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European Union Constitutionalism in Crisis

Nicole Scicluna

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European Union Constitutionalism in Crisis

Several years after the first Greek bailout, the integration project of the European Union faces an interlocking set of political, economic, legal and social challenges that go to the very core of its existence. Austerity is the order of the day, and citizens in both debtor and creditor states increasingly turn to the political movements of the far left and right, anti-politics and street protests to vent their frustration.

This book demonstrates the limits of constitutionalism in the EU. It explores the 'twin crises' – the failure of the Constitutional Treaty in 2005 and the more recent Eurozone crisis – to illuminate both the possibilities and pitfalls of the integration project. It argues that European integration overburdened law in an attempt to overcome deep-seated political deficiencies. It further contends that the EU shifted from an unsuccessful attempt at democratisation via politicisation (the Constitutional Treaty), to an unintended politicisation without democratisation (the Eurozone crisis) only a few years later. The book makes the case that this course is unsustainable and threatens the goal of European unity.

This text will be of key interest to students and scholars in the fields of EU studies, EU law, democracy studies, constitutional studies and international relations.

Nicole Scicluna is a researcher at Collegio Carlo Alberto, Italy.

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List of abbreviations

CAP	Common Agricultural Policy
CT	Constitutional Treaty
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilisation Mechanism
EMU	Economic and Monetary Union
EP	European Parliament
EPP	Group of the European People's Party
ESM	European Stability Mechanism
EU	European Union
FRG	Federal Republic of Germany
GCC	German Constitutional Court
GDR	German Democratic Republic
IGC	Inter-Governmental Conference
IMF	International Monetary Fund
ITL	Integration through Law
LT	Lisbon Treaty
OLP	Ordinary Legislative Procedure
OMT	Outright Monetary Transactions
QMV	Qualified Majority Voting
S&D	Group of the Progressive Alliance of Socialists and Democrats
SEA	Single European Act
SGP	Stability and Growth Pact
TEC	Treaty on European Community
TESM	Treaty Establishing the European Stability Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact)
UN	United Nations
WTO	World Trade Organization

Contents

Introduction

Reframing EU constitutionalism

Europe is in crisis and so is European Union (EU) scholarship. Several years after the first Greek bailout put paid to the conceit that the Global Financial Crisis was merely a disease of American capitalism, the integration project faces an interlocking set of political, economic, legal and social challenges that go to the very core of its existence. Austerity is the order of the day across the continent, and citizens in both debtor and creditor states increasingly turn to political movements of the far left and right, anti-politics and street protests to vent their frustration. Yet, while these events receive scholarly attention, what is less widely recognised is that they have also triggered a crisis of integration *theory*. That our scholarly conceptualisations of the EU – as a community of law, as a *demoicracy*, as a post-national *sui generis* polity – are also in need of a radical rethink. This book aims to contribute to that rethink – a necessary process if the EU is to find a viable path out of its travails.

The book is framed by the *twin crises* of twenty-first-century EU constitutionalism: the failure of the Constitutional Treaty (CT) in 2005, and the euro crisis, which followed several years later. In analysing these crises, I draw on the rich theoretical framework of Integration through Law (ITL) in order to embed and explicate EU constitutionalism. However, in contrast to traditional legal integration theories, law is used to investigate the *limits* of integration, and the potential for partial *disintegration*. In particular, I will demonstrate how the integration process overburdened law in an attempt to overcome political deficiencies, with serious consequences for the EU's 'democratic deficit'. Part of the legacy of the first crisis was a retreat from the Constitution's lofty ideal of democratisation via politicisation. Now, as a result of the second crisis, the integration project has become well and truly politicised and European policies highly salient for national voters. However, this process has occurred largely against the will of EU leaders, who have sought technocratic solutions to what are inherently political problems. Thus, over the past decade, the EU has moved from an unsuccessful attempt at democratisation via politicisation, to an unintended politicisation without

democratisation. This development poses a serious threat to the maintenance of European unity in the medium-to-long-term.

ITL rose to prominence in the 1980s, bringing to light the enduring centrality of law to a Community whose political fortunes had waxed and waned. This was a significant contribution to the scholarly literature, which helped to popularise interdisciplinary approaches to EU studies and bridge the gap between political scientists and legal scholars. Early ITL studies focused on the role of the European Court of Justice (ECJ) and the impact of doctrines such as direct effect and supremacy, as well as the Court's path-breaking human rights jurisprudence, during the European Community's formative years (Haltern 2004). The Court's towering achievement of moving the Community from the realm of traditional international law into its own, *sui generis*, category of federal-like constitutionalism – termed the 'transformation thesis' by Joseph Weiler (1999) – is now a conventional wisdom of EU studies. Ever since the 1980s, the study of European law in context has been a mainstay of the scholarly literature. The focus, however, has shifted from specific institutions and doctrines to a more holistic assessment of legal systems, with extensive subsections of the literature emerging around new theories of governance and constitutionalism in the EU (see, for example, Everson 1998; Walker 2009; Wiener 2011).

ITL scholarship, therefore, was critical in theorising the construction of the EU as a constitutionalised non-state actor *par excellence*, but it is not without its flaws and oversights. In particular, some ITL scholarship has been criticised for its tendency – occasionally verging on triumphalism – to regard law almost exclusively as an instrument of progress towards a more federal Europe (Shaw 1996; Everson 1998: 389). This emphasis on law's integrative force runs parallel to the tendency, in the broader field of EU studies, to treat the process of integration as quasi-teleological, and its putative federal end point as self-evidently a good thing (see, for example, Della Sala 2012; Zimmerman and Dür 2012: 2–6). During the euro crisis, this tendency has manifested itself in the elite consensus – maintained by political figures and academics alike – that no matter the question, 'more Europe' is the answer.

However, as conditions in the eurozone failed to substantially improve, cracks began to appear in this consensus, with a number of academics becoming much more openly negative about the euro's prospects and critical of the undemocratic and austerity-focused manner in which its rescue was proceeding (see, for example, Joerges 2012a, 2012b; Majone 2011, 2012; Marsh 2013; Scharpf 2011). In a notable contribution to the debate, Francois Heisbourg (2013), an avowed pro-European and an expert on European security policy, called for an orderly dissolution of the currency union in order to save the larger integration project. Whilst still in a minority, such views are no longer the province of an anti-EU fringe and ought to be given due consideration. I will revisit them in the chapters that follow.

One of the tasks of this book, then, will be to explicate a general integration fatigue that was signalled – not for the first time, but perhaps most

strikingly – by the failure of the CT, and that has since escalated into a full-blown existential crisis. Again, in an inversion of the conventional understanding of integration through law, it is law's *disintegrative* potential that I am primarily interested in. Put another way, the focus is on law as a *constraint* on, rather than enabler of, ever-closer union. Thus, I follow Jo Shaw in treating the disintegrationist elements of the EU legal order 'not as *exceptions* to an integrationist norm, but as autonomous facets of the whole' (Shaw 1996: 241, emphasis in original). This is not to claim that law has no part to play in the construction and reconstruction of the European project, but rather to suggest that there are limits to the extent to which it can advance an integrationist agenda without major political reform.[1] In this respect, the currency union (and its crisis) serves as a prime illustration of EU actors' overconfidence in the ability of formal law to overcome political deficiencies (Everson and Joerges 2012: 645–49; Joerges 2012b).

Legalisation and de-legalisation: the impact of the twin crises

Early scholars of European law in context rightly observed that the nature of the EC/EU was defined, to a significant extent, by its legal order (Stein 1981; Weiler 1994).[2] The project was forged in international treaty law, took root in the member states via national law, and extended its breadth and depth through the development of a supranational legal order with a certain (though disputed) degree of autonomy (Schilling 1996). The EU has been conceptualised as everything from an 'experimental union' (Laffan, O'Donnell and Smith 2000), to a 'Europe of bits and pieces' (Curtin 1993), a 'regional state' (Schmidt 2006, 2009) and a 'neo-medieval empire' (Zielonka 2006), amongst many other labels. How best then to understand its peculiar constitutional character?

Since the traditional categories of international organisation and federal state are insufficient to capture the constitutional structure of the European polity, an alternative suggestion is that the EU be conceptualised as a Kelsenian *Rechtsgemeinschaft* (community of law). For Hans Kelsen (1989: 286–88), a political community was identical to its legal order and their shared legal bond, the only factor capable of uniting the individual community members. Accordingly, and in contrast to notions of a pre-political *demos*, Kelsen regarded 'the people' as a fictional construct that 'exists only from a juridical and normative perspective' (Ragazzoni 2011: 19). Kelsen focused on *states* as legal communities, but his ideas may be extrapolated to the EU as an entity that is both framed by law and is in search of a non-ethno-culturally based identity. The applicability of the *Rechtsgemeinschaft* concept to the EU relies partly on the potential of the Union's non-national category of citizenship to construct a purely legal, and thereby neutral, bond amongst Europeans. In other words, to create a situation whereby – in the absence of any pre-political criteria of belonging – whosoever is subject to the European legal order is a citizen of the European polity (Busch and Ehs 2008: 5–7, 10–11).[3]

Kelsen's concept of a *Rechtsgemeinschaft* was linked to his theory of legal monism. Since, for Kelsen, the state was identical to its legal order, there was nothing outside of the law; every norm was valid only insofar as it was derived from another, higher norm. This process of norm derivation could be traced back to a basic norm (*Grundnorm*), which was the state's constitution and, therefore, equal to the state itself. Taken to its logical conclusion, legal monism implies that there is only one, international legal system, of which all national and regional legal orders are sub-systems. It follows that all legal norms across all sub-systems, if they were to be considered valid, would have to be reconcilable with each other and would have to coexist in a hierarchical system leading ultimately to one, international *Grundnorm* (Kelsen 1989: 221–24; MacCormick 1998: 527–32; Vinx 2011). The normative appeal of Kelsen's theories is clear. Political conflicts are eliminated through their transformation into legal conflicts, which turn out not to be conflicts at all once the correct hierarchy of norms is determined and the appropriate (higher) norm applied. Monism, thus understood, may be applied in an international or transnational arena to resolve seemingly irreconcilable claims and counter-claims by competing sovereign authorities in a rational and consistent manner. It is in this respect that monist theories are potentially attractive as a means of understanding EU constitutionalism (Vinx 2011).

Certainly, the ECJ has advanced a monist view of the relationship between the EU's (autonomous) legal order and those of the member states, particularly through its uncompromising stand on the supremacy and self-validating nature of EU law (de Witte 2009: 26–32). However, the idea that national legal orders are subordinate to the EU's supranational legal order is logically incoherent, not only because many of the ECJ's jurisprudential claims (including those regarding the extent and origins of supremacy) are contested by national actors, but also because the EU's legal authority derives originally from treaties created by the member states and legitimated by the international law principle *pacta sunt servanda* (MacCormick 1995, 1998). Therefore, in line with Neil MacCormick (1995: 259), I reject monist interpretations of EC/EU law and instead advance an argument in favour of a 'more subtle understanding of the meaning of sovereignty and its locus'. That is, one that treats Europe's legal order as heterarchical rather than hierarchical, and national and supranational legal spheres as interdependent but co-equal (MacCormick 1999; Cooper 2010).[4]

Kelsen's approach to intra- and cross-societal conflict management may be contrasted with that of Carl Schmitt, who criticised legal monism as a purely normative fantasy. Kelsen's theory of sovereignty, according to Schmitt, was no theory at all; as the latter wrote in *Political Theology*, 'Kelsen solved the problem of the concept of sovereignty by negating it' (Schmitt 2005: 21). Schmitt regarded Kelsen's equation of a state's legal system with the state itself as an idealistic disjunction between the juristic and sociological aspects of the state that had no basis in reality (Schmitt 2005: 18–22). It was completely at odds with Schmitt's own conception of sovereignty, which

was centred on the *exception*, rather than the norm. Schmitt's sovereign was necessarily situated outside the legal order because he had the power to take the ultimate decision – that is the decision as to whether or not the normal state of affairs existed and, accordingly, whether or not the legal order was valid (Schmitt 2005: 13–15).

Though both are problematic in their own ways, the theories of Kelsen and Schmitt may still offer insights into how (and how effectively) the EU system manages conflict. Their theories may also shed light on the difficult question of the *nature* of intra-EU conflicts: To what extent are they political and, hence, beyond the limits of the law to adjudicate and resolve? This line of inquiry points us towards ever more difficult questions that, in normal times, did not really need to be answered. If conflicts between different actors or interests within the EU are political, who has the authority to decide on them? Is this authority legitimate? If so, whence does this legitimacy derive? In addressing these issues in the chapters that follow, I will suggest that Schmitt's theories are the more compelling in times of crisis (or, 'states of exception') because of his insistence on directly confronting the problem of sovereignty, *contra* the tendency in EU studies to treat it as an outdated concept that was subsumed by the Union's *sui generis Rechtsstaat*.

What impact is the current state of exception having on EU constitutionalism, then? The twin crises have caused a fundamental, and potentially permanent, shift in the predominant mode of EU governance. From the origins of the European Coal and Steel Community (ECSC) in the 1950s until around the time of the Maastricht Treaty in the early 1990s, European integration was characterised by a highly legalised mode of governance (i.e. the European Community as a community of law). Throughout this period, open political contestation was often suppressed in favour of integration via the proliferation of rules and regulations, with judicial and administrative bodies leading the way. By Maastricht, the limitations of this approach were becoming apparent, as popular 'permissive consensus' gave way to 'constraining dissensus' (Hooghe and Marks 2009). The Constitutional Treaty was the most important initiative in the subsequent push to promote a more inclusive, participatory and democratic mode of governance that would lend the EU the legitimacy to match its ambitious political agendas.

The CT's failure was a watershed moment. Its significance, for my purposes, lay in its exposure of the limits of law as an integrationist tool and the difficulty of transforming European integration from an elite to a mass project. However, its full import can only be appreciated in light of the euro crisis – that is, that insufficient public support exists to build the sort of political union that would make monetary union viable. It is in this respect that the two crises are 'twinned'. The problem of the EU's democratisation that was left open by the CT's defeat is now more pressing than ever. The euro crisis has led to a 'de-legalisation' of Economic and Monetary Union (EMU) that is pushing the EU towards new forms of technocratic and administrative rule (Everson and Joerges 2012). This is not to say that the instruments of the new