Conceptualizing governance beyond the State
From ‘supranational government’ to ‘supranational governance’ in the European Union

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Abstract - The process of European unification has been challenging the traditional idea of the State for 60 years, and has therefore given birth to numerous “new” political concepts. Using the tools of social history of concepts and basing on a comprehensive analysis of academic and political European debates, this paper will try to cast light on the way these concepts happened to make sense in European political thought. Highly representative of this trend is the concept of “supranationality”, which has become widely used amongst both scholars and politicians when discussing the European Union (EU). I will first analyze the raise of the concept of supranationality in the early European process. Supranationality, primarily a political normative watchword for European building, remained mainly thought as a remedy against nationalism and war, relying on a classic understanding of unitary sovereignty. But, considering its understanding since the mid-80’s, it will be shown that it has known an unexpected revival associated with the ‘governance turn’ in both political and academic debates. I will argue that this points to the emergence in European political thought of a paradigm of ‘network sovereignty’, whose clearer expression is the compounded concept of ‘supranational governance’. It will be argued that if this concept indeed challenges the very notion of the sovereign State, it also makes possible a radical reframing of the concept of sovereignty.
The process of European integration has not only led to the emergence of institutions and practices. It has been paralleled by the progressive constitution of discourses and concepts, elaborated in order to define, analyze and, basically, make sense of what was being built – and, very often, of what it should be. This intellectual framing of Europe is not a matter of minor importance. On the one hand, it is itself part of the European integration process, if we are to agree that these discourses are tools used in the struggle to define how we can interpret the emerging institutional and social order. They are directly related to the legitimacy of this order (Wiener: 2008; Berger & Luckmann: 1966). The development of a European polity is thus closely intertwined with the elaboration of conceptual accounts of this development, whose study illuminates ‘the history of change in the self-conceptualization of political societies’ (Pocock: 1987). On the other hand, it is commonly argued that European integration is the most advanced case of regional integration and of alternative experiment to the nation state. It is thus a privileged laboratory of how political discourses and concepts are elaborated in order to think of governing in a non-national context.

One of these concepts, widely used to characterize the EU, is of particular interest in this perspective: the concept of ‘supranationality’. As we will see, it is far from being precisely and unequivocally defined (Hay: 1966; Wind: 2001). Perhaps because of this very contested definition, it has been used from the immediate post-war context to the most recent European debates. Moreover, it has been described as encapsulating the very originality of the European institutions vis-à-vis the nation state (Weiler: 1981). But how was ‘supranationality’ designed and discussed? What kind of picture of power does it provide? And how does it face basic categories of Western (European) political thought such as the sovereign national State? To answer these questions broadly aims at better understanding the formation and development of ‘new’ categories of political thought, and their success or failure. More specifically, it intends to retrace the process of conceptualizing a non-national organization, and to assess to what extent it proposes an original vision of political power.

In this paper, I will consider the history of the concept and carry out its analysis in two moments. In a first part, I will investigate the early uses of ‘supranationality’, back to the beginning of European integration. They are mostly related to the principle, the organization and the development of a supranational organization. Basing on Joseph Weiler’s canonical distinction between ‘decisional’ and ‘normative’ supranationalism (Weiler: 1981), it will be distinguished between three types of discourses on ‘supranationality’. These types, as every ideal-types, are neither strictly exclusive nor precisely historically delimited. They are more to be thought as successive and sometimes overlapping layers of conceptualization. In spite of their deep differences, notably on the nature of a supranational power, I will suggest that they share common conceptual patterns, not radically departing from traditional views of sovereign power. In a second and shorter part, I will then contrast these early views with more recent accounts of ‘supranationality’ elaborated to answer the long-lasting and far-reaching legitimacy crisis of the European institutions. It will be argued that these accounts rely on completely different and much more challenging conceptual grounds.
Methodologically, I assume here that the meaning of concepts should be reconstructed from their uses (Skinner: 2009), for political concepts are usually contested and evolve over time. However, my focus is restricted on political and academic actors and debates. This is not to say that they are the only ones shaping political concepts, but this nevertheless assumes that they play a key role, because of their professional commitment with discourses and concepts. It has similarly been argued that certain academic discourses have played a central role in strengthening the emergence of nation-states in Europe (Wagner: 1990). Moreover, it invites to take into consideration the dynamic relationship between political and academic discourses in the process of conceptualizing Europe - phenomenon once analyzed in terms of “double hermeneutic” by Anthony Giddens (Giddens: 1984). I will mainly confine to the debates in French and German political and academic communities, for both countries are founding members of the European integration, and have been decisively involved in its debates ever since. Still, this is an important limitation if one considers the strength and specificity of, for instance, debates on ‘supranationality’ in the UK.

In this framework, this paper mainly relies on the study of two data sets. The first one is composed of parliamentary debates using the concept (French National Assembly, German Bundestag and European Parliament). This does not imply that Parliaments are the only relevant places where political debates take place, but is more related to the idea that they offer privileged arenas of expression, or ‘tribunes’ reflecting the political vocabulary and its changes, and where it can be best observed. The second one is made up of scientific uses of the concepts, i.e. of articles using the concept selected in academic journals, mostly French, German and European (dealing specifically with European integration) in the fields of law and political science. This corpus does not aim at giving a statistical representation of the debates, for the availability of the journals studied and the research methods in these journals strongly vary from one to the other. However, it provides a substantial ground to survey the uses of ‘supranationality’ over time.

**An old new concept**

At the very beginning, ‘supranationality’ was used as a self-proclaimed ‘invention’, presenting itself as an attempt to conceptualize a united Europe in a completely new way, departing from old and weakened political categories. And yet, in the years immediately following the War, ‘supranationality’ was not a completely unheard concept. It is commonly underlined that its first uses are to be found in the German tradition, especially in Nietzsche’s work (Sidjanski: 1963), where it is associated with an appeal to ‘nomadism’, transcending national borders (Nietzsche: 1988). However, a different and quite opposite line of uses can be retraced between Nietzsche and the European post-war unification debates: ‘supranationality’ was in the meanwhile used to qualify non *a priori* territorially limited organizations - the Catholic Church and the (Roman or German) Empire. The pontifical tradition especially is not to be neglected, for it was concerned with the debates on world peace and
‘supranational state’ (see Mayeux: 1948 ; Abirached: 1952), and represented one of the oldest traditions of political thought claiming to offer an alternative to the classical nation-state. In the work of Abirached for instance, catholic supranationalism aims at building a ‘supranational state’, defined as a constitutional ‘federal state’ exercising its power on a much wider scale than nation. It consists of a strong executive power, and would be the ‘philosophical stone’ of political thought (Abirached: 1952). Catholic thought played a major role in framing the early efforts of European unification (Telo: 2005), all the more since many political leaders of the first times belonged to Christian-democrats parties. This idea of supranationality, relying on universal moral values and a supreme constitutional power, thus provided a kind of blueprint for federal views of Europe. But it should be distinguished from two others versions of supranationality available at this time.

The discourses of decisional supranationalism

A first strictly European use of the concept of ‘supranationality’ emerged in the aftermath of the Second World War. According to Joseph Weiler’s classical distinction, this early use of supranationality can be referred to as ‘decisional supranationalism’, concerning the ‘institutional framework and decision making processes’ of the Community (Weiler: 1981). It was, once, a cornerstone of European political debates, and was used in the European Coal and Steel Community (ECSC) Treaty in 1951. But it also was used as a scientific category to analyze the European process. In what follows, I will try to refine Weiler’s reading of supranationalism in order to cast light on an important divide between two types of supranationalism: a political one and an administrative one.

Supranationality: the need of a new conceptual framework

In post-war political debates, ‘supranationality’ appears as an ill-defined concept, open to several interpretations (Hay: 1966). It is a concept mostly negatively defined by distinction from other concepts. Obviously, a ‘supranational’ organization of Europe opposes the ‘Westphalian order’ that had prevailed since 1648 and whose basic elements were the nation-states. The concept of ‘supranationality’ was aimed at preventing the reappearing of dangers perceived as inherent to the very idea of nation and its by-products: nationalism and wars (Sidjanski: 1953 ; Pernice: 2000). Against the background of the two World Wars, nations were widely distrusted as deeply flawed and as generating more troubles than political stability. ‘Supranationality’ was thus thought as a remedy securing peace and security in a Europe that felt increasingly uncomfortable with the USSR on its East border. This concern for peace is at the very heart of the famous Schuman declaration of the 9th of May 1950, where it is especially insisted on the importance of overcoming French-German ‘secular’ (Schuman: 1950) national antagonism by sharing the production of industrial goods under the supervision of an ‘independent supranational organization’ (Schuman: 1949). The organization was
supposed to integrate their conflicting wills, and hence to make war between them not only virtually impossible but simply ‘unthinkable’ (Schuman: 1950). This idea was embedded in the European Coal and Steel Community (ECSC) Treaty in 1952, where the concept was used for the first time in an international treaty (Hay: 1966). But this first use isn’t very clear on the meaning of supranationality: while the French version actually referred to the ‘supranational character’ of the functions of the ECSC staff, the German translation used the word ‘überstaatlich’ – referring to the State, not to the nation. This different stresses of the concept suggest that the idea of building a non-Westphalian Europe would have to face the diversity of national traditions and of political vocabularies.

The concept of supranational organization did not only denote the overcoming of the disappointing nation-states. It also aimed at drawing a distinction from traditional international organizations (Maroger: 1956), and above all from the model of the League of Nations, created in 1919 but powerless and ultimately unable to prevent the Second World War. The underlying idea was to create an organization able to enforce the rules it adopted (the ‘Authority’), and thus to have a real power to regulate the uncertainty of the old international order. The idea of a ‘supranational organization’ was thus negatively contrasted both with dangerous nation-states and the inefficient international organizations. In other words, supranationality had to define a completely new type of organization on the international stage. But how to give a more positive definition of such an organization? And more precisely, if the central role was to be played by the ‘supranational authority’, how to characterize the functions and nature of this authority?

**Political discourses: Supranational State vs. Supranational Authority**

The landscape of European activists after 1945 is made up of a remarkable number of slightly different ideas and plans (Magnette: 2000; Du Réau: 2008). However, two major interpretations of the ‘supranational authority’ emerge from the early debates on European unification. In very broad terms, it can be distinguished between ‘federalists’ or constitutionalists’ and ‘community’ thinkers (Weiler: 1999). The first ones defended a strong political concept of supranationality, often merging with federalist views. Their more or less explicit aim was to build a political union superimposed to the nation-states, with, at least in crucial matters, a central European government. Spinelli for instance argued that it would not only guarantee peace in Europe, but also independence towards the US, that “supplied the supranational power which Western Europe needed but did not possess” (Spinelli: 1962): a supranational power did already exist and it played a determining role in Europe, but it was in the hands of the US government. Europe had to build up its own ‘supranational power’. To achieve this goal, it was claimed by some of its more active defenders (such as A. Spinelli), a ‘constituent assembly’ was needed (Du Réau: 2008) in order to ‘create a supranational sovereignty’, as a French MP put it during a debate (Le Bail: 1949). It is in this line of thinking that the idea of European federation as a ‘super-State’ enjoying a full range of sovereign rights was mainly developed (Beaud:
1998). In this light, ‘supranational authority’, although it was claimed to be a brand new concept for a brand new type of organization, appears to be still strongly connected with classical political concepts and organizations: trying to depart from the categories of nation-state and international organization, it suggests to relocate sovereignty at a higher level more than it proposes a new conceptual basis for supranationality.

For the second ones, the ‘Community’ thinkers, best represented by the initiators of the Schuman Plan’, time would play a greater role in European unification. If they made clear that Europe was to evolve into a full-fledged federation, it couldn’t be achieved overnight (Schuman: 1950). Moreover, supranational federalism was open to criticism for trying to reproduce at a higher level the logic giving birth to nationalism, and even sometimes calling for a ‘European nationalism’ (Grosser: 1963). Instead, as a starting point, they advocated a weaker and ‘depoliticized’ version of supranationality (Magnette: 2000), that was finally adopted in the actual European construction. They were concerned with the at first sight much more limited project of building a technical institution able to exercise its function without being controlled by political power – which was at the same time a much more ambitious project: building a completely new type of organization outside the borders of traditional power politics (Weiler: 1999 ; Hoffmann: 1995). Their privileged method was not political constitution but technical integration, as displayed in the ‘Monnet method’ of functional integration by an administrative authority (Bailleux: 2014). European integration was to start in very limited and technical areas, not creating a new sovereignty out of nothing, but allowing delegations, or at best transfers of sovereignty in these areas (Hoffmann: 1995). But there was a dynamic side to this conception of European integration: these limited areas were expected to increase over time, and thus to extend the scope of supranational power (Schuman: 1950). European integration to the supranational level was therefore conceived as resulting of a process more than of a constitutional grand decision.

The central properties of this supranational authority in their idea were, first, the right to make binding decisions (Reuter: 1953 ; ECSC Treaty, § 14), contrasting with the traditional chaotic hobbesian order of international relations. The enforcement of these decisions was from the beginning to be controlled by a ‘sovereign Court’, guaranteeing the equal application of the common rules. Then, it was legitimized by its undisputable independence towards the cartels and particular economic forces, on the one hand (ECSC Treaty: 1951) and the member-states, on the other (Schuman: 1950; Jaenicke: 1951; Reuter: 1953). This central quality, independence toward the States, is at the very heart of the article 9 of the ECSC treaty:

“The members of the High Authority shall exercise their functions in complete independence, in the general interest of the Community. In the fulfillment of their duties, they shall neither solicit nor accept instructions from any government or from any organization. They will abstain from all conduct incompatible with the supranational character of their functions.
Each member State agrees to respect this supranational character and to make no effort to influence the members of the High Authority in the execution of their duties.” (ECSC Treaty, §9 ; emphasis added)
The ‘supranational character’ of the High Authority staff is essentially equated with independence toward the member-states and their particular interests. This property involves duties for the staff, on the one hand, but also on the member-states, that should restrain from trying to ‘influence’ their national members of the High Authority, on the other. Independence is here taken as the property of not being bounded or motivated by an external will or decision, i.e. the power of making a decision in the ‘general interest’ of the Community. Reference to the ‘general interest’ of the Community is particularly worth noting, for it states that the Community has a self-standing interest, not defined by the sum of its members but, on the contrary, transcending it an determined by a virtually de-nationalized staff. Finally, the High Authority was thought as an administrative organ. Administrative refers here, on the one hand, to the essentially technical attributions of the High Authority – although, as one of its first observer noted, the ‘non-automaticity’ of its decisions suggests that it might have a ‘governmental character’ (Reuter: 1953). But, on the other hand, administrative also refers to its non-elective character, opposed to the political character advocated by federalists, i.e. to the direct legitimization by an elective procedure (Lindseth: 1999). It implies that the new authority is created by a delegation or limited transfer of sovereignty without, at least before long, general sovereignty claims or powers. It is an independent administrative (non political) authority located at a regional (non national) level. The ‘supranational authority’ enjoys fundamental properties of the sovereign States: the right not to be constrained from the outside in its domain of jurisdiction, i.e. the claim to ‘perfect independence’ (Grotius: 2001) associated with external sovereignty (Held: 2005); a ‘final decision’ power in its increasing domain; a legitimization by its independent care for the general interest. But this last feature makes the ‘supranational organization’ so specific in this context, for ‘independent’ means here ‘non political’, ‘administrative’: ‘supranationality’ does not only mean independence towards the national level of government, it also means independence towards political government more broadly. Supranationality in this version is not only governing at a different level, it is governing by different means. Whereas in the federal view, a ‘supranational authority’ is another name for a federal government established by a constitutive decision creating a ‘supranational sovereignty’, in the administrative view, it further means a change towards administrative governance.

Supranationality as a scientific category: constitution vs. spill-over

Paralleling the political debates, the concept of ‘supranationality’ at the same period increasingly permeated academic debates about Europe, especially in American political science. These debates were confronted with three major challenges: qualifying the emerging object ; explaining its development; tentatively predicting the outcome. But it is here extremely significant that the border between political and academic discourses is very often unclear, to say the least. At this period, the study of European unification was an emerging field, with few people involved, no clear historical precedent or uncontestable references. Moreover, an important number of pioneers of the study of
European integration were also politically involved in it, as militant or as political actors. Finally, the young European institutions themselves did their best to catch the attention of scholars and to develop the academic interest for European unification (Calligaro: 2013). Circulation was thus easy in this low-formalized field between academic discourses and political considerations – grounding a firmly established tradition in European studies. This permeability tends to blur more than usually the distinction between analytical and prescriptive discourses.

Unsurprisingly then, as in political debates, a divide between political and administrative conceptualizations of supranationality can be drawn. Close to the ‘union’ thinkers, federalists analyzed the early developments of European institutions as premises of a European federation. They underlined that the historical events of the XX° century had made the national organization of Europe obsolete. If the European integration process was to avoid the pitfalls of nation-states, the only solution was to create a federation of these States, to merge them together under a superior authority. This federation could only by legitimized by a constitution approved by the peoples of Europe (Spinelli: 1972, cited in Rosamond: 2000), and thus result of a clear political decision. As in national federations, sovereignty would be divided between members and central State (Spinelli: 1958).

Supranationality was here only a new level of government created by a constitutive decision, not a new type of political phenomenon. They proposed a ‘state-like’ view of a supranational federation, ‘replicating the format of the nation-state, albeit in a supranational form’ (Rosamond: 2000). Nevertheless, a different account of federalism was also developed by the influent C. J. Friedrich, who conceptualized federalism as a process, and supranationality as a stage in this continuous process of federalization. Interestingly, he opposed federation and sovereignty, to state that ‘in a federal system, there is no sovereign’ (Friedrich: 1964), for sovereignty requires a unique power able to have the ‘last word’ in decision-making – whereas a federation means, by definition, the coexistence of several powers over the same territory (Beaud: 1998). Supranationality is here an intermediate step between the process leading from the sovereign state to the political federation. This processual view makes him somehow close to the analysts of ‘administrative supranationalism’.

On the other side, of particular importance are the ‘neo-functionalists’, whose major figures are the political scientist Ernst B. Haas and his students S. Scheingold and L. Lindberg. Refusing the ‘idealism of federalists’ (Rosamond: 2000), they tried to explain European integration as a socio-political process, i.e. ‘the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the preexisting ones’ (Haas: 1958). And, as he puts it, the resulting ‘supranational scheme of government…seems to be the appropriate regional counterpart to the national state’ (Haas: 1964) which is no longer able to fulfill its basic duties. However, the development of this supranational ‘counterpart’ is qualitatively different from both national and international structures (Haas: 1958 ; Rosamond: 2000): it doesn’t
rely on a political decision making. This concentration toward a ‘new centre’ is explained by successive ‘spill-overs’, from a limited starting point to a fully integrated polity. In other words, there is a self-development, an ‘expansive logic’ (Stone Sweet & Brunell: 1998) of European integration, that can be observed and, crucially, confers a sense of necessity (although heatedly discussed and later amended, see Rosamond: 2000, Lindberg & Scheingold: 1970) to the further political development of the Community. Thus, although Haas insisted on the ill-defined character of ‘supranationality’, he studied it as an actual feature of Europe (Haas: 1958): the processes at the supranational level have an existence and an explanatory power of European integration, he claimed. So doing, he acknowledged its scientific validity against the numerous critics the concept raised, and triggers a long-lasting conflict with intergovernmentalists – an opposed school explaining European integration in a traditional international vein by the ‘grand bargains’ between sovereign nation-States, and denying the autonomy of supranational activities (Hoffman: 1995; Moravcsik: 1998). Contrary to federalists and intergovernmentalist explanations, the driving force in neo-functionalists accounts of European integration relies on technical, mainly economical grounds, and is shaped by ‘technocratic’ arrangements, not political decisions: politics is not the only nor the main driving force of the integration process. This view of supranationality is very close to the Monnet method, as it has been widely underlined (White: 2001; Rosamond: 2000). It places non-political forces at the heart of the process.

*The crises of decisional supranationalism*

The model of the supranational State and the model of the supranational authority have both been widely discussed in political debates. Moreover, both of them have found support in academic circles, where they have been conceptualized as scientific concepts, trying to escape the realm of ‘political ideology’. However, these early versions of decisional supranationalism have also faced fierce criticism, and, eventually, two deep crises that seemed to doom them to ostracism out of the European political vocabulary. The scope of criticisms raised during these two famous episodes being extremely wide, I will only sketch out two dimensions of the debates: first, the claim that the nation should remain the legitimate unit of decision making (national criticism); second, that the principle of decision making should remain political (technocratic criticism).

The first major crisis that seemed to condemn political supranationality to failure took place between 1952 and 1954, during the European Defense Community (EDC) debate. This was a two-layered project. First, the EDC aimed at extending the model of the ECSC to the area of defense (Aron: 1956). Military power is traditionally a central part of national sovereignty, for it is usually seen as the ground of national independence toward other states. However, the beginning of the Korean War in 1950 and the requirements of the American government to rearm to some extent Germany, raised concerns about European security. The idea was to give Europe the means to defend itself against the Soviet
threat, on the one hand, and, in France at least, to avoid an uncontrolled rearmament of Germany by integrating it in a wider structure, on the other (Aron: 1956). Interestingly, the EDC was explicitly attributed a ‘supranational character’ by the Treaty (EDC Treaty, §1), consisting in common institutions replicating the ECSC’s, military forces and budget. But creating a common army without a common political supervision raises difficulties that the authors of the text couldn’t but face. That’s why the French government proposed in 1952 to add a European Political Community (EPC) to the original EDC text. This EPC was clearly designed to establish the lineaments of a ‘federal or confederal’ structure of Europe on constitutional and parliamentary grounds (EDC Treaty, §38). To sum up, the EDC-EPC projects were a clear step forward a political integration of Europe on the model of administrative supranationalism, but with the clear objective of political union according to a parliamentary structure.

Nevertheless, the French initiated project was rejected by the French Assembly on the 30th of August 1954. The debates that it generated were of rare violence – according to a contemporary observer, French political life had not known such extreme polarization transcending the traditional borders of political parties since the ‘Dreyfus case’ in the end of the XIX° century (Aron: 1956). Many cases were made for and against the projects. Circumstantial arguments, such as the fear of a German rearmament, not even ten years after the end of the war, played a great part in the debates. However, two more general points were made relating to the idea of supranationality. They blamed the projects for badly endangering sovereignty, understood as national independence (external dimension), and as self-determination (internal dimension). The project would indeed have implied to ‘transfer almost all of the States military sovereignty’ (Semler: 1953) to a European organization. Politically, this was criticized for placing France in the dependence of the US government (especially by the communists), who strongly supported European security concerns, and possibly of a rearmed Germany (especially by the conservatives). It was thus seen as reducing in a significant way the ability of France to make its own strategic choices, and to secure the very independence it had lost during the war. Further, it crashed head-on against the conception that sovereignty is nationally based and not dividable. Sovereignty, in the sense defended here, can only be based on the ‘national fact’, in the terms of the Gaullist Michel Debré, because the nation is the only legitimate political unit where the diversity of individual wills can be aggregated to build a ‘general will’. Other principles can well be imagined, but they would be inaccurate in the XX° century context. Pretending to divide sovereignty practically amounts to remove the power of self-determination inherent to the ‘liberal government’, hence of democracy, given that it exists no ‘European nation’. It would result in either ‘anarchy’ or non-democratic government (Debré: 1953). This non democratic government relates to the ‘technocratic critic’, for the only ‘stable elements’ in the contemporary ‘dispersion’ of power is the administrative staff: giving up with the nation, as intended in the EDC-EPC projects, imply to let the ‘technocrats’ decide instead of the peoples of Europe. This widely supported critic of the undemocratic character of
the supranational institutions, not balanced enough by the EPC project, would be one of the most enduring ground for distrusting European institutions.

It was the last attempt to use the word ‘supranationality’ in an official European Treaty. This heated debate, and the final failure of the plan, froze the hopes of federalists, for it made clear that a political union, at least viewed as a supranational federation, was not in touch with the actual mood and projects of one of the founding members of the ECSC. It also suggested that Europe was not to turn into a federation in a foreseeable future, and thus, that analytical projections of federalist categories were surely inaccurate. It also weakened the defense of administrative supranationality, in giving much attention to the technocratic critic. But, as we will see, the most critical point against administrative supranationality was made a few years later, in 1965-1966, during the ‘empty chair crisis’.

This famous ‘constitutional crisis’ (Gerbet: 2007) broke out between the then French President, the general De Gaulle, and the Commission of the European Economic Community (EEC), created by the Rome Treaty in 1957. The Commission, presided by the German Walter Hallstein, was clearly in the line of the administrative supranationalism of Monnet (Olivi: 1998). Although the purpose of the EEC was much wider than the ECSC, there was a strong continuity between them, all the more since the Merger Treaty signed in 1965 had organized the merging of the executives of the ECSC, the Euratom Community and the EEC (applied in 1967). Yet, the French President had made clear his concern for French ‘national independence’, whose guarantor he must be according to the new French Constitution adopted in 1958 (articles 5 & 16). Against this background, in 1965 a violent conflict was triggered when the Commission, under the direct supervision of W. Hallstein, tried to include increased institutional powers for the European institutions in his proposals about the financial arrangements of the Common Agricultural Policy. The heart of the conflict laid in the French rejection of the very federal principle of ‘majority voting’ in the Council of Minister of the member states – principle that the French government contested in the name of national ‘vital interests’. From July 1965 to January 1966, the French representative in the European institutions were forbidden by the French government to take part to the normal activities of the institutions. Finally, a compromise was elaborated in January 1966 in Luxemburg (the ‘Luxemburg compromise’), but it didn’t actually resolve the question: it only stated that the different member states didn’t agree on this principle, but that, given their will to find as often as possible a unanimous solution, it shouldn’t harm the work of the European Communities. It nevertheless left the Communities in a precarious equilibrium, and highlighted the obstacles that any new proposals of further supranational integration would encounter. De Gaulle would have declared afterwards: ‘Supranationalism is gone. France remains sovereign’ (Van Midelaar: 2013 ; Moravcsik: 1998). In other words, it was seen as a clear stop to the ‘functional logic’, and to the idea that more supranationality would result of a progressive an continuous shift of powers from the national to the supranational level. In 1972, Michel Debré, then Minister of Defense, famously and bluntly declared that ‘supranationality was dead’ (Ipsen: 1973).
Theoretically as well, it was a puzzle for neo-functionalist explanations of integration as resulting of an autonomous process of ‘spill-over’. This unpredicted sequence of events led Haas to publish a self-criticism of the ‘obsolescence of regional integration theory’ (Haas: 1975; Moravcsik: 1998) and L. Lindberg and S. Scheingold to revise their account of integration theory to include ‘spill-back effects’, insisting that they did « not see any necessary sequence in [their] models » (Lindberg: 1963; Lindberg & Scheingold: 1964). Although it was by no means the end of neo-functionalis, it raised doubts about the importance of the supranational level and processes in explaining European integration, and fostered a more state-centric approach (see Moravcsik: 1998).

The discourse of normative supranationalism

By the end of the 1960’s, decisional supranationalism was extremely weakened. Once a political watchword, the word of ‘supranationality’ itself was now avoided by its promoters, for it was perceived to have brought more confusion and ideological opposition than real utility (Reuter: 1958; Hallstein: 1969). However, at the same period, paralleling the crisis of decisional supranationalism, a different way of conceptualizing supranationality emerged, “concerned with the relationships and hierarchy which exist between Community policies and legal measures on the one hand and competing policies and legal measures of the Member States on the other” (Weiler: 1981). This ‘normative supranationalism’ was given a strong legal meaning by a certain part of the legal specialists and actors. If the main debates about decisional supranationalism related to the category of nation, as an entity able to independently determine its will, legal supranationalism has mainly to deal with the State as rule-maker.

Supranationality as a legal concept: inventing a category

As in political science debates, uses of the concept of ‘supranationality’ in legal-academic debates first intended at defining the nature of the emerging European legal order. This apparently purely technical question in fact raised a major problem and had far-reaching political potential implications: if, according to the explicit goal of its initiators, the ECSC was to constitute a new type of association between sovereign nation-states, how should it be considered from a legal point of view? Was it to be defined as a classical international organization, with the limits already underlined in terms of enforcement capacity? Was it to be defined as an extension of national legal orders? Was it a brand new type of organization requiring to develop a new vocabulary?

Two conflicting answers to these questions were proposed. On the one side, ‘mainstream’ lawyers (Davies: 2007) argued that, since it had been created by an international Treaty, there was no reason to depart from classical legal categories. The ECSC and later the EEC were international organizations, made up of sovereign States, free to withdraw from the association, and functioning according to
normal rules of international relations. ‘Supranationality’ could well be a political watchword but had no consistent existence in the field of international law, where sovereignty is the inescapable cornerstone. If European rules were to be integrated to national laws, it was because sovereign States agreed on this in the Treaties, according to constitutional provisions, not because of a specific nature of European law. Or, as one of its fiercest critic put it, the concept of ‘supranationality’ was only a political and ideological word with no legal ‘essence’ (and then existence) for, legally speaking, there can be no middle-ground between sovereignty and non-sovereignty (Rosenstiel: 1962): a supranational organization either means a federal State or an international organization. On the other side, ‘supranationalists’ claimed that, although created according to standard international law procedure, the European Communities have evolved into something different from traditional international organizations. In particular, as in political debates, their independence from the member states was taken as a crucial property of this originality: it suggests that they are neither a State nor a powerless international organization (Bärmann: 1960). Moreover, it is emphasized that European institutions have a direct relation to individuals of the member-states, contrary to traditional international law (Reuter: 1958). As a consequence, supranational organizations basically question the monopoly of States to produce binding rules. The emergence of this new reality required to adapt the legal categories.

This divide between ‘mainstream’ and ‘supranationalists’, although modulated according to national traditions, was a transnational one. For instance, the opposition between defenders of the principle of sovereignty, as the fundamental principle of international law, and defenders of the idea of supranationality as questioning this very principle can be drawn in France (Bailleux: 2014; Gautron: 2009) as well as in Germany (Mangold: 2011; Davies: 2007). Although the defense of sovereignty was more dramatic in France – whereas German lawyers turned to the question of the rule of law (Chaltiel: 2000) – the idea of a supranational law equally challenged the traditional categories of legal thought.

It is important to underline at this point that this debate about the legal nature of European institutions was not only of strictly academic interest. It was also a concern for European activists and civil servants, who strongly supported the ‘supranationalist’ thesis, in order to legitimate the idea of a *sui generis* European order, independent from the member States and open to autonomous development (Bailleux: 2014). They especially tried to foster academic research and teaching about European unification, notably in the field of law, because it was perceived as an old, respectable and neutral knowledge, whose social authority was hardly disputable. A series of interactions was thus initiated to secure the legal characterization of the European Communities in the academic debates (Bailleux: 2014). The crucial moment of these early efforts took place at the first European-wide legal congress, promoted by the legal service of the EEC and held in Stresa in 1957. But there, the outcome of the discussions and the reports presented severely disappointed the hopes of the High Authority staff. Indeed, international law scholars systematically attacked the validity of the notion of ‘supranationality’, acknowledging its political role but denying its legal utility (Bailleux: 2014). They
especially underlined the vagueness of the concept and the difficulty to give it a coherent legal meaning (Ipsen: 1973). It resulted a long-lasting ‘doctrinal schism’ (Bailleux: 2014) in legal conceptions of European integration.

Supranationality as a legal fact: constitutionalizing the debate

However, in this debate to define Europe, a new player and major support of supranationality progressively emerged, instigating a ‘quiet revolution’ (Weiler: 1999) : the European Court of Justice (ECJ). It contributed to impose supranationality as an actual distinctive feature of Europe, on the one hand, and to provide it with a substantial legal content, on the other.

Whereas in political debates and official documents ‘supranationality’ became a dirty word, mostly used to criticize the European institutions, it is to underline first that the Court repeatedly used it. In fact, far from disappearing from the official legal vocabulary of the Court, it tended to be increasingly present (fig. 1). This apparently benign fact is nevertheless significant, for it contributed to give a legal existence to the concept, in integrating it to the jurisprudence and the actual legal vocabulary of the Court. Being ‘performed’ by the highest judicial institution of the European Communities, it was given a certain ‘respectability’ in legal debates – though it didn’t by itself answer the critics once made by the legal academia.

<table>
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<th>Opinions and decisions of the ECJ using the word 'supranational' (fig. 1)</th>
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But, more importantly, it was also given a legal substance by the Court’s jurisprudence, in a series of famous cases which grounded European legal doctrine, and defined the essential features of
‘normative supranationalism’. Two well-established principles are especially central to this definition of a European legal order:

- **Direct effect**: contrary to classical international law, the Court established in 1963 that provisions of the Treaty were directly applicable to individuals, creating direct duties and, more suggestive, directly opposable rights for the individuals *vis-à-vis* the member-states. This doctrine was established by the ground-breaking *Van Gend en Loos* case, opposing a Dutch company to the Dutch fiscal administration about custom duties. In its decision the Court stated that ‘this Treaty [the Treaty of Rome] is more than an agreement which merely creates mutual obligations between the contracting states’ – assertion which is to understand as based on a teleological interpretation of the Treaty (see Pescatore: 1972), aimed at preserving the intention and thus the coherence of European law. As a consequence ‘the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals’. It clearly makes the point that the Community shouldn’t be analyzed as a traditional international order. In this interpretation, it works much more as a constitutional law as an international Treaty (Weiler: 1981). However, it is worth noting than in his conclusions the Advocate General, Karl Roemer, after a lengthy demonstration, refuses the theory of direct effect although he explicitly acknowledges that the Community is a ‘supranational jurisdiction’ (Roemer: 1962): direct effect is not, for him, an essential property of a supranational law.

- **Supremacy**: The following year, the Court made another essential decision to the definition of the European supranational legal order. It established a clear (although not easily accepted) hierarchy between member states and Community norms. In the *Costa vs. ENEL* case, the court took the chance to assert that ‘by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply’. Indeed, otherwise ‘the obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories’. And a rule with contingent interpretations is closer to arbitrary power than to the rule of law (*Rechtsstaat*): the Court, in this interpretation is thus committed to guarantee the homogeneity of European law, i.e. its very legal character (Mangold: 2011; Hallstein: 1969). As a consequence, European rules take precedence over national rules, even with constitutional value (Weiler: 1981).
The combination of these two principles tried to establish the European legal order as ‘new’, not only in chronological terms, but also in quality. With the doctrines of direct effect and primacy, this ‘new international legal order’ was indeed to enjoy qualities clearly distinguishing it from traditional international law. This interpretation of course gave ground to the ‘supranational’ thesis: the European law was defined as autonomous, located between national and international law. Further, it was said to have precedence over, to be hierarchically above national legal orders. The Court itself was hence tentatively established as the highest jurisdiction in Europe, dominating the pyramids of laws in the member states and ultimately playing an active political role in the Communities (Alter: 2009). In this meaning, strongly emphasized by lawyers such as J. Weiler, legal supranationality is not to be understood as producing a federal polity, creating a new sovereignty. Neither is it a replacement of sovereign political power by an administrative organ (although it was sometimes criticized according to this line). More convincingly, legal supranationality, with the ECJ as its main organ, works as a ‘boundary patrol’ of sovereignty (Somek: 2001). It binds sovereignty in controlling its abuses by the States (war, discrimination,…), but does not dissolve it as a principle.

As could be expected, the acceptance of these principles was quite uneven and difficult. Surprisingly perhaps, given their broad potential implications and the critical period of these founding decisions, governmental opposition was not the main source of contestation of these principles (De Witte: 2011). It might be that, as suggested, the claims of the Court for direct effect and supremacy were based on a purely legal necessity: the assumed need for a legal order to be coherent and homogeneous. In these debates, supranational ‘law was regarded as a technique, not as politics’ (Wind: 2001). It is thus not surprising to note that the first critics of normative supranationalism stemmed from legal debates, especially involving national Courts. Indeed, it took a long while for national Courts to acknowledge direct effect, and, most of all, supremacy (De Witte: 2011). The relation of European law to national Constitutions was (and to some extent still is) one of the main point of contention: could European norms be acknowledged a higher position than the highest national texts? The answer to this question was extremely disputed, most of all perhaps in Germany, where the Constitutional Court (Bundesverfassungsgericht) several times in famous decisions (Solange I in 1974, Solange II in 1986 Maastricht in 1993 for instance) made clear that the German Constitution ‘does not confer a power to surrender by way of ceding sovereign rights to international institutions the identity of the prevailing constitutional order of the Federal Republic’ (Bundesverfassungsgericht: 1986, cited and translated in De Witte: 2011). Of special interest is the claim made by the German Court in these decisions that the European norms do not protect enough the fundamental rights and the democratic values inherent to the German constitutional order. This criticism of the legitimacy of European law, and of the ECJ, entered political debates as well, reshaped as a criticism of the ‘government of judges’, especially in France where constitutional review was long held for illegitimate (Stone Sweet: 2007). The expression was used about the ECJ as soon as 1966 in a French book studying the ‘government of judges in the European Communities’ (Colin: 1966). It is traditionally used to denote a non-respect of the
democratic principle of separation of power, but, in the European context, it was more specifically used to point out that European law does not ‘stem from a representative parliamentary instance’, as a French communist MP expressed it (Brunhes: 1990), and thus, is out of democratic control.

**Political supranationalism, administrative supranationalism, legal supranationalism**

I have tried to typify three versions of ‘supranationality’ as it was conceptualized in the beginnings of European integration process. They represent three attempts to come to terms with the organization of authority in a non national frame. These tentative conceptualizations, it was suggested, have been developed in different fields, in reaction to different challenges and with different views of what a supranational organization means. In particular, they differ on the extent to which this supranational organization is political, and on the method to achieve its inception. The following table tries to summarize the main features of these three types that have been spelled out in the course of the analysis.

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<th>Supranational polity</th>
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<td><strong>Supreme power</strong></td>
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<td><strong>Relation to the member states</strong></td>
<td>Inclusion</td>
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<td><strong>Method</strong></td>
<td>Constitution</td>
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<td><strong>Sovereignty</strong></td>
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Notwithstanding their differences, these three conceptualizations share central common features, a basic pattern of how power could and should be organized. First, the three of them define supranationality as a property of a specific locus of power, a supranational organ distinct from its national and international counterparts. The federal view sees it as a ‘new political centre’, the administrative view as the ‘supranational authority’ concerned with the ‘common good’ of the organization and the legal one as a ‘new legal order’ under the authority of a European Court. Secondly, this distinction from other national and international powers is specified and secured by the necessary independence of a supranational power. It has been underlined that the claim for independence was shared by the federal activists, the defenders of the ‘Monnet method’ and the advocates of a supranational legal order. In their discourses, independence primarily stood for the ability of not being bounded by external powers. Thus, an independent supranational organization is an organization able to take decisions without being influenced by particular external sources. Thirdly, this property is closely related to the capacity to enforce these decisions - or, put otherwise, to make binding decisions on the member states. A supranational organization, in these conceptions, is hierarchically located above the member states. In sum, the three conceptualizations analyzed here regard a supranational organization as distinct, independent and superior to the member States.

This definition of a supranational organization does challenge the very concept of sovereign national State as the basic unit of power – and was perceived so from the beginning. It points to the creation of a rival to the State. But, it doesn’t fundamentally depart from the classical conceptual framework of the sovereign State (Wind: 2001). In a sovereign organization, the highest power is attributed to a unique organ enjoying the ‘authority to make the ultimate decision’ (Bellamy & Castiglione: 1997), for sovereignty in its classical meaning is not dividable. The sovereign is at the top of the hierarchy of powers and is acknowledged the right to impose its decisions without being constrained from the outside: unity, hierarchy and independence of power are the three core principles of the doctrine of sovereignty as they are basic properties of the conceptualizations of ‘supranational organization’ we have spelled out here.

**Supranationalism revisited: The discourse of ‘supranational governance’**

This proximity between the early concept of ‘supranationality’ and more traditional representations of power becomes most obvious by contrast with more recent versions of ‘supranationality’. The three early versions have been widely criticized since the 50’s. Although the range covered by the criticisms is extremely broad and would require a specific analysis, I tried to suggest that most of them at first revolved around the question of the possibility and organization of a supranational organization, before increasingly turning to the question of its legitimacy. The idea of a supranational constitutional federation has been attacked for lacking a legitimate ground, seen as located only in the nation. There would be no legitimate democratic decision-making at a wider scale than the national one, or, in other
words, a supranational European democracy would fail because it would simply lack a ‘*demos*’ (commonly known as the ‘no-demos thesis’) (see Lindseth: 1999 ; Müller: 2010). Administrative supranationalism had to face the ‘technocratic’ line of criticism, blaming it for excluding the citizens of the decision-making process (Georgakakis: 2012) and relying on a depoliticized vision of authority. Finally, criticisms against legal supranationalism established by the ECJ made clear that fundamental and democratic rights were not guaranteed enough at the European level, and thus that the EU could hardly be considered legitimate according to its own standards. Further, it reactivated debates about the ‘government of judges’, which met with criticisms of the apolitical character of European governance. Hence, obviously, the concept of ‘supranationality’ in its different versions has been confronted to a major legitimacy problem. In trying to conceptualize the organization of power at a non national level, it was deemed to fail to provide an appropriate answer in terms of legitimacy. These criticisms took a particular political significance in the political context prevailing from the mid-80’s. It was indeed a time of deep change in the perspectives of European integration, on the one hand, with the Single European Act (1986) and the perspective of the Single Market, the Maastricht Treaty (1992) and the move towards a single currency, the creation of the ‘European Union’ (EU) and slowly increasing competences. On the other hand, the complexity of the EU kept on growing, with the increased role of Committees, the development of sub-national institutions and, of course, the repeated enlargements. These joint processes of deepening and complexifying fueled the criticisms of the low legitimacy of the EU, and the discourse of the ‘democratic deficit’ (on the academic debate see Milev: 2004). All this converged to make a reconceptualization of the concept of ‘supranationality’ urgently needed.

I will argue now that elements of such a reconceptualization have been given in European academic debates in order to provide a new account of legitimate ‘supranational organization’. They have been developed following different lines, but nevertheless share common grounds, clearly contrasting with the early conceptions of supranationality. I propose to label these new grounds ‘supranational governance’, in order to distinguish them from the early ones analyzed before\(^1\).

\(^1\) The affinities of these reconceptualizations with governance will, I hope, become clear. However, it is important to note that, although referring to a specific group of scholars who proposed and used this concept (around A. Stone-Sweet), I use the term in a broader meaning than they do. Indeed, the concept of ‘supranational governance’ was first circulated by the end of the 90’s by a group of scholars originally interested in European law and, especially, European constitutional process (Stone Sweet & Brunell: 1998 ; Stone Sweet & Sandholtz: 1997). They were thus familiar with both legal and ‘constitutional’ traditions of ‘supranationality’. Moreover, they explicitly claimed a proximity with neo-functionalist theories of integration against intergovernmental ones, since they tried to explain the development of Europe in giving much weight to the own logic of supranational institutions (Stone Sweet & Sandholtz: 2012). The result of this development, i.e. what they try to explain, is the ‘supranational mode of governance’, defined as ‘the EU’s capacities to create, interpret, and enforce rules as “supranational governance” (Stone Sweet & Sandholtz: 2012) or, more specifically, the mode of governance ‘in which centralised governmental structures (those organizations constituted at the supranational level) possess jurisdiction over specific policy domains within the territory comprised by the member states. In exercising that jurisdiction, supranational organizations are capable of constraining the behavior of all actors, including the member states, within those domains’ (Stone Sweet & Sandholtz: 1997). Hence, they propose a seemingly quite traditional account of supranationality, insisting on centralization, binding power and independence in specific
In the wake of this legitimacy crisis, a first line of argumentation tried to reassess administrative supranationality on more satisfying grounds. The administrative version of supranationality used to claim that, if a political union might well be the ultimate goal, it had to be achieved by a progressive and essentially technical integration. The main justification of this approach, in democratic terms, was its ‘outputs’, its ability to be efficient and to provide the results expected in the ‘general interest’ of the Community (Lindseth: 1999), independently of contingencies of political life. However, it was precisely criticized for lacking democratic grounds, i.e. for being out of the scope of political control, often defined as control by an elected Parliament (Majone: 1995). But, G. Majone argued, to increase the powers of the European Parliament, and to design the EU like a national democracy would be of little help. First, even in national democracies, parliaments have a limited power on decision-making. Secondly, the EU in its development looks more like one of the administrative organizations common in the US system, exercising a ‘delegated power’ (Stone Sweet & Thatcher: 2002), than it resembles a traditional political body. It should thus be thought of in terms of ‘accountability’ (judicial control) rather than of ‘legitimacy’ (popular control) (Majone: 1995; Lindseth: 1999). In other words, the EU could be deemed ‘accountable’ without relying on majoritarian institutions. Now, ‘accountability’, contrary to ‘legitimacy’, is in no opposition with independence: an independent organ can be accountable, if it can be scrutinized by a Court for instance, without being legitimated by popular voting. It makes transparency, not participation, the fundamental value. In sum, it is attempted to escape the legitimacy dilemma by contesting the very grounds on which this dilemma relies: the EU is not to be regarded as a political organization, but as an administrative one. As such, it doesn’t need to satisfy to the criteria of majoritarian institutions, without being undemocratic. It results a picture of an administrative authority that ‘no one controls’ but which is yet ‘under control’ (Hix: 1998). Or, in other words, this implies to move from a hierarchical view of a control exercised from a definite point of the system, to the idea of a ‘network’ of overlapping control mechanisms (Majone: 1995).

This theoretically radical reframing of the problem was however contested from the inside of the administrative approach of supranationality. Partly as an explicit answer to Majone’s effort (Joerges: 2001), a competing redefinition of supranationalism was elaborated, and labeled ‘deliberative supranationalism’. Contrary to Majone, it tried to reintroduce democratic legitimacy in administrative supranationalism by analyzing the European system according to a procedural definition of democratic legitimacy. But contrary to classical ‘political’ approaches, the focus of ‘deliberative supranationalism’ was not on Parliaments and nation-states structures, for they were perceived as unable to take into account ‘external effects’, i.e. effects of national decisions on external people or domains. And yet, the concept is interestingly located at the crossroads of legal, constitutional and administrative traditions of supranationalism. Moreover, they insist on the non-exclusive character of this ‘supranational governance’: it coexists with national and intergovernmental modes of governance, and is therefore open to complexity.
polities: ‘a supranational polity would then have the task of facilitating deliberative interaction among affected states and societies by providing an institutional set up which complements national member state democracies with transnational deliberative structures’ (Joerges & Neyer: 2006). In the case of the EU, these ‘complements’ would be found in the numerous committees and agencies that play an ‘underworld’ role (Joerges: 2001). These non-majoritarian bodies, it is argued, nevertheless constitute a network of international ‘fora’ where discursive interaction could take place between representatives of governments, of civil society and of economic interests (Joerges & Neyer: 2006). It therefore entails a democratic procedure – although it is acknowledged that these committees are equipped with few legal powers – complementing national democracies. This procedural justification is thought as ‘an alternative to hierarchical legal structures’ (Joerges: 2001). The small number of citizens involved in these procedures is justified by an elitist account of democracy in modern societies, for ‘my mere status as a citizen does not qualify me for a qualitatively convincing (to me at least) technical decision’ (Joerges: 2001). Specialized knowledge, more than the general will, should play the key role in determining the ‘general interest’.

Both previous models of legitimacy are clearly connected with the administrative view of supranationality, even if they encapsulate elements of the legal approach (control by Courts, procedural legitimization). A third attempt to conceptualize the democratic legitimacy of a supranational institution is to be found in an argument mainly stemming from constitutional debates and whose most acute account is proposed by the German lawyer Ingolf Pernice. It does not search to anchor the legitimacy of the European Union in a purely administrative and technical ground, no more than in a knowledge-based democracy. In a much more classical contractualist vein, it identifies the EU as a polity, and the basis of its legitimacy with ‘the will of the member-states’ citizens’ (Pernice: 2000). The public authority is created by a ‘social contract’ ‘expressed’ by a Constitution, and, consequently constitutionality is the criterion of legitimacy for a public authority. But contrary to early constitutional approaches of supranationalism, the Constitution is not defined as an ex nihilo creation, but as a process (Pernice: 2000; for developments see Habermas: 2011), in constant evolution. On this basis, he observes a ‘constitutionalization’ process of the EU, which gives a ground to conceptualize its legitimacy: even if lacking a formal written Constitution, a text formally superior to all national and European norms, he analyzes the EU as a ‘compounded Constitution’ made up of national and supranational legal orders, i.e. a process of adjustment of national and supranational rules leading to ‘an ever closer union’. It is a case of ‘supranational federalism’, defined by a ‘constitutional pluralism’ (see also Weiler: 2002) which is to be carefully distinguished of classical federalism, for there is no such thing as a State Constitution, a highest norm prevailing over all the others. On the contrary, this processual definition of the Constitution allows to assert that there is ‘no hierarchy’ between European and national rules, only cases where a ‘preference’ must be established to guarantee the uniformity of law in the member States. In this approach, it becomes possible ‘to escape from the idea that all law must originate in a single power source, like a sovereign’ (McCormick: 1993). In other
words, national and supranational rules are in no opposition, but are entangled in a network of complementary rules. Accordingly, a constitutional legitimacy has already been developing in the EU, legitimacy that a formal Constitution would improve only if it was not conceived as a State Constitution, as an higher level, but as a complement of existing rules.

*Beyond sovereignty?*

In spite of their differences, it is striking to notice that these approaches share common assumptions about what should be a legitimate supranational power. First, the three of them question the very idea of a definite hierarchical power. In Majone’s view, legitimate control should be conceived without referring to a specific point situated above the others, but as diffuse and exercised by a diversity of actors. In ‘deliberative supranationalism’, legitimacy stems from the procedure of deliberation, complementing national democratic procedures without opposing them – as is also the case in ‘multilevel constitutionalism’, where the logic is one of complementarity, not of hierarchy. This does not exclude the idea of hierarchy itself; but it *challenges the idea of a stable and absolute hierarchy* (Castells: 1998). Secondly, this shift from a model of hierarchical control to a model of multilateral and procedural legitimization points to a move away from the claim that a supranational organization should be, above all, independent. On the contrary, legitimacy here appears to be associated with a certain intertwining of different agencies, levels and norms. It is because of the strong relations existing between the different agencies that new administrative supranationalism is legitimated; it is because of the mixed character of Committees and of their relations to national democracies that they can constitute a legitimate procedure; it is because it combines national and supranational elements of ‘Constitution’ that the EU can be thought as legitimate. In other words, the border between national and supranational organs and levels is systematically blurred (Bartelson: 2006), thus replacing the value of independence by the concept of *interdependence*. Finally, this non hierarchical interdependence opposes the State’s classical ‘conceptual framework in which notions of unity and sovereignty [are] inextricably intertwined’ (Ladeur: 2013). It replaces the idea of the State as ‘unitary personal substrata’ (Ladeur: 2013) by a ‘networked model’ of supranational legitimate power, a system of interrelations where the basic units of political life are taken in such interactions that they can hardly be regarded as isolated. A legitimate supranational power is not thought as a specific independent authority equipped with the ‘last word’ capacity. On the contrary, it is much more depicted as a ‘network State’ with a ‘swing-wing’ sovereignty (Castells: 1998) and a system of ‘governance without government’ (Hix: 1998). In other words, it is the very model of a supreme power entitled to make final binding decisions that is put into question by these different approaches of supranational legitimacy. Whereas early versions tried to conceive a supranational power according to the sovereignty model, ‘supranational governance’ attempted to escape the idea, expressed in debates about federalism, that it is not possible to conceive a consistent and politically effective
organization being ‘at the same time multiple and one, simple and compounded, independent and bounded’ (Voyenne, cited by Constantinesco: 2002).

These efforts of reconceptualization of what a legitimate supranational organization could be were certainly promoted by European institutions from the beginning, with support brought to research projects on the issue of ‘governance’ in the mid-90’s and early 2000’s (see for instance the EU-funded network ‘Efficient and Democratic Governance in a Multi-Level Europe’ (2004-2008), coordinated by a specialist of the governance approach, Beate Kohler-Koch). It was, most of all, given an institutional expression in the ideas published under the title of ‘White Paper on European governance. Enhancing democracy in the European Union’ (European Commission: 2000). The then President of the European Commission, Romano Prodi, summarized the new ideas it developed in stating that ‘we have to stop thinking in terms of hierarchical layers of competence separated by the subsidiarity principle and start thinking, instead, of a networking arrangement, with all levels of governance shaping, proposing, implementing and monitoring policy together’ (Prodi: 2000 cited by Căjvăneanu: 2011). These discussions were complemented by the debate on the European Convention and the project of a Constitutional Treaty (Pernice: 2000), in which legal specialists were strongly involved (see for example the early controversy between Weiler and the ECJ judge Mancini on European statehood, Weiler: 1998).

But, eventually, the Constitutional Treaty was rejected by French and Dutch referenda in 2005, and the discourse of the ‘democratic deficit’ has become even more deafening since the financial crisis has broken out in 2008. Moreover, the relatively limited echo of these discourses in public debates (although this would need further investigation) can be contrasted with the resilience of the concept of sovereignty. From a widely debated political watchword, the concept of a ‘supranational organization’ has progressively evolved into an academic specialized category. These discourses thus seem to have failed to provide a politically convincing model of a legitimate supranational organization.
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