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Rethinking the notions of constitution and constitution-making process*

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1. Constitutionalism and security: a double dichotomy

As well known, classic Hartian legal positivism claims that the existence of a rule of recognition is a necessary condition for the existence of a legal system. For a legal system to exist, a sufficiently large number of people belonging to a selected group, namely a society's officials, must hold the so-called internal point of view. If the condition above is satisfied, this means that officials are under a duty to apply all other rules, which are identifiable as valid law through criteria that are set out by the rule of recognition itself. We can discern here the features of law as a social practice and the concept of obligation. This is the normative component of the rule of recognition, which sets Hartian positivism apart from its predecessors, such as Austin and Bentham, who viewed las as a habit of obedience and explained obligation in terms of external motivations, namely through non-normative elements, such as sanction and threat of coercion. As opposed to the earlier versions of legal positivism, Hart claimed that, in addition to regular patterns of obedience, law is also constituted by a normative attitude, i.e. the internal point of view, which means that accepting a rule implies endorsing a certain regular behaviour as a collective and binding standard of conduct. Yet, one of the difficulties emerging from Hartian positivism is that we still need to explain how people *believe in* – as opposed to simply endorse- the authority of a constitution and the legitimacy of constitutional claims.

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In fact, as noted by Dyzenhaus, a Hobbesian angle can be detected in Hart's approach, according to which the mutual relationship between protection and obedience would be undermined by commands that were unable to claim authority on the basis of some moral or other standard. A legal order can properly endure only if the legal subjects accept it as serving the interests that a legal order is supposed to serve – even if they strongly disagree with the content of the law[1]. Meaningfully, Hobbes' idea that only a system of authoritatively posited rules is able to provide stability to a political and legal system resurfaces somehow in Kelsen's *Stufenbau,* which reflects an analogous concern for maintaining social order in a political community. Law is coercive, but must also be equipped with legitimate authority: for this to happen, those who are subjected to it must be allowed to contribute on equal terms to making it. Of course, Hobbes' configuration of law as the outcome of the expression of legislative will as the command of the Sovereign collides with more modern versions of legal positivism, but, as noted above, some intellectual roots can be found in his works[2]. In a sense, recent versions of legal positivism owe some of their insights also to Weber, who claimed that while systematic obedience is a necessary feature of political domination, it does not contribute to the *legitimacy* of the domination if it is grounded on fear or expediency. Obedience based on a belief about the rightfulness of the authority or "belief in legitimacy", provides a more stable basis for a government. Unlike Hobbes, then, Weber distinguishes between legitimate and illegitimate political order[3].

I believe that these constitutional issues pertaining to our understanding of the concept of constitution and the process of constitution-making in light of legitimate authority can be best observed through the prism of "security"[4]. The focus here is neither on the traditional definition of security as a good provided by a political community to its citizens, nor to specific instantiations, such as military security, or phenomena, such as securitisation[5]. The intention in this article is rather to

[1] D. Dyzenhaus, *The Constitution of Legal Authority* in D. Kyritsis, S. Lakin (eds.) *The Methodology of Constitutional Theory*, London, 2022, p. 179 ss.

[2] S. Coyle, *Thomas Hobbes and the Intellectual Origins of Legal Positivism*, *Canadian Journal of Law and Jurisprudence*, 2003, p. 243 ss.

[3] M. Weber, *Economy and society: An outline of interpretive sociology*. Berkeley, 1978, p. 213-215.

[4] M. Fichera, *The Foundations of the EU As A Polity*, Cheltenham, 2018.

[5] As pointed out elsewhere, securitisation theories focus on security issues as constructed only through language, whereas the argument here is that *the context* in which

place emphasis on the security *of* a constitutional settlement and the attributes of its existence. Moreover, "security" does not equate to mere "stability". "Stability" can be more easily associated with ancient constitutional thought (e.g. Aristotle or Plato) when considering the conditions ensuring the endurance or persistence of a regime. "Security" has instead a more existential connotation and can be viewed as a sort of political morality that underpins a constitutional settlement.

As Hamilton argued in The Federalist Papers, «the circumstances that endanger the safety of nations are infinite» and «It is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them»"[6].

We may thus define security as a meta-constitutional rationale that founds modern polities and is articulated through two dychotomies and six dimensions.

This section will consider the two dichotomies in detail, whereas the next section will provide an overview of the six dimensions. In particular, we may in the first place separate the dichotomy between self-preservation and self-empowerment from the dichotomy between change and permanence. Such dichotomies lay the foundations for a justification of authority, in the sense that a polity exists to preserve itself against adversities and it is in its nature to develop gradually its own powers and competences.

The main argument in this article is therefore that constitutionalism and constitution-making – including European constitutionalism- are driven by the meta-constitutional rationale of security. This notion informs simultaneously the process of transformation of a polity, the practices and institutional arrangements that characterize it, and scholarly work. Security, in other words, expresses the need for a constitutional community not only to develop shared values, but also to ensure that such values are protected over an extended period of time.

It follows that security is associated with the ineludible need to face threats to the survival of a constitutional community, which can emerge at any particular historical and social moment. Security and crisis are deeply intertwined. Crisis is not only an inescapable feature in the evolution of a constitutional project, but also a creative force. Crisis generates the need to

security issues emerge is also relevant: security can in this way be employed to propel constitutional changes in a certain direction. See M. Fichera, *Security issues as an existential threat to the community* in M. Fichera, J. Kremer (eds.), *Law and Security in Europe: Reconsidering the Security Constitution*, Antwerp, 2013, p. 85-111.

[6] C. Rossiter (ed.) *The Federalist Papers: Hamilton-Madison-Jay*, New York, 1961.

adopt security measures to address its implications, and at the same time, security – if pursues for its own sake, at all costs – leads to crisis. We will come back to this configuration of security for security's sake. It bears clarifying at this point that this article will consider EU constitutionalism as a specific and significant example of contemporary constitutionalism, which can be particularly useful for explanatory purposes. One of the reasons is that European constitutions cannot be conceived nowadays without reference to transnational or post-national constitutionalism.

In the following pages, I will proceed to illustrate the relevance of the two dichotomies mentioned above for the security of the European project as a noteworthy example of constitutional project. As noted earlier, the first dichotomy is between self-preservation and self-empowerment. Security as self-preservation and self-empowerment is a constant feature of EU polity-building. In other words, self-preservation and self-empowerment feed each other: a polity that seeks to empower itself also aims to preserve itself and *vice versa*. Yet, to some extent, a tension can also be detected in this dichotomy, because the more a polity pursues self-empowerment and self-preservation, the more this risks producing some degree of disjointedness in the structure and exercise of powers, thus impairing the very achievements that are sought for. For example, self-empowerment of a polity may undermine features of autonomy or identity of its components, or may be unbalanced towards some of its institutions at the expense of others. This tension operates at the core of constitutionalism and it is the source of many crises that sometimes develop. Also, importantly, a constitutional polity that seeks to preserve its substantive framework from internal and external threats may sometimes take measures violating the formal constitution or going beyond its letter.

Because founding a polity means also attempting to secure its long-term survival, security as a political morality reveals itself through two self-justifying discourses of power: security and rights. In this respect, the EU legal order, on the one hand (*Van Gend en Loos*[7]), vows to protect, emancipate and empower individuals – the rights discourse–and, on the other hand (*Costa v. ENEL; Kadi*[8]), empowers the EU legal order itself– the security discourse- through its triple claim of autonomy, authority, and legitimacy. Although these discourses are constitutive of the European

[7] ECJ 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1

[8] ECJ 15 July 1964 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66; ECJ 3 September 2008 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* ECLI:EU:C:2008:461.

project at a deep, foundational level, they are characterized by ambiguities and contradictions and have appeared as if they were neutral—thus concealing legal-political conflict. Yet, as the project of integration reaches more advanced stages, concealment is no longer possible. It becomes necessary to address conflict openly and contradictions and paradoxes must be brought to the fore.

In fact, discourses concerning the EU's self-empowerment (i.e., the security discourse) and individual self-empowerment (i.e., the rights discourse) for the purposes of the survival of the EU have been present since the early days of EU integration in a number of official documents[9], and still emerge in more recent academic interventions. They are developed in order to support a variety of different theories, from constitutional pluralism to federalism. For example, Koen Lenaerts argues as follows:

«(…) in order for the European integration project to succeed, pluralism cannot be absolute. This is so because "the peoples of Europe, in creating an ever closer Union among them, are resolved to share a peaceful future based on common values" [quoting the Preamble to the Charter of Fundamental Rights of the European Union [2012] OJ C 326/02] (…) The survival of the EU requires that what brings us together must remain stronger than what pulls us apart».[10]

Analogously, Flynn believes that constitutional pluralism is a strong theory that ensures the survival of the EU[11]. In doing so, he attacks Kelemen's argument for federalism, which is based on exactly the same reasons, as Kelemen himself claims that constitutional pluralism:

«(…) should be abandoned by all those who value the survival of the EU legal order and of the European Union itself. (…) those states that voluntarily choose to join and voluntarily choose to remain members of the

[9] See e.g. Address by Professor Walter Hallstein in the debate on the Dehousse Report (Primacy of Community law over municipal law of the Member States)— European Parliament, June Session 1965, p. 3, at http://aei.pitt.edu/view/year/1965.creators_name.html; Declaration by the Commission on the Occasion of Achievement of the Customs Union on 1 July 1968, EC Bull 7-1968 p. 6–8; European Commission Report to the European Union by Leo Tindemans, Bulletin of the European Communities, Supplement 1/76; Speech by Joschka Fischer at the Humboldt University in Berlin, 12 May 2000 –*From Confederacy to Federation – Thoughts on the Finality of European Integration,* p. 3–5; Speech by Mario Draghi, President of the European Central Bank, at the Global Investment Conference in London, 26 July 2012.

[10] K. Lenaerts, *EU Values and Constitutional Pluralism: the EU System of Fundamental Rights Protection*, in *Polish Yearbook of International Law*, 2014, p. 135-136.

[11] T. Flynn, *Constitutional Pluralism and Loyal Opposition*, in *ICON*, 2021, p. 1.

Union, EU law, and the Court of Justice as the ultimate guardian of that law, must enjoy unconditional supremacy».[12]

Just like all other theoretical analyses emphasizing the need for the survival of the EU polity, Kelemen's reasoning, which looks primarily at the Court of Justice of the European Union (CJEU), can be perfectly inscribed within the perspective of *longue durée*. After all, he has explicitly examined in the past the issue of the durability of EU federalism[13].

The second dichotomy of the security meta-constitutional rationale is between change and permanence. Here, to give an example, the role of the Court of Justice of the European Union (CJEU) is central in both forging autonomous concepts and doctrines that are constitutive of the EU polity and ensuring that the legal order maintains a degree of consistency and uniformity in accordance with the political morality of integration. For this reason, all fundamental principles and doctrines of EU law are articulations of the meta-constitutional rationale of security, including direct effect, primacy, uniformity, autonomy, as well as Member States' common constitutional traditions. Common constitutional traditions are aspects of security, because they ensure a dynamic relationship between change and permanence: they represent a repository of values and symbols for the polity, but at the same time enable the constitutional community to adapt to the changing social and historical circumstances. Fundamental principles and doctrines, such as direct effect, primacy, uniformity and autonomy can all be interpreted as tools of empowerment and preservation that a legal order equips itself with in order to achieve a degree of endurance and resilience, therefore permanence, across time and space. Of course, other organs of the EU contribute to the interplay between change and permanence, including the Commission, the Council, the European Central Bank (ECB) etc. Discourses running through and between these institutions and civil society are often developed in the name - or are presented as acting on behalf - of the "people", more specifically two conceptions of people: "mobile people", i.e. people moving freely across the territory of the EU, and "peoples" in the plural, including both citizens and States.

Change and permanence are two poles of the dichotomy, because any constitutional settlement can only endure if some of its features are placed above negotiation, while others are left open to negotiation. As will be

[12] R. D. Kelemen, *The Dangers of Constitutional Pluralism*, in G. Davies, M. Avbelj (eds.) *Research Handbook on Legal Pluralism and EU Law*, Cheltenham, 2018, p. 392, 403.

[13] R. D. Kelemen, *Built to Last? The Durability of EU Federalism*, in S. Meunier, K. R. McNamara (eds.) *Making History: European Integration and Institutional Change at Fifty*, Oxford, 2007, p. 51.

explained below, neither full negotiability of constitutional values, nor fixity, i.e. absolute unamendability of constitutional provisions or institutions are conducive to security. This is why change and permanence, despite being poles of a dichotomy, should not be conceived as rigidly opposed to each other, but, analogously to self-empowerment and self-preservation, as elements of the same architecture that may sometimes be in reciprocal tension.

To give a more specific example of the strains that lie underneath both dichotomies illustrated above, one may refer to the non-regression clause under Article 2 TEU. This provision can be interpreted as a commitment to the shared values of the EU that is supposed to persist throughout the whole EU membership[14]. Yet, the extent to which this clause has effectively been violated, to wit the degree of democratic backsliding, may be questionable. In other words, the scope of what can be subject to change and what should remain unmodified fluctuates, depending on the interpretation of such scope by the interested actors. Analogously, the need for the EU to protect Article 2 values (self-preservation and self-empowerment) risks impairing or unduly constraining processes of constitutional amendment at the domestic level if it does not go hand in hand with a process leading to the gradual incorporation of those values in the society.

2. Dimensions of security

In addition to the two dichotomies examined in the previous section, it is possible to discern six dimensions in our inquiry on security: spatial, temporal, popular, ontological, epistemic, reflexive (see table below).

[14] ECJ 20 April 2021, Case C-896/19, *Repubblika v Il-Prim Ministru,* ECLI:EU:C:2021:311; ECJ 24 June 2019, Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531, para. 42, ECJ 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, ECLI:EU:C:2021:393, para. 160.

Table: Security dimensions

Dimension	**Conceptual category**	**Dichotomy**	**Questions**
Spatial	Space	Inside/outside	Who is the Other? Where is it located?
Temporal	Time	Past/future	In which direction is the EU polity moving?
Popular	People	Demos/no demos	What is constituent power?
Ontological	Nature of the polity	State/international organisation	What is the best interpretative scheme?
Epistemic	Pluralism	Unity/plurality	How should multiple rationalities or claims of authority coexist?
Semantic or reflexive	Notion of Security	Secure/insecure	What does it mean to be secure? How to be secure as a polity?

Each dimension, for its part, relies upon a conceptual dichotomy through which it is possible to operationalize it. Yet, each dichotomy reveals internal nuances and contradictions, which show how difficult it is to capture the rationality of European constitution-making comprehensively and exhaustively. The first dimension is the spatial dimension: space is a category that explains the development of a polity as a geo-political and geo-legal entity, related to other geo-political and geo-legal entities (not only in relation to enlargement policies, foreign policy and in general external relations, but also, for example, trade and environment). This dimension is

operationalized through the dichotomy inside/outside. The questions that ought to be asked in this respect are therefore: who is the Other? Where is it located? This is not merely a question relating to the delineation of external and internal borders, with all implications for cross-border regulation, but also of boundaries between "us" and the "Other". As an analysis of the free movement provisions and citizenship provisions may show, there exist in reality multiple inside and outside even *within* a polity and this reveals contradictions that are not always reconcilable, as patterns of discrimination and inequality are revealed[15]. The confrontation with the Other may thus turn into a potential threat to a constitutional project and constitutional measures taken in this field may be justified to some extent by the claim that such threat exists and needs to be addressed. The second dimension is a temporal one. The most pressing questions in this context are: in which direction are we moving? How can we make sure that we are moving in the right direction? What is the role of past and future in the configuration of time?

The third dimension of security is the popular dimension: "the people" is an entity that a constitutional project has had to come to terms with repeatedly, often to draw on its evocative force. As a result, inevitably we grapple with the dichotomy "demos versus no demos". According to some approaches the category of people is indispensable for constitutionalism, whereas according to others it is not. The relevant question therefore is: what is constituent power? Is it necessary for transnational integration? What are the conditions that ensure a legitimate source of sovereign power? The fourth dimension is ontological, because it concerns the nature of a polity (in the case of the EU: a sovereign State? a member State? a regional State? etc.). In what ways is the nature of the polity defined by existential threats and challenges to such nature? The fifth dimension is instead epistemic and addresses the issue of pluralism, as the co-existence of multiple rationalities and claims of authority within the same polity or legal system. When we ask what the best way to preserve a constitutional project is, we must tackle the dichotomy "one/many" or "unity/plurality" and seek to ascertain how several rationalities can coexist in the same space. Finally, our last dimension, the semantic or reflexive one, is based on the distinction between secure and insecure. In this scenario, our inquiry revolves around the question: what does it mean to be secure? How can a polity be secure? The necessary implication here is that whoever leads the security discourse is also the master of a vocabulary of immediacy, urgency, threat, which

[15] C. O'Brien, *Unity in Adversity*, London, 2017.

leaves little space for reflection and negotiation. Importantly, security reveals its double-edged nature, as the presupposition for constitutionalism, and simultaneously as a threat to its development, if pursued at all costs.

As far as the EU is concerned, in the last decade for the first time all dimensions of security have been affected simultaneously. The economic and financial crisis, the refugee crisis, Brexit, the crisis of the rule of law and democratic backsliding, the Covid-19 pandemic and the war in Ukraine have raised questions that had not been answered previously, or that had either been left in the background or taken for granted.

In my previous work, I have addressed some of these dimensions of security in more detail. For example, concerning the spatial dimension, I have considered the question of the enlargement of the EU as emblematic of the tension between its imperialistic and its normative traits[16]. In this respect, I have identified the relationship between Russia, Ukraine and the EU, as a key factor that would define the EU's territorial expansion in the years to come[17]. I have also considered more deeply both the popular dimension, through the configuration of what I call "discursive constituent power", i.e. a form of constituent power that is exercised through security and rights discourses, as defined above[18], and the epistemic dimension[19].

More recently, I have explored the temporal dimension as a feature of constitutionalism, including EU constitutionalism[20]. My claim is that modern constitutionalism can be said to be characterized by attempt to rise above time and exercise control over an extended period, thereby reducing uncertainty and limiting contingency.

Constitutionalism's most significant feature, in other words, is to endure through time as much as possible. This temporal dimension expresses the durability of a polity (*longue durée*). This is visible in the most recent forms of constitutionalism beyond the State. For example, Articles 53 of the TEU and 356 of the TFEU state that «The Treaty is concluded for an unlimited period». The notion of a community of «unlimited

[16] M. Fichera, *Carl Schmitt and the New World Order- A View from Europe* in P. Minkkinen, M. Arvidsson, L. Brännström (eds.) *The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology*, Abingdon, 2016, p. 165 ss.

[17] M. Fichera, *The constitutional and historical relevance of the AFSJ and the CFSP/ESDP* Sieps Policy Paper October 2015.

[18] M. Fichera, *The Idea of Discursive Constituent Power*, *Jus Cogens*, 2021, p. 159 ss.

[19] M. Fichera, *Securing the European Project: From Self-Referentiality to Heterarchy*, *Cambridge Yearbook of European Legal Studies*, 2021, p. 273 ss.

[20] M. Fichera, *The EU and Constitutional Time- The Significance of Time in Constitutional Change,* forthcoming.

duration» is also famously contained in the landmark ruling by the CJEU (Case 6/64 *Costa v ENEL,* para. 3). This means that constitutionalism is characterized at least by an aspiration to perpetuity.

However, in order for such aspiration to be not a mere rhetorical device, but a source of legitimacy, certain conditions must be present. As a result, it becomes important, first of all, to identify those conditions, and, secondly, to know how to activate them. In other words, how can a polity achieve *longue durée* legitimately (and should it achieve it)? What are the conditions that ensure the durability and functioning of a constitutional order beyond the State?

I take this to be an issue pertaining to the material constitution, interpreted as the «deeper societal context in which formal constitutional development is embedded»[21]. In fact, complex legal and political frameworks are likely to reach a point in their evolution in which this issue is not simply present, but must be inevitably addressed, due to rising legal-political conflict. When the ambition of a polity is to become or to be already "constitutional", its claim is to regulate the relationship between individuals and institutions as well as between institutions in a particularly penetrating way, for example by creating mechanisms addressing contradictions and tensions, which are typical of constitutionalism. Questions about the material constitution of a polity are therefore in a sense part of a more general quest to identify the conditions guaranteeing to some extent the stability of a settled *status quo*. As will be seen later, the idea of authority that an entity or person may have can be more promptly tied to perpetuity, i.e. to the flux of ideas that develop over time, as a result of being challenged or of some form of learning activity.

In fact, constitutionalism should be reconceived, by reconstructing a common ground allowing all participants to hold a strictly forward-looking perspective, capable of including also later generations.

Constitutionalism has neglected or downplayed the temporal dimension of the future as regards its normative underpinnings. In other words, the constitutional nature of a legal system can only be upheld if it does not relinquish the ideal of setting up a long-lasting constitutional community. Temporality indicates the possibility to stretch into the future, beyond presentist visions, and constantly re-assess a polity's commitment over an extended period.

[21] M. Goldoni, M. Wilkinson, *The Material Constitution*, *The Modern Law Review*, 2018, p. 567-597, 569.

However, the temporal dimension needs to be complemented with the reflexive dimension, which concerns more specifically the question of how to be secure as a polity. Hence the relevance of an *ongoing* process of self-amending and self-interpreting constitutionalisation. The intention is to address upfront the issue of the extent to which it is possible to design conceptually a constitutional framework that successfully reconciles rule of law and democracy in the transnational sphere. The aim of this article, in other words, is to emphasise the nature of a collective commitment held over time.

Looking at a constitutional community as an *ongoing* deliberative process triggers the previously neglected question "what for?" rather than: "what is its nature?". We should therefore examine the reasons why the EU polity exists and the stakes that are raised when a constitutional community announces itself as a constitutional community.

What emerges here is what I define the "paradox of large time" (*Grosszeit*), which should be more appropriately called a "double bind". The concept used here – *Grosszeit*- is a neologism that I employ for this occasion and is the temporal equivalent of the category of "large space" (*Grossraum*) used by Carl Schmitt in his work. *Grossraum* refers to a State's territorial over-stretching, which goes beyond its traditional borders and represents an attempt to form large-scale spatial orderings as spatially concrete entities. *Grosszeit* instead concerns the effort of a constitutional community to extend its duration as much as possible – ideally, to the point of reaching *unlimited* duration. It may therefore be seen, in one possible interpretation, as an overweening attempt *to colonise* the future and bind future generations indefinitely. However, no matter how constitutional the commitment placed at the beginning of constitutional time may seem, proclaiming "a community of unlimited duration" has inevitably an impact on the democratic component of a polity. It implies the exercise of a sphere of influence by earlier generations over later generations through a large-scale temporal ordering. Alternatively, a constitutional community could extend its duration by simply changing constantly its constitution every few years: yet, would that be the same community? In the name of which projectuality would that community exist?

In other words, the long-term extension of a constitutional project, which stretches indefinitely into the future, takes place either in the name of a set of values defined once and for all at a fixed moment in time, hence binding all future generations belonging to the coming communities – thus compromising the democratic credentials of a constitutional project and the autonomy of the components of a polity, or by accepting that a constitution

can be replaced within a short time frame, sometimes entirely, thus embracing full contingency and giving up on projectuality, i.e. the idea of a shared collective commitment over an extended period of time.

When exploring ways in which the above paradox can be resolved, it is important to take into account that constitutionalism can only be reconciled with democracy if the past is not fixed, but re-presented over and over again: never identical with itself, but always projected into the future. When the past is pre-determined, the notion that emerges in the background is eternity. We talk about perpetuity, as opposed to eternity, when we emphasise a constant process of will-formation and re-negotiation of values, which keeps the constituent process epistemically open-ended. This means that perpetuity is not the same as eternity: the latter is associated with fixed and immutable concepts, whereas the former is the result of a reflexive and self-amending process.

The focus here is then on the reflexive dimension of security, which allows a shift from what I call self-referential security to heterarchical security, as illustrated in the following section.

3. From self-referential to heterarchical security

A further step in our inquiry is the distinction between self-referential and heterarchical security. Self-referential security reflects, in the first place, the understanding of the EU as one-size-fits-all machinery, as a system of law that reproduces itself as a mere collection of norms. Moreover, security for its own sake implies that a constitutional project's unyielding perseverance in pursuing one or more specific goals at all costs may impair the very ideal from which that project is inspired. There is a close link between self-referential security and the drive towards technocratic governance in Europe, bolstered by a constant state of emergency. An example of self-referential security is Mario Draghi's speech at the Global Investment Conference in London on 26 July 2012; «the ECB is ready to do whatever it takes to preserve the Euro» or, typically, the announcement of *finalité* as an inevitable achievement of a community of fate- the idea that the European project must be preserved because the European project must be preserved, with an element of inevitability attached to it.

What is neglected in self-referential reasoning is that the preservation of a polity – its values, its myths, its imagery- can only go hand in hand with a measure of legitimacy. When a polity's endurance is at stake, then it is also

a matter of avoiding its degeneration. Self-referentiality, and, relatedly, decisions on the validity of a legal system made on the basis of criteria identified by that very system, are very much present in dominant versions of legal positivism. As pointed out at the beginning of this article, according to Hart, what ensures the existence of a legal system and is at the same time the source of its normativity is the fact that a duty has been conferred upon and accepted by its officials to comply with and apply not only the rule of recognition, but also secondary rules[22]. The problem with this configuration is that, by way of contrast, the general public is not required to either accept or apply the rule of recognition from the internal point of view. As observed by Chun, the critique levelled by Dewey against Austin that legal positivism assumes an anti-democratic conception of sovereignty and authority can be extended in some sense to Hart's approach, too[23]. In this conception, normativity is derived from the determinacy of the sovereign as a hierarchically superior class over a relatively passive public. The security of the legal system is guaranteed by the officials' compliance with the secondary rules and it is not necessary for the general public to constantly practice, endorse and accept the primary rules from the internal point of view. Given that, by virtue of the lack of internal endorsement, the normative element is not considered necessary, the "habit of obedience" will be sufficient. As a result, of group of legal officials acquires legal authority because it has rendered itself determinate: legality is self-generated and law produced its own normativity[24]. Once again, we detect here a scheme of self-referentiality that betrays a hierarchical understanding of law.

Moreover, the problem with many contemporary approaches on legality is that the predominant version of liberalism – promoted by the EU – has been too "presentist": it has focused too much on the present moment, on the demands of the market here and now, and has relied upon the overly optimistic and rather vague assumption that the future would be indefinitely characterized by continuous growth and the persistence of postwar consensus. In a sense, contemporary forms of populism and Euroscepticism may be seen as a response to the "lack of future" of the European project.

With a view to contributing to the debate on European constitutionalism, and reconciling constitutionalism and democracy, a shift

[22] HLA Hart, *The Concept of Law*, 2nd edn, Oxford, 1994, p. 116.

[23] M. Chun, *The anti-democratic origin of analytical jurisprudence*, *Jurisprudence – An International Journal of Legal and Political Thought*, 2021 p. 1 ss.; J. Dewey, *The Later Works: 1925–1953* Carbondale, 1981.

[24] M. Chun, *The anti-democratic origin of analytical jurisprudence* op.cit. 20.

is advocated here from self-referential security (i.e. security for security's sake) to heterarchical security, with a focus on the notions of authority, legitimacy and representation. This shift takes place within the reflexive dimension of security.

It is claimed that endurance for the EU polity can only be achieved if constitutional processes are anchored to local layers of deliberation and material constitutionalism. Moreover, the connection between constitutionalism and security may in principle be extended to a broader range of issues, related to the contemporary discussion on the fate of the planet and the rise of artificial intelligence. Given that the future challenges for humanity are likely to concern its very survival, it is important to establish to what extent the reflexive dimension of security should incorporate the idea of radical contingency, which is an inherent feature of modernity. This suggests the need to place emphasis on the role of future generations, thus encompassing non-human questions directly affecting the possibilities of survival of both human and non-human subjectivities.

The shift from self-referential to heterarchical security allows room for self-determination and autonomy. Such move needs to rely upon the heterarchical paradigm, i.e. mainly the so-called constitutional pluralist theories, which admit of the coexistence of several claims of ultimate legal authority in the same territory not only as a fact, but also as a prerequisite for a legal system to endure. In fact, by means of the lens of security, the implications of heterarchy can be recognized and explored fully. In particular, the claim that «the federation contract aims to establish a permanent contract, not just a provisional regulation» and «the federation aims at the preservation of the political existence of all members in the framework of the federation»[25], may apply to the heterarchical paradigm as well. As a result, the question of sovereignty as a "decision on an existential conflict" is always possible and always remains open. Interestingly, Habermas also argues that «in supranational political communities, unlike in federal states, the issue of ultimate decision-making authority must not be resolved through hierarchization»[26]. However, he adds that leaving the question open should not be allowed «*at the expense* of a principle of democracy that has only been realized in the nation-state»[27].

[25] C. Schmitt, *Constitutional Theory*, 2008, p. 385.

[26] J. Habermas, *An exploration of the meaning of transnationalization of democracy, using the example of the European Union*. In P. Deutscher, C. Lafont (eds.). *Transforming the Global Political and Economic Order*, Cambridge and New York, 2017, p. 3 ss.

[27] Ibid.

Yet second-level considerations of legitimacy indicate that *deliberating about what it means to be secure and how to be secure* should also be an integral part of heterarchical security. Opening up of institutional and citizen-level sites of deliberation is conducive to a self-constituting virtuous cycle, in which elements of different layers of society are able to contribute reflexively to polity-building over time. The deliberative approach proposed in this work, in other words, possesses substantivist connotations. It is attentive to the conflictuality among the material forces of society, or, better said, the conflictual process of subjectivation that contribute to the generation and preservation of a polity. One of the effects of such approach would be the reactivation or rethinking of intermediate bodies – trade unions, political parties, NGOs, think tanks, local assemblies, regions and other forms of local government etc. – as sites of social aggregation and collective engagement. The lack of interaction between the latter and other relevant institutions, such as courts or parliaments, is in some form a major factor of weakness of contemporary societies, including a transnational polity such as the EU.

There is more. The move advocated here – from self-referential to heterarchical security- cannot take place through deliberation without some degree of concern for the preservation of the material constitution, with the aim of enabling, to some extent, the simultaneous presence of political unity and plurality, thus setting out the polity's political objectives. A political community built around the material constitution is not viewed as static and separate from society, but as dynamic, operating *over time* and intimately connected with society. This consideration incorporates the understanding that domestic and European material constitutions are nowadays largely interpenetrated with each other and, relatedly, that social and economic elements are deeply embedded in both.

Before delving into a consideration of constitutionalism from this angle, it may be useful to focus on the relationship between temporality and normativity.

We can consider the two models of polity-building – one, tendentially republican, dating back to Aristotle and Rousseau and the other, more liberally oriented, connected with Plato, Kant and Kelsen – as two opposed visions of the interplay between permanence and change, or two alternative approaches to the question of *longue durée*.

When addressing *longue durée*, lessons can be learned from both the model associated with Aristotle and Rousseau and the Kantian model. In fact, the link between temporality and normativity is crucial for a constitutional system, especially when it develops beyond the State. In

particular, at least four modes of connection can be envisaged: uni-temporal and uni-normative; multi-temporal and multi-normative; trans-normative; trans-temporal.

In a first modality - uni-temporal and uni-normative - a legal system is supposed to operate along one single temporal and normative thread. There exists a consolidated institutional apparatus, expressing one specific normativity, or at least a largely predominant normativity, which develops through a single timeline, usually starting from a constituent event following a critical juncture. Normativity can come in different guises: it may be exemplified by a core set of institutions and procedures associated with the rule of law and individual autonomy, or some manifestation of the republican idea of the common good. Regardless of whether one adopts or rejects the prevailing legal positivist approach, it is common to claim that a liberal-democratic constitutional settlement relies upon a number of features that are supposed to persist, because they originate from the will of the constituent subject and can only be de-legitimised by the configuration of an equivalent will. After the critical juncture has been successfully addressed, extra-legal manifestations of constitutionalisation are concealed or ignored, to prevent competing layers of normativity from emerging and threatening the dominant temporal and normative framework. Decentralisation of legislative power is possible, although it is in the end subsumed under the State's general will. This is what has happened typically in the formation of many post-WWII nation States in the Western world.

However, a multi-temporal and multi-normative understanding of legal orders is also possible. For example, Kaarlo Tuori argues that temporality manifests itself differently, depending on whether one refers to the normative layers of a legal order – i.e. the surface layer, or the legal cultural layer- or the social practices – i.e. law-making, law-adjudicating and scholarly writings.[28]

In his analysis, Tuori reprises the German historical school of thought and, in particular, Savigny's criticism of early legal positivism - although, in doing so, Tuori remains firmly anchored to the legal positivist mind frame. He applies this conception also to the European constitution, which is described as a multidimensional normative entity, characterised by a multi-temporal process of formation and sedimentation[29].

[28] See e.g. K. Tuori, *Ratio and Voluntas- The Tension Between Reason and Will in Law,* Abingdon, 2010, p. 37; K. Tuori, *Properties of Law*, Cambridge, 2021.

[29] K. Tuori, *Many Constitutions of Europe,* Oxford Handbook Online, 2016.

Within the trans-normative modality, the legal system is viewed as a self-justifying necessity, determined by the egoistic impulse of free individuals to overcome a situation of chaos[30]. Given the ever-present possibility that the order created through law collapses, either the legal system faces contingency upfront[31], or a sovereign decision is taken once and for all on which values within a political community must be preserved. In the latter conception, which has the merit of bringing to the fore the role of the material constitution, a legal system exists because it is legitimated by the exceptional moments in which its survival is at stake and the sovereign intervenes to assert its authority[32]. A neat, non-negotiable line is drawn between those who are inside and those who are outside a given value system. In the former conception, the emergence of a legal system is explained through the notion of double contingency. Thus, for Parsons, in situations of social interaction the contingency of what an actor actually does or states is complemented by the contingency of the other actor's reaction. The resulting indeterminacy of the action can only be remedied by the creation of long-term structures transcending individuals and relying upon a shared cultural or symbolic system of values inherited from the past to build up a form of consensus that enables meaningful interaction. Luhmann reformulates contingency as the property of a fact that is the outcome of a selection and can therefore always be otherwise, regardless of the existence of shared values and norms. Temporality is therefore a key feature of double contingency, which must be accounted for by law. As a social, self-referential system, law produces and reproduces itself and «is valid until further notice»[33]. It differentiates itself from other systems in order to perpetuate itself. This is therefore, in a sense, a radicalisation of the Kelsenian model. Moreover, the future, too, is portrayed as contingent, with the result of distinguishing between a "present future" - which is the future as imagined in the present - and a "future present" - which is what actually happens in the future, something that can be very different from our imagined scenarios, also as a consequence of plans made in the present[34].

The uni-temporal and uni-normative modality, as noted, relies upon one single normativity and rules out contingency, as if the enthusiastically

[30] T. Hobbes, *Leviathan,* Cambridge, 1996.

[31] T. Parsons, *The Social System,* Chicago, 1951); N. Luhmann, *Law As A Social System,* Oxford, 2008.

[32] C. Schmitt, *Constitutional Theory op.cit* .

[33] N. Luhmann, *Law As A Social System,* op.cit.

[34] N. Luhmann, *The Future Cannot Begin: Temporal Structures in Modern Society*, *Social Research,* 1976, p. 130.

advocated pattern of development of legal systems – the nation State, within a clearly delineated liberal democratic framework- were the only possible, with no alternatives. For this purpose, extra-legal constituting dynamics are also excluded. This seems to encase the process of European integration within a rigid scheme, thus preventing a richer, more nuanced development. The trans-normative modality, by definition, transcends normativity and either replaces it with a decisionist stance, which antagonises the Kelsenian model, or limits itself to formulating an "ethics of contingency", a reflexive instability that permeates the very concept of democracy[35]. The multi-temporal and multi-normative modality looks, from this perspective, more promising as a tool for analysing constitutionalism beyond the State. In particular, *longue durée* is explained as a legal-cultural phenomenon, with the consequence that the entrenchment of norms and values has an institutional character. However, as observed earlier, the angle adopted is still legal positivism: ultimately, the State is the only source of legitimacy of posited law and the statist paradigm is viewed as a given, precisely because it is the repository of the deepest legal-cultural layers.

There are many reasons why the trans-temporal modality can be adapted more easily to constitutionalism beyond the State than any of the previous versions. While it is true that the link between temporality and normativity may be formulated in different ways, there cannot be constitutionalism without the interpenetration between the two. Normativity does not emerge *ex nihilo*, from a voluntary act, whether it be the general will, the sovereign or something else. There may be normative reasons why a constitutional community is formed, but a collective commitment can only truly be verified as a commitment across a timeline. A constitutional community needs constitutional time to differentiate itself from other non-constitutional communities, if only by developing a narrative – and narratives, by definition, cannot but unfold over time. In order to legitimise itself and perpetuate its own existence in time, such community must create a distinction between past, present and future, as well as a distinction between the first act of creation, placed at the beginning of constitutional time, and subsequent acts of preservation - a distinction which is performed within a given timeline.

In order to understand the implications of the passage from self-referential to heterarchical security, it is useful to recall three conceptions of legality, which may be relevant for European constitutionalism.

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[35] A. Mascareño, *Ethic of contingency beyond the praxis of reflexive law Soziale Systeme,* 2006, p. 274; N. Luhmann, *The Future of Democracy*, *Thesis Eleven,* 1990, p. 46.

4. *Legality as* auctoritas

A first relevant conception is legality as *imperium*. In this conception, the old configuration of law as command – with all its later, more modern nuances- still resonates firmly. Its most typical expression is self-aggrandizement. A legal system builds on internal conditions of normative validity that are independent of the content of law. The validity of legal norms derives from second order procedural norms and, in the case of a supranational legal order such as the EU, the purpose of a legal system is to reproduce and enlarge itself as such. Self-referential security thus evokes *longue durée* for its own sake and, in this sense, implies an act of closure towards constitutional time.

Under legality as *instrumentum*, instead, the relationship between the parts and the whole is re-conceptualised and changes object of reference. Legality is identified as a technique for the coordinated coexistence of self-contained units: if any *longue durée* is pursued, it is exclusively the *longue durée* of the original components of the polity, i.e. the old, reassuring - solid but also insufficient- structure of the nation State. Both images – legality as *imperium* and legality as *instrumentum* – generate the paradox of "large time" because their perspective is presentist.

From a third perspective, legality emerges as authority (*auctoritas*). Here it is relevant to recall Arendt's understanding of authority as a notion that is distinct from both coercion by force and persuasion through arguments. Interestingly, Arendt associates authority with permanence and durability and points out how the notion has been tied to cognate notions, i.e. religion and tradition. It is through authority that, in ancient constitutionalism, political structures were endowed with the attributes of permanence and durability. The Roman word *auctoritas*, as well known, comes from the verb "to augment". This shows how the Roman idea of authority is closely tied to the past and points to the foundation as its source, viewed as a sacred act. What authority does is therefore to augment the foundation and make it binding for future generations. As opposed to power, authority is rooted in the past and is elusive, intangible. There is therefore a strong connection between authority and temporality.

I believe that retaining some features of this ancient view of authority may be useful for European constitutionalism. It is in this sense that law as *auctoritas* may be opposed to law as *imperium*: whereas the latter is centered on self-aggrandizement, the former relies on an external source to pursue growth – whether this be a specific act of foundation, or its representation in other forms, or a political morality that provides reasons for joined action; moreover, *auctoritas* does not deny power, but at the same time transcends it and is rooted more deeply than mere coercion or persuasion in the collective understanding of a community. It is for this reason that, while the concept of constitutional identity is important for European constitutionalism, it is only truly meaningful if it is integrated with an elaboration of common constitutional *traditions*. Constitutional identity *per se* is reified when it is configured as expression of the identity of a constitution at any given moment. In order to acquire contextual meaning, it must be viewed in dynamic terms, as a process and, in this sense, the interlacing between constitutional identity and constitutional traditions allows building up a structured narrative as a backbone for the development of European constitutionalism. It follows that, contrary to what critics of this notion (e.g. Scholtes) have argued, common constitutional traditions are not supposed to *replace* the language of constitutional identity, but rather simply enrich it with nuances that are missed by a monolithic and static conception of a European superstate[36].

However, in many ways, conceiving of law as *auctoritas* as if it were only backward-looking - to the past - and not also forward-looking - to the future- seems to amount to a narrowing down of its potential. The challenge resides therefore in avoiding the paradox of "large time" and at the same time thinking of *auctoritas* as sufficiently open-ended, unlike Arendt's conception.

From this perspective, a genuine collective effort of deliberation cannot be limited to only one generation, but needs to stretch out to several future generations, considered at least as *potential* actors that are represented by present actors. This is a way in which past, present and future can be connected with each other along a pathway.

From what has been suggested so far it follows that the conditions for a new form of constitutionalism need to be created, such that as many actors as possible should be involved in a collective development of the constitution together with other actors through a form of "democratic deliberation" outside the classic institutional channels. For this purpose, the

[36] J. Scholtes, *Abusing Constitutional Identity*, *German Law Journal,* 2021, p. 534 ss.

project builds up a link with the recent development of theories of deliberative constitutionalism[37] . These theories elaborate upon the notion of "deliberative democracy", i.e. a configuration of democracy as not amounting merely to an aggregation of citizens preferences, but including a participatory process of collective decision-making. This means that popular discursive processes justify constitutions if they are undertaken under conditions that respect the rights and freedoms of participants[38] .

The shift from self-referential to heterarchical security implies that the articulation of law and politics, the possibility of a unity of the two systems, is activated not only from the inside, but also from the outside, via deliberation.

The claim of deliberative constitutionalism is that deliberative democracy should be extended to processes of constitution making and amending. Rather than emphasizing founding moments or exceptional situations, deliberative constitutionalism looks at a polity's ongoing self-correcting learning process, a "public conversation" aimed at developing the commitment to equality and freedom contained in the original document[39]. Habermas' idea of "dual constituent power" (exercised by individuals as simultaneously national and EU citizens) ultimately relies upon the role of elites and the media as catalytic agents able to "win over" the population through a top-down momentum that «must abandon incrementalism steered by experts»[40]. However, this approach risks degenerating into mechanisms of manipulation and coercion if it is not transparent and open to contestation. Alternative versions of "dual constituent power", instead, advocate a full bottom-up approach, driven directly and entirely by citizens[41]. However, a mere bottom-up technique ultimately cannot help advocating the creation of institutions representing citizens' constituent power. This project seeks a middle way, in which both approaches have equal value and goes beyond traditional views of participatory democracy, limited to voting, protests, or marches. It encourages civil society engagement, the creation of networks and channels

[37] R. Levy, H. Kong, G. Orr, J. King (eds.) *The Cambridge Handbook of Deliberative Constitutionalism*, Cambridge, 2018.

[38] S. Chambers, *Kickstarting the Bootstrapping: Jürgen Habermas, Deliberative Constitutionalisation and the Limits of Proceduralism*. In R. Levy, H. Kong, G. Orr, J. King (eds.) *The Cambridge Handbook of Deliberative Constitutionalism*, Cambridge, 2018, p. 256 ss.

[39] J. Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles? Political Theory*, 2001, p. 766 ss.

[40] J. Habermas, *The Crisis of the European Union: A Response*, Cambridge, 2012.

[41] M. Patberg, *Constituent Power in the European Union,* Oxford, 2020.

of communication between institutions, experts and ordinary citizens, the growth of intermediate bodies (cities, regions or trade unions, social movements and grass-root organisations) and the circulation of information through the media and academic expertise. The idea is that the "mobilised deliberation" of engaged and self-conscious publics is better entitled to undertake an act of transformative politics through a collective reinterpretation of constitution. This comes close to what Ackerman claimed for the US Constitution[42]. However, unlike Ackerman, constitutional politics is not viewed here only as an episodic activity, which takes place through exceptional constitutional moments. This interpretation, which has a longer term perspective, should be performed by *all* the relevant actors of that system - not only by those that proclaim themselves as exclusive interpreters of the law. Courts, as a result, should welcome a more open interaction with society.

This occurs through a "self-correcting learning process", stretched towards the future. As a result, the paradox deriving from the fact that democratic legitimacy of the EU is claimed by the very authorities that set the conditions for that legitimacy (the "bootstrapping paradox"), is dissolved over time, by demanding from every new generation a revision of the system of rights. The past is -within certain limits- re-negotiated over and over again, and therefore is never identical with itself but always already projected towards the future. In a sense, the continuous re-presentation and re-interpretation of this past and its extension into the future enables the democratic component of a legal system. In other words, the project opposes "present-tense temporality", as upheld by some constitutionalists and political thinkers across a line of thought that begins with Rousseau and Jefferson, which looks at democracy as a promise to live in the present, and thus places (written) constitutionalism and democracy directly in opposition to each other.

Past, present and future are reconnected through the idea of "mutuality", in terms of deliberation between generations. The project purports to conceptualise how deliberation between generations should be interpreted, by relying on theoretical works on intergenerational justice[43]. This has important policy implications for the way economic, environmental and social rights measures should be viewed and the subjects that should be involved in decision-making procedures.

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[42] B. Ackerman, *We the People, Vol. 1: Foundations*, Cambridge, Massachusetts, 1991.

[43] B. Barry, R. I. Sikora (eds.), *Obligations to Future Generations*, Winwick, 2012); F. G. Menga, *L'Emergenza del futuro- I destini del pianeta e la responsabilità del presente*, Roma, 2021.

The concept of "communal constitutionalism" suggested here implies the co-existence of a plurality of normative orders, sites of decision-making, social practices and mechanisms of allocation of resources, which are not necessarily associated with State actors. Although it bears affinity with theories of constitutional pluralism and general theories of deliberative constitutionalism, its distinctive trait is its emphasis on social justice – thus the substantive, and not merely procedural, dimension of liberal democracy- and on a future-oriented perspective.

In essence, regular testing of a complex polity's commitment to both rule of law and democracy means that, in order for that polity to be durable in the long term, temporality must be anchored to local layers of deliberation and social justice considerations.

Most contemporary views assume that the environment of constitutionalism can only be monist, and accordingly that a single, unitary constituent is opposed to a single, unitary constituted entity. There is no consideration of the possibility that multiple constituent forces develop simultaneously at several levels of governance and from different sources, thus generating pressure on different sites and at different times. Analogously, there is no consideration of the possibility of interaction among these forces, which may often be contradictory and set against each other.

What communal constitutionalism aims to emphasise is that the two tensions present in the meta-constitutional rationale of security – between self-preservation and self-empowerment on the one hand, and between change and permanence on the other – are an ineliminable presence in modern constitutionalism. It has been observed by Lindahl that both Rawls and Habermas develop a concept of collective self-rule achieved through reciprocal recognition as a criterion of necessary existence. However, whereas Habermas advocates a transcendental move, whereby practical reason seeks to overcome contingency, for others, such as Kelsen, the purpose of the majority principle is to make contingency endurable: in the first case, democratic legitimacy is achieved through justice as inclusion, whereas in the second case, democratic legitimacy is achieved through peace or order. Lindahl claims that not only collective self-preservation, but also the preservation of "the strange as strange", as he calls it, is the feature of "enduring contingency" as a democratic ethos. In other words, modern reason in democratic systems is about dealing with contingency, rather than

overcoming it[44]. The shift from self-referential to heterarchical security and the reflexive dimension associated with communal constitutionalism show that unity and plurality can coexist as the two poles of an open-ended deliberation process. Self-preservation and self-empowerment, permanence and change contribute to the interaction between those two poles.

We may seek to extend the connection between constitutionalism and security to a broader range of issues, related to the contemporary discussion on the fate of the planet and the rise of AI. The purpose is to understand whether and to what extent the very notions of constitutionalism, constituent power, authority and representation need to be reformulated in light of the emergence of new forms of non-human subjectivity. Given that the future challenges for humanity are likely to concern its very survival, it is important to establish to what extent the reflexive dimension of security should incorporate the idea of radical contingency, which characterizes modernity[45]. As a result, both the tension between self-empowerment and self-preservation, and between permanence and change, as highlighted above, may lead to shedding some light on the meaning of the very conditions of modern liberal democracy. A related consequence of such endeavor would be the revision of the notion of constituent power, as well as of the object of constitution-making and amending, as encompassing non-human questions directly affecting the possibilities of survival of both human and non-human subjectivities.

Another crucial feature of communal constitutionalism is in fact the role given to future generations. This is yet another side of the subject of *longue durée*. If we are truly honest about encouraging deliberation, we must take into account the question whether or not future generations ought to be included in such collective endeavour.

In fact, it is perfectly possible to conceive of future generations as "having a stake" in the decisions taken by current generations. In other words, it is not a matter of old constitutional provisions exercising authority over time. Instead, the reverse is true: future potential "selves" possess authority over current constitution-makers. One can imagine a number of relevant themes – from the environment to digital governance and global health- in which the authority of those who are not yet, but might be, should be taken into account, because they will be affected by current decisions – or, one might say, because they will be affected *even more* than those who are

[44] H. Lindahl, *Enduring Contingency: Remarks on the precariousness of liberal democratic law*, *Netherlands Journal of Legal Philosophy* forthcoming.

[45] H. Blumenberg, *The Legitimacy of the Modern Age*, London, 1985.

already. The deliberative process encouraged by communal constitutionalism should therefore be diachronic and unroll *as if* future generations were simultaneously debating.

The burden of constitutionalism –the fact that, at least when a constitution is made, this requires, in a sense, the imposition of some values over others, by some people over others- can thus only be democratically bearable and ensure *longue durée* if inclusiveness is conceived *all the way down*, to the extent it embraces future generations as actors of constitution making and amending. Rather than "future selves" being bound by the terms of the first constitution, it will be rather us subjects to their authority, by virtue of a commitment to the values normally associated with both constitutionalism and democracy.

Moreover, a full understanding of mutuality means that it is not only us who act as representatives of those who cannot be, but might be: they, too, act as representatives of current generations, for the latter, too, have a stake in any future decision for all fundamental matters, such as environment and global health. Despite the lack of binding force, our interests in the well-being of future generations – starting from our descendants- and in the existence of a peaceful and prosperous future political community ought to be valued. Becoming aware of such degree of mutuality is part of the reflexive dimension of the security of the European project, because it is through such process of self-understanding that a political community elaborates the meaning of how to be secure.

5. Conclusions

This article has argued that constitutionalism and constitution-making – including European constitutionalism- are driven by the meta-constitutional rationale of security. This notion expresses the need for a constitutional community not only to develop shared values, but also to ensure that such values are protected over an extended period of time. Importantly, "security" should not be conflated with mere "stability", which is normally associated with ancient constitutional thought (e.g. Aristotle or Plato) when considering the conditions ensuring the endurance or persistence of a regime. "Security" has instead a more existential connotation and can be viewed as a sort of political morality that underpins a constitutional settlement.

Moreover, security is characterised by a double dichotomy: the dichotomy between self-preservation and self-empowerment and the

dichotomy between change and permanence. Such dichotomies lay the foundations for a justification of authority, in the sense that a polity exists to preserve itself against adversities and it is in its nature to develop gradually its own powers and competences.

In fact, discourses concerning the EU's self-empowerment (i.e., the security discourse) and individual self-empowerment (i.e., the rights discourse) for the purposes of the survival of the EU have been present since the early days of EU integration. The EU legal order, on the one hand (*Van Gend en Loos*) vows to protect, emancipate and empower individuals – the rights discourse–and, on the other hand (*Costa v. ENEL; Kadi*) empowers the EU legal order itself– the security discourse- through its triple claim of autonomy, authority, and legitimacy. Although these discourses are constitutive of the European project at a deep, foundational level, they are characterized by ambiguities and contradictions and have appeared as if they were neutral—thus concealing legal-political conflict. Yet, as the project of integration reaches more advanced stages, it is increasingly necessary to address conflict openly, including contradictions and paradoxes inherent in the process of integration.

To this purpose, this article has distinguished six dimensions in our inquiry on security: spatial, temporal, popular, ontological, epistemic, reflexive. Concerning the EU, in the last decade for the first time all dimensions of security have been affected simultaneously by multiple crises: the economic and financial crisis, the refugee crisis, Brexit, the crisis of the rule of law and democratic backsliding, the Covid-19 pandemic and the war in Ukraine.

Finally, the article has advocated a shift from self-referential to heterarchical security, which is represented by the heterarchical paradigm, i.e. mainly (but not exclusively) the so-called constitutional pluralist theories. The heterarchical paradigm brings into relief the coexistence of several claims of ultimate legal authority in the same territory not only as a fact, but also as a prerequisite for a legal system to endure.

At the same time, the shift from self-referential to heterarchical security requires that the unity of the legal and political systems be activated not only from the inside, but also from the outside, via deliberation.

Looking at a constitutional community as an *ongoing* deliberative process triggers the previously neglected question "what for?" rather than: "what is its nature?"

In other words, second-level considerations of legitimacy indicate that deliberating about what it means to be secure and how to be secure should also be an integral part of heterarchical security. This form of deliberation

places emphasis on the conflictuality among the material forces of society and the need to take into account the role of future generations.

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ABSTRACT: The purpose of this article is to provide a different conceptual framework for our understanding of constitutionalism and constitution-making. Rather than on considerations of pedigree, or, alternatively, definitional issues relating to the nature of a polity – in this particular case, the EU polity – the focus is instead on the question "what for?". What does a constitutional commitment stand for? What is the point of setting up a constitution? We may in fact trace an underlying political morality in any given self-justifying process of constitutionalisation, namely the notion of "security" *of* a constitutional settlement, and the development of the European project may be useful in placing emphasis on this aspect. Securing a polity"s structure and development has to do with the question of legitimate authority and is therefore at the root of what we consider essential for the creation and endurance of a constitution.

In other words, security as employed here does not correspond to traditional understandings of security as a public good provided to citizens, or to the idea of securitisation. It rather qualifies as a meta-constitutional rationale that informs the process of transformation of a polity, its practices and institutional arrangements and even scholarly work. The article illustrates how security, including the security of the European project, is characterised by two dichotomies, i.e. self-preservation and self-empowerment, on the one hand, and change and permanence, on the other (section 1). In addition, the article distinguishes six dimensions within security: spatial, temporal, popular, ontological, epistemic, reflexive. The argument is that these dimensions can be identified within constitutionalism as such and are useful to single out tensions and contradictions that emerge from the EU process of constitutionalisation (section 2). Relatedly, it is also claimed that a shift from self-referential security (i.e. security for security"s sake) to heterarchical is vital for the viability of the European project. For this to occur, a process of deliberation ought to take place within the reflexive dimension of security in the form of what is called here "communal constitutionalism" (section 3). As a result, the conception of legality as *auctoritas* is formulated, thus highlighting that the predominant version of liberalism – promoted by the EU – has been too "presentist". In fact, unity and plurality have the potential to coexist as the two poles of an

open-ended deliberation process. In this frame, the role of future generations is liable to be taken into account more seriously (section 4).

KEYWORDS: constitutionalism - legitimate authority – deliberation - constituent power - political community

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