus in terms of its persuasiveness falls behind the other two theses that delineate the reason clearly. They explain the emergence of constitutional narrative either as a deliberate, well reckoned choice with the aim of bolstering the integration or contrastingly as an inadvertent move flowing from the epistemological gap that had to be quickly and somehow closed. Both of these reasons are equally plausible and can find their affirmation in practice. At the same time they are not mutually exclusive. We can easily imagine that constitutional language was first of all used more or less automatically because European integration outgrew its initial international character, (if it was not based on the international law, it had to be structured on the constitutional law), and it

[42] For a review of the applicable case law *see* A. Oppenheimer, *The Relationship between European Community Law and National Law: the Cases*, Vol. 1 and 2. (Cambridge University Press 2003, Cambridge) and Monica Claes, *The National Court's Mandate in the European Constitution*, (Hart 2006).

was only subsequently realized that the employment of constitutionalism could also serve some more instrumentalist objectives such as emboldening the integration.

II.3. The Whence Question

However, if the answer to the question of the reasons for the emergence of constitutional narrative can not be obtained at least without a tiny degree of speculation and it therefore remains partly ambiguous, the whence question poses much less of a difficulty. It is clear that as integration initially had not been conceived of in constitutional terms the constitutional narrative had to come from an environment external to it. It had to be borrowed from somewhere and modeled after a certain comparable constitutional experience. With a bit of historical memory it is not difficult to guess which that comparative constitutional experience could be, for there was not much of a choice.

As the post WWII Europe was burnt down to ashes and ripped by the iron curtain amidst of the looming cold war its natural ideological ally and consequently epistemological role model was the United States of America. The latter had by the time a long constitutional federal tradition, which was in the light of European dreadful experience with two consecutive wars and growing communist threat considered a success story and an example worth following. This was so despite the many tainted features of American constitutionalism related to its vestiges of the past which at the time simply somehow fell out of the mainstream perception also thanks to one of the most progressive Supreme Courts in the American history. The Warren court was a direct inspiration for many European constitutional courts, initially that of Germany, but after the fall of the Berlin wall in particular for the new democracies of the Central and Eastern Europe.[43]

It was thus the American constitutional law which was long in the post WWII years, and it admittedly remains so nowadays though to a smaller extent, considered as the paradigm of constitutionalism and of a non-unitary, federal organizational structure. As such it was full of epistemological resources that proved right at hand for the EU constitutional narrative. It was therefore with a background ideal of the American constitutional federal state that European

[43] For a broad overview, *see*: H.N. Scheiber (ed.), *Earl Warren and the Warren Court: The Legacy in American and Foreign Law*, (Lexington books 2006).

integration was approached by those who cast it in constitutional terms. This was only the more so due to the clear personal link between the American constitutionalism and the nascent EU constitutional narrative. The early proponents of the EU constitutional narrative were namely themselves at least with one foot, if not with both of them, standing on the American constitutional soil. Indeed, the foundations of the EU constitutional narrative were laid by the American constitutional scholars. It is, as Weiler famously noted in his fully self-characteristic picturesque style, the house that Eric built.[44]

"*Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and by the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe*."[45]

It was thus a scholar from Michigan who initiated the constitutionalisation thesis that was later taken over and driven to its perfection by Joseph Weiler who has also openly worked within the American constitutional tradition. His monumental piece *The Transformation of Europe*, later included in the book with an indicative title: *The Constitution for Europe*, became the cornerstone, almost a sort of Bible of the EU constitutional narrative, openly argued that structural principles underlying the relationship between the Member States and the Union were as egregious as that found in the American federal constitution itself.[46]

However, constructing the constitutional nature of European integration against the backdrop of the US constitutionalism was not limited just to some isolated, though influential, cases. The very concept of constitutionalization is of Anglo-Saxon origin[47] and a special relationship to the American constitutional culture is explicit in the most influential English scholarly literature which has often tended to take the constitution and the US Supreme Court as its implicit model.[48]

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[44] J.H.H. Weiler, 'The Reformation of European Constitutionalism', *Journal of Common Market Studies*, Vol. 35, No.1, (1997), at p. 101.
[45] E. Stein, 'Lawyers, Judges and the Making of the Transational Constitution', *American Journal of International Law*, Vol. 75, No. 1, (1981), at p. 1.
[46] J.H.H. Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg, in NICOLAIDIS ed., THE FEDERAL VISION, LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION, OUP 2001, at 56.
[47] J.P. Jacqué, 'Cours general de droit communautaire', Academy of European Law, Collected Courses of the Academy of European Law (1990), at p. 265.
[48] F. Snyder, 'Constitutional Law of the European Union', in Academy of European Law (ed.), Collected Courses of the Academy of European Law, (1995), at p. 58.

One of the biggest projects which had a wide and strong impact on the epistemology of EU law: the *Integration through law*, was thus explicitly aimed to examine the role of law in the European integration using the United States' federal system as a comparative point of reference.[49] While the authors of the project never failed to emphasize the differences between the US and the nascent EU legal and political structure, they simultaneously did not hesitate to add that the letter despite its non-statal character did in fact closely resemble the features found in the federal state experience, with an emphasis that especially in the constitutional field the examples were abound.[50] Further influential work was done by Lenaerts, presently the ECJ judge who has in a number of articles labored on the comparison between the EU and the United States, borrowing the latter's constitutional federal features to explain and reinforce the EU constitutional developments to eventually arrive at the conclusion that the constitutional character of the EC Treaties stands beyond doubt.[51] All these and other examples[52] could not but prove that the EU constitutional narrative has been from its outset on closely dependent on a comparative method. Since this could not come without important consequences for the present state of EU affairs, we turn in the next step to explore type, role and the results of the comparative constitutionalism in the legal construction of European integration.

III. The Pitfalls of Comparative Constitutionalism for European Integration

Comparative constitutional law has been traditionally regarded in two different ways depending on the role it was expected to play. In one version it is a pure science, which is concerned exclusively with a comparative methodology for the sake of comparison itself, without any ambition of applying the hence obtained results in practice. In contrast, the other more widespread conception emphasizes the applicative side of comparative constitutionalism. The

[49] Cappelletti et. al., 'Integration Through Law: Europe and the American Federal Experience: A General Introduction', in Cappelletti et al. (eds.), Integration through Law, Vol. 1, Book 1, (Walter de Gruyter, Berlin 1985) at p. 11.
[50] Id. at p. 12.
[51] K. Lenaerts, 'The Judicial Umpiring of American Federalism and European Supranationalism: Some Comparative Thoughts', in Federalism: A U.S. – European Comparative View, Brussels, Center for American Studies (1984); K. Lenaerts, 'Two Hundred Years of U.S. Constitution and Thirty Years of EEC Treaty. Outlook for a Comparison', (Brussels, Story/Kluwer Law and Taxation, 1988), Lenaerts, *supra* n. 17.
[52] S. J. Boom, 'The European Union after the Maastricht Decision: Is Germany the "Virginia of Europe?'. Jean Monnet Working Paper 5/1995, www.jeanmonnetprogram.org/papers/95/9505ind.html. M. Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court', Benjamin N. Cardozo School of Law, Working Paper No. 157, http://ssrn.com/abstract=917890.

comparative findings – as practices worth following or avoiding – can be used as insights for the drafters in the preparatory works leading to the adoption of the legislation; and/or can be employed by the courts in their judicial decision-making.[53]

These different functions of comparative constitutional law are then traditionally subject to wide-ranging, sometimes weary, but certainly well-known debates about the pros and cons of the use of comparative constitutional law. Its proponents, for example, claim that comparative constitutional law has become a must in a globalizing world, which is based on universal human rights where people and institutions in different constitutional systems find themselves in comparable situations and therefore can and have to learn from each other. Unless we decide to abide by parochialism and develop isolationist, self-sufficient and conceited attitude, which is, if not impossible, at least self-defeating in the contemporary world, engaging in the discourse across the constitutional systems becomes inevitable.[54] On the other hand, those who refrain from succumbing to the alleged virtues of the comparative constitutional law caution that communities have different ways of leading their lives, they strike different balances between similar values and that unreflective borrowing from one environment into another could come with negative consequences. There is a chance of hegemonization, of imposing alien values, or of using comparative examples in an instrumental, ideological way for the attainment of narrow political or judicial goals. Finally, translation from one environment into another can come with distortion of a legal transplant for it might be misapprehended by the borrowing outsider.[55]

However, in case of European integration, especially at an early stage of emergence of the constitutional narrative, the comparative constitutional law beside its above described methodological and applicative functions performed another one, which is traditionally not associated with it. Reliance on comparative constitutional law has not been primarily of a scientific concern and neither was it essentially meant to provide the EU courts and lawmakers with comparative constitutional guidance to optimize their work. Comparative constitutionalism

[53] For a comprehensive account *see* M. Tushnet, The Possibilities of Comparative Constitutional Law, 108 *Yale Law Journal* at p. 1225.
[54] Id., A.M. Slaughter, 'A Global Community of Courts', 44 *Harvard International Law Journal* (1991).
[55] Seth F. Kreimer, 'Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing', *U. Pa. J. Const. L.* 640, A.M. Slaughter, 'A Global Community of Courts', 44 *Harvard International Law Journal* (1991).

rather figured as an epistemological source of the constitutional nature of integration. It was used as a means for closing a yawning epistemic gap that was created by the novel practices. In that it was not employed in a piecemeal fashion and after a careful weighing of arguments pro and against certain constitutional transplants, as the traditional comparative constitutional law science would have expected, rather it resulted in sort of a wholesale import of a very particular, i.e. American constitutional idea. The comparative American constitutional experience was thus taken over as a mindset, as an intellectual pattern underlying the EU constitutional narrative which has won a dominant position in the legal construction of European integration.

The result is well known: we have demonstrated how European integration appears in the light of the constitutional narrative. But what we have not exposed yet, is that a hence developed EU constitutional narrative misrepresented and distorted the practices of integration – and has through that, we will claim, created its two major problems. The first relates to the structural principles of integration, more precisely to the question of legal implications stemming from the principle of primacy of Community law, whereas the second concerns the conundrum of the proverbial European democratic deficit.

III.1. Pitfall No.1: Principle of Primacy and the Constitutional Narrative

As far as the principle of primacy of Community law is regarded the constitutional narrative conferred on it a federal constitutional reading completely resembling the supremacy doctrine as developed by the US Supreme Court in the famous case *Marbury v. Madison*.[56] This reading, however, simply disregards both the nominal features as well as the content of the doctrine as espoused by the ECJ. While the latter has almost unexceptionally, save for one case which most likely due to a mistake in translation contains the word supremacy,[57] ruled that Community law has primacy and therefore takes precedence in application over the conflicting national law, without impinging on the latter's validity because it is part of another legal order and thus in an

[56] Marbury v. Madison (5 U.S. (1 Cranch) 137,1803.

[57] It has been argued that ECJ has used the language of supremacy in its judgment only once, *see* C. Mayer, 'Supremacy - Lost?', *German Law Journal* (Vol. 6, No, 11, 2005), at p. 1498. This was in the case C-14/68 Walt Wilhelm, 1969 E.C.R. 1, par. 5. However, the use of language in this case amounts more to the slip of the tongue as to a genuine espousal of an hierarchical concept of supremacy. Whilst the Court claims that "*in conferring on a Community institution the power to determine the relationship between national laws and the Community rules on competition, confirm the* ***supremacy of Community law***", it emphasizes in various parts of the same judgment that this confirmation of supremacy means that "*Community law takes precedence*."

exclusive domain of its courts,[58] the dominant constitutional narrative has following its comparative ideal almost consistently used the term supremacy[59] denoting the hierarchical superimposition of the EC law over the subordinated laws of the Member States.[60]

This reading, which due to the dominant position of the constitutional narrative has not remained only at the level of reading, but it rather figures as the right and broadly accepted understanding of the relationship between EU and national laws, of course, could not but lead to the so called constitutional conflicts. Pursuant to the constitutional narrative these consist of practices of national constitutional courts which refuse to switch from the national rule of recognition, namely from the national constitution as a supreme legal act of the national legal order, to the EU Treaty as the new highest constitutional act. Despite that from the jurisprudence of the ECJ follows no such requirement of switching between the Grundnorms, the dominant narrative created the appearance that it does.[61] This stirred the national constitutional courts which are first of all - as national courts - unable, but also unwilling, to ground their jurisdictional standing and the ensuing legitimacy in the EU treaties, even if they function as a constitutional charter. As a result they came up with a stronger constitutional language invoking the need for protection of national sovereignty and the preservation of the essence of the national constitutions.[62] But the stronger the language the national courts used, the more the dominant narrative insisted on the supremacist character of primacy (and other structural principles), which in turn led only to more defensive reactions of the national courts and consequently more insistence on supremacy by the dominant narrative…

The latter due to its inherent reliance on the comparative constitutional experience of the United States therefore created fertile grounds for legal and political tensions and constitutional conflicts

[58] ECJ C-10-22/97, Ministero delle Finanze v IN.CO.GE.' 90 Srl [1998] ECR I-6307 and ECJ C-185/96 Commission v. Greece, Par. 30.
[59] As Snyder wisely observed this has been probably due to the cultural link to the American constitutional environment. Snyder, *supra* n. 48, at p. 58. For a confirmation see Rosenfeld, *supra* n. 51, at 22.
[60] Pescatore, *supra* n. 6, Weiler, *supra* n. 18, at p. 57; E. Grabitz, Gemeinschaftsrecht Bricht Nationales Recht, (Ludwig Appel Verlag, Habmurg 1966).
[61] M. Kumm, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty, *ELJ* (Vol. 11, No. 3, May 2005.)
[62] See BVerfG Case Nos 2 BvR 2134 and 2159/92 Maastricht Treaty 1992 Constitutionality Case, Decision of the Danish Supreme Court on the Maastricht Treaty, Decision No 92-312 DC Re Treaty on European Union, 1992 Maastricht II Conseil Constitutionel, p. 399, Decision No 1236/92 Spanish Constitutional Court, Re Treaty on European Union, 1st July 1992; p. 712.

in integration. Because it was epistemologically blinded or perhaps even purposively, depending on the choice of the theory explaining its emergence, the constitutional narrative failed to see that primacy is not about supremacy and consequent hierarchical subordination of national legal orders, rather it is about the co-existence of plurality of legal orders where the national ones recognize to the EU law priority in the application within the scope of its competences for the sake of its effectiveness and ultimately for the very viability of integration as such. On this understanding, which is correct because it is affirmed both by the practice of the ECJ and by the national constitutional courts,[63] there is no need for any constitutional conflicts because no legal order is threatened by supremacy claims that could lead toward its subordination, to the subsequent loss of its autonomy and potentially even to its devolution. This understanding has been, however, to the integration's detriment suppressed by the dominant constitutional narrative that due to its epistemological roots in the American constitutionalism read in the integration an hierarchical constitutional structure which consequently, as an element alien to the integration's nature, functioned as an irritant provoking a conflicting atmosphere.

III.2. Pitfall No. 2: Democratic Deficit and the Constitutional Narrative

Another product of the dominant constitutional narrative is the propagation of the impression, which is nowadays almost unexceptionally taken for granted, that the European integration is inadequate in democratic terms. It is said to be democratically deficient, *inter alia*, due to the inexistence of a system of separation of powers, due to the alleged prevalence of the executive branch and consequently only limited role of the parliament, due to the overall lack of transparency and consequent lack of accountability in its governance, and on account of the too-intrusive and too-expansive character of jurisprudence of its overly activist Court. Additionally, the EU is portrayed as being increasingly governed by the bureaucrats and it is therefore too remote from the people, who can not influence its policies and identify with them and therefore simply feel alienated.[64]

[63] ECJ C-10-22/97, Ministero delle Finanze v IN.CO.GE.' 90 Srl [1998] ECR I-6307 and Opinion 1/2004, Tribunal Constitucional on the Treaty establishing a Constitution for Europe, December 2004, in 42 CMLRev 1169, 2005.
[64] *See* M. Avbelj, 'Can the New European Constitution Remedy the "EU Democratic Deficit"**?',** *EUMAP On-line Journal*, http://www.eumap.org/journal/features/2005/demodef/avbelj/, visited 13 August 2007.

However, the question which is rarely, if ever, raised in connection with this proverbial democratic deficit, but which is essential to the understanding of what the latter really stands for, is a question of a criterion against which European integration is measured so that it appears democratically deficient. Given the epistemological roots of the EU constitutional narrative, which were revealed above, the criteria for measuring the adequacy of democracy are clearly those of a constitutional federal state. In that way the democratic deficit should be consequently best understood as a discrepancy between the current state of democracy in European integration and an ideal model of a statist federal democracy. But once the problem of a democratic deficit is framed in these terms, and this is essentially what the constitutional narrative does, then its continuous persistence in spite of numerous remedial attempts appears rather unsurprising. For, as it is, at least implicitly if not explicitly, envisaged by the constitutional narrative, the integration could only overcome the democratic deficit completely if it appropriated the features of a federal state.

But this is nothing more than clearly and *ex ante* self-defeating expectation. It pokes the integration precisely in its most sensitive part. One of the ever present and perhaps the most acute anxieties shared by the people of the member states, which is probably not infrequently and for a reason encouraged by the national governments themselves,[65] is that integration is drifting towards a state-like structure at the expense of the existing member states. Now, the constitutional narrative's strategy of remedying the democratic deficit in pursuit of the federal statist ideals does just that – it is driving the integration in a direction its people (and above all the national governments) fear it most. Hence, there is no way such a strategy could be successful. We just need to recall a recent experience with the Treaty Establishing the Constitution for Europe. The latter put the objective of remedying the democratic deficit on the top of its agenda. It adopted an explicit constitutional character and implemented a wide range of solutions that were expected to bring the existing level of democracy in tune with the desired one.[66] However, it eventually nevertheless failed to persuade the French and the Dutch people, simply for a reason of choosing not just wrong means, but first of all wrong ends.

[65] Id.

[66] For example, it incorporated the Charter of Fundamental Rights to strengthen the principle of rule of law, it rendered the relationships between the EU institutions more transparent; it simplified the classification of legal acts; it increased the power of the European Parliament and strengthened the principle of subsidiarity by involving the national parliaments in the EU law-making procedure, it emphasized the participatory democracy, etc.

The constitutional narrative due to its epistemological grounding in the aforementioned comparative constitutional experience was again either blind or it deliberately failed to see that a discrepancy between the type of democracy (and means of democratic legitimation) in the European Union and in the federal constitutional state should not have been construed as a deficiency, but simply as a difference. Failing to do that the constitutional narrative created an unsound and wholly artificial atmosphere in which the European integration is in a permanent pursuit of a type of democracy that it can never and moreover it should never achieve. Similarly as in the case of the distorted conveyance of the primacy doctrine which itself generated the unnecessary constitutional conflicts, the constitutional narrative's conception of the democratic deficit has created a false dilemma which is pushing the integration in a direction that it would least like to take and thus only creates new grounds for its potential setbacks.

IV. Heaving Learned the Comparative Lesson: *Quo Vadis* the EU Constitutional Narrative?

These two examples have demonstrated that the EU constitutional narrative's constitutive and inherent reliance on a comparative constitutionalism, more concretely: on the American constitutional experience, has introduced unwelcome and unnecessary tensions in the process of integration. The constitutionalisation thesis itself, as demonstrated above, thus gave birth to the constitutional conflicts resulting from the supremacist reading of primacy; and to the democratic deficit conundrum growing out of the alleged discrepancy, instead of difference, between the EU's and federal state's democracy. The negative consequences of comparative constitutionalism, at least two of them, are thus clearly revealed. What remains to be questioned is whether they could have been avoided before or whether and how could they be eschewed at least now.

In asking that question we should not forget that comparative constitutionalism in case of emergence of the EU constitutional narrative performed a unique, i.e. constitutive function. It served as its epistemological source, providing the alphabet following which the EU constitutional language could develop. In that way, once the integration was to embark on the constitutional path, the reliance on the American comparative constitutional experience was practically unavoidable. As explained above, there was not much of a different choice. However,

what was not unavoidable, or so it seems, was a subsequent staunch, rigid and immutable adherence to it. The EU constitutional narrative, until very recently and still only with a marginal change in its approach, has remained unconditionally devoted to the idea of constitutionalism that is closely informed by the statist federal ideals. Despite the fact that the EU practices have not entirely matched, or have been even clearly and perhaps deliberately different from the constitutional practices in the federal states, the constitutional narrative failed to take that into account and to draw some different lessons from it. It simply has not developed a kind of (self-) reflective dimension that would enable it to construct a constitutional language that would better fit European integration. It has been probably due to the lack of (constitutional) imagination, but even more likely due to the prior tacit, albeit wrong, assumption, that European integration can survive exclusively in a constitutional federal state-like manner, which again brings us back to the reinforcement thesis, that an unreflective, even uncritical, reliance on a comparative constitutional paradigm of a federal state endured.

This last thought brings us to the final question of this paper. Given that the EU constitutional narrative, as it currently stands, has been so deeply and decisively constructed following the American constitutional and hence statist ideal, is it then at all possible and even desirable to develop a constitutional narrative that would be freed of the inherent statist underpinnings to make it fit the special, we would claim, pluralist nature of European integration?

If we start with the desirability part of the question first, it is certainly true that pragmatic considerations discourage us from debunking the constitutional narrative and to start our search for a better non-constitutional narrative from scratch. As we have seen the constitutional genie has escaped the integration's bottle a long time ago and now dominates its commonplace perception. Launching a full-scale attack to prove its inappropriateness for integration could amount to a futile tilting at the windmills. Moreover, there is no *a priori* reason for which the integration should not proceed along the constitutional course. There is certainly a lot to the constitutional idea that can prove beneficial for the integration and for the objectives towards which it strives.[67]

[67] Walker, *supra* n. 12; Snyder, *supra* n. 48.; M. Avbelj, 'European Constitution-Building through a Basic Law and Differentiation, in Neuwahl et al. (eds.), Unresolved Issues of the Constitution for Europe, (Les Editions Themis 2007).

However, all these considerations depend on whether constitutionalism can be severed from the statist environment at all. So far the scholarly debate has devoted very little critical reflection to this question. There has been Joseph Weiler who observed with uneasiness, what were also the seeds of his own work, that integration resulted in a constitutional legal order without a constitutional theory.[68] But he was, of course, only partly right. It is not that the EU constitutional narrative comes without a constitutional theory. It has one, borrowed from the American constitutional experience, but which is unfortunately at least to some extent inappropriate. What the integration rather lacks is its own, genuine and authentic constitutional theory. The fact that it does not have one despite a widespread EU constitutional hysteria in the last couple of years just demonstrates that the EU constitutional narrative has been so far essentially extremely under-theorized. It was therefore really high time to ask: what kind of constitutionalism are we [in the case of the European Union] actually talking about?[69]

This paper has answered this question. The present EU constitutional narrative is epistemologically rooted in the American federal constitutional experience and it therefore promotes a monist, hierarchical, functionally state-like vision of integration. But, the European integration is not a state and it should not become one. It should rather be conceived of as a pluralist legal entity composed of supranational and national levels, each sovereign in their own sphere of competence, that all together encompass twenty eight autonomous legal orders. In that shape the integration can proceed in constitutional terms only if the constitutional idea is capable of adjusting itself to this kind of a pluralist legal and, to make sure, also political structure. Instead of classical constitutionalism embedded in the monistic mindset, the integration is in need of a kind of pluralist constitutionalism. Some important work, pioneered by Neil Walker, already attempted to demonstrate the capacity of constitutionalism to redefine its spatial, temporal and normative criteria in pluralist terms to adjust itself to a special, pluralist and growingly complex nature of European integration.[70] Nevertheless, the bulk of work still remains to be done. It is by no means clear that pluralist constitutionalism is at all viable a conception. There exist strong intellectual currents that see all the attempts in that direction as a sign of hubris, since for them

[68] J.H.H. Weiler, *The Constitution of Europe*, (Cambridge University Press 1999).
[69] M. Avbelj, 'Questioning EU Constitutionalism', *German Law Journal* Vol. 9, No.1.
[70] Walker, *supra* n. 12, at p. 334.

the pluralist constitutionalism is nothing else than an oxymoron. Only the time will therefore tell whether we are intellectually strong enough and sufficiently influential to promote this kind of constitutionalism that integration is in a genuine need of. This paper therefore closes where a real work must begin. But it can only begin once we have become aware that the current EU constitutional narrative has been so far due to its genesis, i.e. because of its epistemic and fairly unreflective reliance on the comparative constitutional law, on a wrong track.