

# A European Account of Justice: Under Pressure of Subsidiarity?\*

*Dries Cools*

## 1 Introduction

### *The Juncker Commission and the Greek crisis*

On 16th December, 2014, the newly elected European Commission, headed by the former Luxembourg Prime Minister Jean-Claude Juncker, presented its work programme for 2015.<sup>1</sup> The Commission's agenda for 2015 had been trimmed down to 23 new proposals, whereas 80 pending policy proposals had been withdrawn in line with the principle of 'political discontinuity'.<sup>2</sup> Europe was to be big in the big things and small in the small things.<sup>3</sup> One of the big things the Commission would focus on is the so-called Juncker plan, a €315 billion investment plan for the EU to put the lacklustre European economy back on track. With four former prime ministers and four former deputy prime ministers among its members, the new Commission, 'voted into office',<sup>4</sup> claimed to have heard the complaints from member state capitals: the Juncker Commission would withdraw from petty over-regulation and do what it should do: re-ignite the economy. That was the new talk of the town in Brussels.

The new Commission started its term at a time it was thought that the worst of the Greek crisis had subsided. However, it had not. Seven months later, the Greek crisis re-emerged in full force. After a relative calm following the third bail-out programme, agreed upon in August 2015 between Greece and the European institutions,<sup>5</sup> new doubts about Greece's repayment capacity had surfaced again at the time of writing. These two events – the alleged discontinuity of the new Commission and the Greek crisis – offer insight in a shift which is taking place within the EU constitutional narrative.

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1 European Commission Communication 2014/910, December 16, 2014, *Commission Work Programme 2015, a new start*, [ec.europa.eu/atwork/pdf/cwp\\_2015\\_en.pdf](http://ec.europa.eu/atwork/pdf/cwp_2015_en.pdf).

2 *Ibid.*, 2.

3 Quote of Frans Timmermans, vice president in charge of better regulation in a video clip on the 2015 Commission work programme: [ec.europa.eu/priorities/work-programme](http://ec.europa.eu/priorities/work-programme).

4 *Commission Work Programme 2015, a new start*, 2.

5 Eurogroup statement on the ESM programme for Greece, August 14, 2015, <[www.consilium.europa.eu/press-releases-pdf/2015/8/40802201771\\_en\\_63575184720000000.pdf](http://www.consilium.europa.eu/press-releases-pdf/2015/8/40802201771_en_63575184720000000.pdf)>.

### *Purpose and structure*

In this paper, it will be first described how the European principle of justice, understood in a Dworkinian sense (section Dworkinianisms below) as a constitutional theory of equal distribution of a certain set of resources and opportunities among Europeans, has emerged as a hallmark of the Community's and the Union's constitutional narrative. It will then be argued that this constitutional principle of justice has come under pressure through the rise of subsidiarity in the EU's constitutional discourse. The first four sections of this article will provide a schematic (rather than a strictly chronological) account of the evolution of the EU's constitutional narrative. First, the emergence of the European idea of justice, as the principle guiding the establishment of the common/internal market, will be described (section 2). Second, it will be described how the idea of justice presupposed and led to the further development of the constitutional notion of a European political community and to the emergence of a constitutional narrative of *fair* decision-making structures, i.e., an account of equal participation in decision making (sections 3 and 4). Third, with these two main tenets of a constitutional discourse in place (an account of justice and an account of fairness), the question arose as to the demarcation of the EU constitutional order from national constitutional orders. Subsidiarity provided the answer to that question and has significantly impacted both the development of EU constitutional law and the respective roles of the EU institutions (section 5). The narrative of the Juncker Commission illustrates this point. Fourth and finally, it will be argued that the delegational element present in subsidiarity has changed the nature of the European principle of justice, from a supra-political principle to an inherently political principle dependent on national conceptions of justice. The Greek crisis will provide some contentious elements to make this point. This paper, in short, is the story of how the snake has bitten its tail, of how the starting point of European integration – an account of justice – has been the victim of an expanding European constitutional narrative.

### *Dworkinianisms*

I will use the notions of 'justice' and 'fairness' in a Dworkinian sense throughout this paper. 'Justice' refers to 'a just distribution of resources and opportunities' in the community, whereas 'fairness in politics is a matter of finding political procedures that distribute political power in the right way, (...) generally understood to mean procedures and practices that give all citizens more or less equal influence in the decisions that govern them'.<sup>6</sup> Justice and fairness shall be applied consistently. This principled consistency that permeates the legal and political order is what Ronald Dworkin qualifies as political integrity.<sup>7</sup> For Dworkin, the principles of justice, fairness, and integrity originate in the soil of a community's political practice. They constitute the basic principles that regulate the life of the members of the community and are as such recognised by the members of the community.

6 Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 164-5.

7 *Ibid.*, 165-6.

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They are associative obligations which the participants of the community owe to each other and not to outsiders.<sup>8</sup>

I will consider the principles of justice and fairness as the two cornerstones of every constitutional narrative. Various theories of fairness and justice might be set forward, but the basic intuition remains: any constitutional narrative will address these two questions: how we are to be governed (fairness) and how we organize the distribution of resources and opportunities in society, involving a balancing act between individual rights and policy objectives (justice).

This paper speaks of the principles of justice and fairness<sup>9</sup> of the European (Economic) Community and later the European Union. Given the short and tumultuous history of European integration, this constitutional narrative has been subject to significant shifts. These shifts are the object of this paper.

The purpose of this paper is not to demonstrate why the European polity should or should not be considered as just<sup>10</sup> and fair or to demonstrate why the Union does or does not constitute a Dworkinian political community. Neither is its purpose to demonstrate why Dworkin's idea of law as integrity can or cannot hold in the Union. This paper will describe how a European constitutional discourse of equal opportunities for a European political community has emerged (whether it *fits* is another matter) and demonstrate how it is now threatened by the idea of subsidiarity.

## 2 The emergence of the European idea of justice

### *Post-war conceptions of European justice*

The European idea of justice emerged as a supranational legal principle intended to check the excesses of national politics. At its inception, this conception of justice seemed to have a limited scope: it prescribed an equal opportunity for all Europeans to freely provide goods, services, capital, and labour across the Community. This type of 'access justice'<sup>11</sup> proved to have a wide explanatory scope,

8 *Ibid.*, 199-202.

9 I will leave the principle of procedural due process aside, which Dworkin understands as the guarantee of 'an equitable process': Dworkin, *Law's Empire*, 164. Dworkin focuses his analysis on justice and fairness as well.

10 One could question whether justice has not been made subordinate to the promotion of the efficiency of the internal market. See inter alia: Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political,' *European Law Journal* 21(5) (2015): 572-98.

11 Marija Bartl describes how this type of 'access justice' is linked in the EU to the improvement of the functioning of the internal market: Bartl, Bartl, 'Internal Market Rationality,' 586-7.

which allowed the Community and later the Union to set foot in various spheres of human life.<sup>12</sup>

The speed at which this conception of justice came to light might not surprise, after the events of World War II. The prime purpose of European integration after World War II was to provide a compelling answer to the deficit of national politics. Aggressive conceptions of popular sovereignty could no longer be left unchecked; legitimating political action by grounding it in the will of the people through democratic majority requirements was no longer deemed sufficient. For the Founding Fathers, the central question was not so much the legitimacy of European integration, but rather the legitimacy of national states. The only way for national politics to rebuild a credible legitimacy was to insert themselves in a larger order of legal restraints.<sup>13</sup>

This question differs from the question of the legitimacy of the EU as we are used to it today: What is the entitlement of the EU to produce norms? For the Founding Fathers, the question was rather: What is the entitlement of nation states to freely decide upon a political course of action? Whereas European norms are the starting point of the former *question* in 2015, they were the gist of the *answer* to the latter question in 1950. That is why the four freedoms related to the circulation of goods, services, persons, and capital could claim the moral higher ground. They provided a dam against national strife; they embodied the guarantee that the atrocities of the war would not be repeated. They encapsulated the idea of justice which functioned as a deterritorialized<sup>14</sup> transcendental *condition sine qua non* for member state politics. Surely, the various applications of the European principle of justice were never beyond hermeneutical activity. However, the very idea that an increasing set of entitlements had to be accessible to all Europeans without discrimination functioned as a difficultly assailable paradigm<sup>15</sup> in post-war politics.

In short, the European Economic Community was conceived of as an apolitical, ethical project designed to limit and thus to legitimate national sovereignty. From the point of view of Founding Fathers like Jean Monnet, the European Coal and Steel Community was a source of functionalist peace enhancing output legiti-

12 See Case 9/74, *Casagrande v. Landeshauptstadt München* [1974] ECR 773 as an exemplary case in which the Community power was further stretched making use of the basis of the European principle of justice. In *Casagrande*, the equal rights provisions for children of migrant workers laid down in Council Regulation 1612/1968 were found to outlaw national provisions of education law, even though the Community had no competence in this field. This phenomenon is described by Weiler as a process of absorption: Joseph H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 47-50.

13 The need for relegitimation was most pressing for Germany: See Weiler, *The Constitution of Europe*, 37, note 59.

14 'Deterritorialisation' is a concept borrowed from Gilles Deleuze and Félix Guattari, *Qu'est-ce que la philosophie* (Paris: Minuit, 1991).

15 Dworkin, *Law's Empire*, 72, on paradigms in interpretation.

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macy.<sup>16</sup> From the viewpoint of the nation state, the European Economic Community was a source of what some authors have qualified as juridical sovereignty, making the exercise of political will subordinate to juridical principles.<sup>17</sup> From this vantage point, the Community became an even stronger source of juridical legitimacy when the Court ruled that the protection of fundamental rights ‘must be ensured within the framework of the structure and objectives of the Community’.<sup>18</sup>

### *Institutional ramifications*

This juridical and apolitical conception of Europe was embodied in the way the European Commission was conceived. Whereas it is fair to say that the ‘Rome Treaty placed the Commission in the driving seat in the development of Community policy’,<sup>19</sup> it is equally true that the Commission was conceived as a technocratic body that had to safeguard the European principle of justice by ensuring the correct application of the Treaties. This was not so much conceived of as a legislative act of freedom but as a technical-executive task. Hence, EU law produced by the European institutions at the behest of the Commission was called secondary law rather than legislation. This reflected the idea – or the illusion – that EU law was no more than a logical deduction from the Treaties. The exclusive right for the Commission to initiate legislation and the fact that the Commission could not be held accountable before a legislative body were in line with the institutional role that the Commission was given.

### *The heroic Court years*

In the 1960s, the principle of justice became a truly constitutional principle. It came to be embedded in a constitutional narrative for the Community’s legal order.<sup>20</sup> European justice, as an equal entitlement to the free exchange of goods, services, capital, and labour was given constitutional prominence through the recognition by the European Court of Justice of the doctrines of direct effect<sup>21</sup> and supremacy<sup>22</sup> of Community law. In the famous *Van Gend en Loos* ruling in which the Court recognized the direct effect of Community law, the Court endorsed the creation of a new legal order in which member states had abandoned a part of their sovereignty and in which member state citizens were recognized as legal subjects. In doing so, the Court rejected the interpretation of Community law as an instrument of international law generating rights and obligations only for sig-

16 Paul Craig, ‘Institutions, Power, and Institutional Balance,’ in *The Evolution of EU Law*, ed. Paul Craig and Gráinne De Búrca (Oxford: Oxford University Press, 2011), 15-6.

17 See *i.a.* Alain de Benoist, ‘What is Sovereignty?’, *Telos* 116 (1999): 109.

18 ECJ, Case 11/70 *Internationale Handelsgesellschaft* [1970] E.C.R. 1125, para. 4.

19 Craig, ‘Institutions, Power, and Institutional Balance,’ 43.

20 See Weiler, *The Constitution of Europe*, 19-29 for a description and assessment of the constitutionalisation of the Community’s legal order.

21 ECJ, Case *Van Gend & Loos* [1963] E.C.R., at 22-3.

22 ECJ, Case *Costa* [1964] E.C.R. 585.

natory parties.<sup>23</sup> This landmark judgement was adopted by the Court to give full effectiveness to the idea of justice that was shaping the young Community.

### 3 Justice, but no fairness

In contrast with the constitutional account of the duty of justice, the Community did not have a similarly complete account of the fairness of its decision-making procedures in the first decades of its existence. Throughout the 1960s and 1970s,<sup>24</sup> decision making was *de facto* in the hands of the member states, since President De Gaulle had refused to accept the application of the Rome Treaty majority arrangements. His refusal led to the infamous Luxemburg Accord<sup>25</sup> in 1966 on the basis of which each member state retained its veto right. The Luxemburg Accord also reduced the factual weight of the Commission in decision making, in contrast with the more glamorous role the Commission was expected to play as the arm of the European idea of justice, instituted by the Rome Treaty (above, section Institutional ramifications).

The absence of a narrative of fairness does not imply that there was no account of the Community's decisional structures. The Community functioned in the 1960s and the 1970s as a long-term contractual relationship between like-minded nation states founded on the pre-eminence of national political will, which could only be limited on a voluntary basis by a contract between the member states. In a classical international treaty setting, such situation could well be described as *fair*, as no contracting party can ever be committed to an undesirable outcome. In the situation of the Community, where, as the Court had noted,<sup>26</sup> member states had abandoned a part of their sovereignty, the same situation could hardly be described as fair. From the point of view of national fairness, member states were limited in pursuing national policy in areas of transferred sovereignty. However, neither was there a Community conception of fairness, as any member state could at any point in time veto decision making, which made majority preferences in the Community irrelevant and equal participation of Community citizens in decision making an illusion.

How was it possible that justice could thrive but not fairness? The paradoxical answer to this question is that justice could thrive *precisely* because fairness was not allowed to thrive. The Community, in the words of Joseph Weiler, was a constitutional legal order without a constitutional theory.<sup>27</sup> Member states reacted to the constitutionalization of the idea of justice by holding on to veto power.<sup>28</sup> Precisely because member states could keep full control over decision making in

23 ECJ, Case *Van Gend & Loos* [1963] E.C.R., at 22-3.

24 Majority voting was formally re-instated by the July 20, 1987 Amendment of the Council Rules of Procedures, [1987] O.J. L291/27.

25 Luxembourg Compromise (1966) 3 Bull. CE 10.

26 ECJ, Case *Van Gend & Loos* [1963] E.C.R.

27 Weiler, *The Constitution of Europe*, 8.

28 *Ibid.*, 232.

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Brussels, they were willing to accept the primacy and the direct effect of Community law.<sup>29</sup> As long as fairness was the sum game of fair national decision-making procedures, a European account of justice was allowed to flourish.

As a result of this, two visions of Europe became strangely connected to each other in an uneasy constitutional marriage: a national-political understanding of Europe that explained the Community's decision-making structures and a Communitarian apolitical conception of Europe that explained its legal order. Member states were able to legitimize their political systems by having signed up to the Community legal order; but at the same time, Community decision making was controlled by the member states in the Council. This marriage might have worked for some time, but it impeded the Community from having a clear constitutional narrative.

#### 4 Fairness, at last

##### *The urge for fairness*

A European account of justice without an account of fairness was gradually found to be insufficient. Two tentative political-historical reasons can be put forward to explain this evolution. First, the more the memories of World War II faded away, the weaker the appeal to the atrocities of the war became as a sufficient argument to justify European integration. This became all the more a truism when European regulation expanded further and further in a wide variety of spheres of human life.

Second, to effectively further the idea of justice of the common market, the Luxembourg Accord was traded in for an expanded regime of qualified majority voting. This move was demonstrative of the intellectual difficulty to uphold the idea that the market promoted through European law making is value neutral and does not imply any substantial policy choice, as member states effectively differed on the implementation of the common market. It clearly showed that the precarious European constitutional equilibrium was under threat. On the one hand, there was a clear limit to the appeal and the apparent universality of the idea of European justice. On the other hand, individual member states were bound to lose control over decision making in Brussels. In other words, the legitimacy of the European legal order could no longer be founded in the ethical legitimacy it generated for its member states and the question of the fairness of European decision making could no longer be seen as a contractualist derivative from the question of the fairness of national politics. To remedy both flaws, the development of a European account of justice had to be founded in a procedural narrative of fair European decisional structures to ensure that all European citizens would be equally well represented in the Brussels decision-making procedures. In political terms, this process can be largely described as the battle of small against big member states: the small member states wanted to avoid that the bigger ones

29 *Ibid.*, 31-9.

would lay claim to the Community's decision-making process, favouring thus the citizens of the big member states.

#### *A European political community*

There is a third reason, related to the very structure of constitutional argument, why justice without fairness does not work. There are two steps in this argument.

*First*, the European idea of justice presupposes that the Community/Union constitutes a political community in the Dworkinian sense, within which specific obligations of justice hold. Why is this so? Once we have accepted that certain obligations of justice apply at European level, we need a credible account of the source of these European obligations. Part of the answer can be found in contractual theories. We and our political leaders adhere to a European idea of justice, as the collective policy outcome of such adherence is in the interest of the constituent member states. However, such contractual theories do not yet explain why such obligations specifically hold at European level and not at another level. Any theory of the source of the European idea of justice must therefore do justice to the specificity of the community as a source of obligations and recognize the Community and later the Union as a true political community.

Therefore, in order to be able to credibly promote the principle of justice, the Community had to be *seen* as a community of citizens, committed to justice as a communal obligation. Citizens of such a community conceive justice as an obligation they owe to one another. For Dworkin, *associative* obligations, and not any form of social contract, are the source of the *political* obligations of justice, alongside fairness and integrity.<sup>30</sup> The commitment to these principles is what differentiates a political community from a random community. The proposition that such community exists is not a metaphysical statement. It is a personification without which the principles of justice and fairness cannot be rendered operational, as principles ascribed to the community.<sup>31</sup>

One could argue that it suffices that the political principle of European justice is built upon communal obligations of justice holding within each member state. However, this would imply that a potential duty of justice of a Hungarian towards a Belgian would not be recognized on an equal footing as the special communal obligation of justice Hungarians owe to one another. Such sum of national principles of justice would be an insufficient basis for the European principle of justice.

The idea of the Community as a political community in which specific communal obligations hold among Europeans constituted an intellectually compelling platform to legitimate the Community's action. I do not intend to argue whether or not this constitutional conception of the Community/Union *fits* the communal practice of the Community. My only claim is that a European political community was a necessary discursive postulate to found the European principle of justice.

30 *Ibid.*, 206.

31 *Ibid.*, 171.

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Whether it remains convincing in time of rising Euroscepticism is a different matter.

*Second*, once a European account of a political community within which justice holds is a discursive reality, an account of fairness is needed. This goes to the heart of political philosophy: we *collectively* decide how the distribution of means among us will be organized. No one else shall decide for us, and no one among us shall have a greater say on this matter than anyone else. Fairness in decision making is the only guarantee that the eventual distribution of means will be just. The presence of justice without fairness was a matter of principled inconsistency, staining the integrity of a community committed to a consistent application of the principles of justice and fairness.

The move to fairness in European integration coincided with an upsurge in Community activity after the moribund 1970s. The further the reach of Community justice, the more the need arose to endow the Community with fair political structures. The more it became clear that the development of a European narrative of justice was a hermeneutical activity requiring debate, the clearer the need arose for a fair organization of this debate.

A landmark moment in the coming of age of such a political community in Europe's constitutional discourse was the Maastricht Treaty, which as a matter of paradoxical semantics superposed a Union onto the new European Community that replaced the European Economic Community. To the existing Communities of member states was added a Union with Union citizens, committed to fundamental rights as general principles of Community Law.<sup>32</sup> The Maastricht Treaty symbolized the transition from a sketchy constitutional narrative based on decisional contractualism and a universal ethics of the free market to a constitutional narrative anchored to a European political community.

I have followed thus far a line of reasoning *à la* Dworkin, but in reverse mode. The idea of a European political community emerged as a viable discursive postulate to support a new European constitutional narrative destined to replace the ramshackle narrative of decisional contractualism and a market-based conception of justice. Admittedly, it can be argued that the idea of a European political community did not only emerge as a discursive necessity for the European elite trying to mould a viable European constitutional narrative. Conversely, it would be a long stretch to argue that the idea of a European political community would be a thought structure sufficiently practiced by the population at large to be able to found the idea of European justice in associative ties, as Dworkin presupposes when dealing with the arguably less problematic case of the U.S. political community. The truth might lie somewhere between those poles (but is not further researched here): the recognition of a European political community might have been a well-accepted idea and an indispensable discursive postulate and a workable educational or communicative strategy for a European elite trying to deepen

32 Art F, § 2 TEU.

the reach of European justice. On the other hand, its acceptance in the population at large is far more speculative.

To save the European idea of justice, one thing was to found it in a political community and fair procedures. However, an opposite route would have been possible as well. Rather than building the idea of fairness, why not limit the purview of the European principle of justice? Should we grant unfettered freedom of movement to all EU citizens, including those of the new member states? Should we not restrict the Schengen *acquis*? Now that the Union is confronted with an unprecedented refugee crisis, such questions abound.

*Fairness at work: a European democracy*

The gradual recognition of a European political community led to a second wave of constitutionalization, after the constitutionalization of the legal order under the auspices of the Court in the 1960s. The second wave deepened the constitutional account of a European polity built upon democratic principles and the rule of law. It endowed the Community and even more so the Union with constitution-like provisions not unlike those of classical nation states. This second wave has promoted not only a narrative of fairness but also a deepened account of justice, in response to the expanding reach of European justice.

The narrative of fairness was clearly expressed in the strengthening of the procedural *democratic* qualities of European decision making, with the introduction in 1979 of universal suffrage to elect the members of the European Parliament and the expansion of the co-decision procedure since Maastricht, based on the cooperation procedure of the 1986 Single European Act. These new decisional devices further reduced the Community's original decisional contractualism in favour of a community account of fairness.

A second prong of the new constitutional narrative is the EU citizenship, put in place by the Maastricht Treaty. The Treaty created a new constitutional subject, the EU citizen, for a new order, the EU. This EU citizenship goes beyond the original economical scope of the Community's market-based idea of justice. It entails political rights, such as the right of EU citizens to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence<sup>33</sup> and thus to play a prominent role in the new 'fair' decision-making structures. A third prong in the renewed constitutional narrative is the Charter of Fundamental Rights, integrated by the Lisbon Treaty in the constitutional *acquis* of the Union.

As a result of these changes, the EU has come to resemble more and more a self-standing fully-fledged constitutional polity. The European Union now offers a consistent constitutional narrative including an account of fairness and justice.

33 Now Art. 20 TFEU.

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## 5 Subsidiarity: a constitutional Europe rooted in the member states

### *Origins*

The more the Union affirmed itself as an autonomous constitutional unit with a fully-fledged narrative of justice and fairness, the more the question of the demarcation of national political communities and the European political community came to the forefront. In the process of emancipation of the Union as a self-standing political unity from its constituent member states, the question inevitably arose as to what the role of the member states should be. Were they bound to become mere building blocks of the larger whole or was there any role for national political communities, and how large should that role be?<sup>34</sup>

This questioning gave birth to a more encompassing theory of fairness, involving the member states. This new globalizing narrative of fairness offers an explanatory account of the totality and of the interconnectedness of EU and member state decision making. The key notion in this narrative is 'subsidiarity'. This concept tries to explain why certain competence matters shall be a matter of national political communities and others a matter of the European political community.

The conception of a European political community had proven to be a promising avenue to convincingly attribute powers to the Union, but it left the question unanswered how this European political community relates to national (and regional) political communities, which also lay claim to be fertile ground for political obligations. The need for a clear demarcation between national political communities and the European political community became all the more pressing when the Union set course for a new chapter in European integration with the Economic and Monetary Union.

The drawing of this demarcation line was to be performed by the multi-interpretable notion of subsidiarity. The idea of subsidiarity has its roots in Johannes Althusius's thinking about consociative popular sovereignty. For Althusius, the people are the exclusive possessor of sovereignty, and sovereignty can only be delegated. The 'people' is not a monolithic bloc, but a complex set of different layers, *consociationes*. Smaller units, such as families or guilds partake in larger politically organized groups on the basis of an upwards process of representation. Institutionally, this is translated into a dual decision-making structure at each level. At every consociative level, one political body represents the lower level that has delegated sovereignty and another body represents the level above.<sup>35</sup>

The more immediate forerunner of subsidiarity in the Community and the Union was the notion of subsidiarity as it figures in the 1949 *Grundgesetz* (hereafter the

34 It could be argued that this questioning became more prominent the more the Union expanded. Contrary to the old member states, the new ones were less moulded by the absorptive capacity of the Community and the Union. However, this assumption would require further investigation, as the quest for reaffirmation of the member states seems to have spread to some of the old member states as well...

35 De Benoist, 'What is sovereignty?', 116.

'Basic Law') of the post-war Federal Republic of Germany. The idea of subsidiarity finds its expression in the constitutional rules on the division of competences between the *Bund* and the *Länder*,<sup>36</sup> and in the federal legislative process, involving a *Bundesrat* with representatives of the governments of the *Länder*.<sup>37</sup>

Together with the rule of law idea of *Streitbare Demokratie*,<sup>38</sup> subsidiarity is one of the anchors of post-war German constitutionalism. Both are constitutional guarantees against totalitarianism. Subsidiarity and the protection of democracy provide a safeguard against the concentration of powers, and the rule of law limits the range of possible policy decisions. The moral stature of the Basic Law is unparalleled in Europe, which explains the importance of the German constitutional provision which grounds the European Union in the German project of subsidiarity and the rule of law. Article 23 of the Basic Law provides that 'the Federal Republic of Germany participates in the development of the European Union, which is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'. This article describes the central tenets of the German ideal-typical conception of Europe: subsidiarity, the rule of law and a foundationalist tendency to found the European constitutional order in German constitutional law.<sup>39</sup> Legal figures need to be grounded in underlying norms. Kelsen's search for a basic norm<sup>40</sup> transpires the essence of German legal thinking as driven by the need to find an original underlying moral starting point. In German thinking about Europe, this moral starting point is the German Constitution. Subsidiarity is the cornerstone of a narrative of fairness that attributes the totality of European legal norms to the political community of its member states. German constitutional thought looks at Europe from the point of view of the need for a constitutional continuum of a system of norms attributable *in fine* to the sovereign German people.<sup>41</sup> Only the German Basic Law can guarantee the fairness and justice of European norms.

### *Subsidiary in law and institutions*

- *Subsidiarity in law*

The upsurge of subsidiarity has had important consequences for both the development of European constitutional law and for the practical workings of the European institutions.

36 Title VII and VIII Grundgesetz für die Bundesrepublik Deutschland 23. Mai 1949 (BGBl S. 1), hereafter the 'Basic Law'.

37 Title VII Basic Law.

38 The set of constitutional provisions intended to protect the liberal democratic order against internal threats, including the Eternity clause of art. 79.3 of the Basic Law.

39 Gilles Deleuze and Félix Guattari provide an interesting account of the foundationalist tendency of the German legal tradition: Gilles Deleuze and Félix Guattari, *Qu'est-ce que la philosophie*, 101.

40 Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967).

41 Art. 20(2) Basic Law provides that 'all state authority is derived from the people'.

First, in European law, subsidiarity is now a general principle of EU law and has been given a separate protocol attached to the Lisbon Treaty.<sup>42</sup> It has also shown its force in recent evolutions in European law and policy. No rulings on the compatibility of EU law with national constitutional law are more feared and respected than those of the German Constitutional Court. In its *Lisbon* ruling, the Court went into considerable detail to demonstrate that the Lisbon Treaty was in compliance with Germany's constitutional identity. In the same ruling, the Court built further on its established case law on *ultra vires* review to verify whether the EU had not transgressed the boundaries of its explicitly attributed powers. Highly interesting is the Court's suggestion to the German legislature to create 'an additional type of proceedings before the Federal Constitutional Court that is especially tailored to *ultra vires* review and identity review to safeguard the obligation of German bodies not to apply in individual cases in Germany legal instruments of the European Union that transgress competences or that violate constitutional identity'.<sup>43</sup> Both the stringent identity review and the *ultra vires* review are testimony to the German foundationalist intent to create a decisional constitutional continuum for an integrative European legal order.

- *Subsidiarity in institutions*

Second, the success of subsidiarity in European law and politics has had noticeable institutional ramifications. First, it has led to a further strengthening of those European institutions that may be positioned within an Althusian framework of upwards delegation, i.e., the Council, the European Council, and the European Parliament. The Council and the European Council represent the sub-European level of the member states, whereas the European Parliament is supposed to directly represent the European citizenry. Second, it reflects and it has led to a weakening of the European Commission, as the institutional manifestation of the European idea of justice. As a non-representative, non-political organ (at least in its original conception), the European Commission fits poorly into the Althusian frame of upward delegation of sovereignty. As for the future, there could be two ways that would make the Commission fit better with subsidiarity. Either the Commission would be further relegated to an executive secretariat of an increasingly powerful European Council, or the Commission could be made a real political government, answerable to the European Parliament and reflecting the majority of the European Parliament. The Juncker Commission seems at least to have chosen the latter avenue. Even more indicative of the fact that the Commission is intent on becoming a classic political governmental body, is the way in which Mr. Juncker was 'voted into office'. Mr. Juncker was appointed President by the European Council after a German style *Spitzenkandidaten* campaign in which every political group in the European Parliament had put forward a lead candidate. Not surprisingly, this campaign – lukewarm at most in other parts of the EU – enjoyed

42 Protocol on the Application of the Principle of Subsidiarity and Proportionality, [2012] OJ C 326/206.

43 German Constitutional Court, judgement of June 30, 2009, 2 BvE 2/08, nr. 241(2009) 62 *Neue Juristische Wochenschrift* 2267.

a sizable degree of visibility in Germany (the fact that two of the lead candidates were German and that Mr. Juncker himself is fluent in German might have helped).

## 6 Subsidiarity and justice

Not only EU law and the EU's institutions have been impacted by subsidiarity. More profoundly, the constitutional narrative of justice itself has been impacted. The resurgence of national political communities in the constitutional narrative of the EU has brought national conceptions of justice again to the fore. The attribution of European norms to underlying political communities has raised the question of the compatibility of these norms with national conceptions of justice. Questions of this sort are obviously not the mere consequence of the flourishing of subsidiarity within the EU's constitutional discourse. However, their status has changed. They now fall explicitly within the ambit of EU constitutional debate, whereas in the proto-constitutional discourse of the Community, European justice transcended national conceptions of justice. The question of the compatibility of European justice with national justice was then not a question to be asked. Where needed, European justice had to correct the excesses of national conceptions of justice. However, the transcendental (or at least paradigmatic) functioning of the European idea of justice – legitimating member state politics – has been surreptitiously traded in for a narrative of justice reterritorialized on national conceptions of justice.

Such attribution of the European idea of justice to national conceptions of justice is likely to have severe consequences for the European idea of justice, in cases where there is no agreement among national political communities on how to apply the European principle of justice in EU competence matters. There will be little room for an effective account of European justice if strong opposing national conceptions of justice exist, especially since subsidiarity allows them a primordial place in the Union's constitutional discourse. Subsidiarity only works where national political communities are ready to defer to the principle of justice of the above *consociatio*, so that the above principle of justice can flawlessly be anchored in the principle of justice of the underlying community. If that is not the case, there is a risk of principled inconsistency in those areas for which the above *consociatio* is in charge.

Undoubtedly, the Greek crisis is a case on point. National yardsticks of justice have been more prominent in the debate on the crisis than European yardsticks of justice. Greece had to pay a price to the other Eurozone member states for the loans that it was granted, to ensure a sense of retributive justice for the lending national treasuries. That this price assumed the form of measures that are nowhere else imposed in the EU, such as an increase of certain VAT rates, more

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flexible opening hours for shops on Sunday, and a fire sale of its public assets<sup>44</sup> is hard to reconcile with a principled European account of a just distribution of resources across Europeans. Other cases on point, unfolding while writing, are the UK's demand for an exemption from EU rules to be allowed to reduce welfare benefits to EU migrant workers and the rejection of the Visegrád countries to host a share of the thousands of refugees knocking at Europe's doors.

## 7 Conclusion

The European principle of justice has travelled a long way since its inception after World War II. From the great heights of the common market war against inter-state strife, it is now finding firm ground in a European constitutional discourse of national political communities. The composition of the Juncker Commission and its claim to have understood member states' concerns were an attempt to open up the ivory tower of the Commission to national conceptions of justice. Will this be enough to counter the increasingly massive rejection of the European idea of justice or will this, on the contrary, contribute to such rejection? One may wonder what will happen if the European idea of justice continues its journey down from the sky and reterritorialises on the nation state. This could have the potential to put the original intention of European unification at risk: restraining national politics in an ethical-juridical straightjacket with one fundamental objective: Never again war.

44 Euro Summit Statement, July 12, 2015, <[www.consilium.europa.eu/en/press/press-releases/2015/07/12-euro-summit-statement-greece](http://www.consilium.europa.eu/en/press/press-releases/2015/07/12-euro-summit-statement-greece)>.