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Introduction

SEVEN DECADES AFTER the end of the WWII, the challenges facing Europe have changed dramatically. War in the EU has become materially impossible and unthinkable: Peace as the absence of military confrontation between Member States has been achieved. Instead, Europe is increasingly facing new types of conflict that may potentially prejudice Peace. Internally within the Union, disagreement is looming between Member States on policy issues that range from immigration to sovereign debt. Externally, the Union and its states are challenged by instability at their external borders, transnational private interests and powerful third states. This indicates that the threat to Peace has not disappeared but has changed in two important dimensions. First, a conquest no longer implies a war.[1] A People may now be conquered without the use of military force. Trade, financial and technological interdependence offer new means for subduing a state. Conquest extends to the capacity to govern, not mere territorial control. The promise of Peace is thereby extended to enabling governance in the pursuit of one's own goals. Second, the source of potential disruptions of governance has shifted: these are not only caused by Member States to each other but by actors not bound by Union law. Externally, these are third states, transnational private interests, individuals and organisations that find themselves outside EU and national law. Internally, the ability of a people to govern may be undermined by malfunctions in the political process. This book explores how, with the changing nature of conflicts, Union law is adjusting to ensure continued Peace.

The uniqueness of EU legal order lies in its structure, designed to advance Peace between the peoples of Europe. This structure contains a strong introvert bias aimed at eliminating threats to Peace that originate in the risk of conquest between Member States in the Union. Community law reduces this risk by empowering the individual and disempowering the state in what can be termed as a 'reciprocal disarmament of national polities'. While successful between Member States in the Union, this very structure of EU legal order renders it vulnerable to external actors who are not bound by Union law. Herein lies the potential self-subversion of EU legal order: reducing the risk of conquest between Member States may raise the risk of conquest by external actors. A tension results between what I shorthand as the liberal and republican models, the former centred on empowering the individual against the state, the latter focused on strengthening the polity against conquest. These two models are not incompatible. Every policy of the Union presents

[1] For a broader understanding of war and therefore threats to Peace, see DMC Yuen, *Deciphering Sun Tzu* (Oxford, Oxford University Press, 2014).

a mixture of both. It is shown that from the very beginning of the Communities, even policies structured on individual rights have concealed deeply republican elements. The liberal and the republican are not alternatives but two indispensable aspects of a single whole. By adjusting their proportions, EU legal order can strengthen Peace in the face of the changing nature of conflicts.

Three dimensions of constitutional adaptation are identified throughout this book. First, with the relative increase in risks of conquest by actors not bound by Union law, the introvert bias in Union powers shifts from the internal to the external. Second, the need to develop a common policy towards external actors diversifies conflict potential between Member States: not only interests but also ideas may conflict. A need emerges for Union law not only to prevent conflicts of interests, but also to offer rules for constant (re-)negotiation of conflicts of ideas. Third, the rise of conquest through governance (as opposed to the military conquest of territory) leads to expansion not only of Union powers, but also of the scope of EU constitutional law. What constitutes 'a purely internal situation' that falls outside the scope of Union law is re-conceptualised not in terms of geography and policy choices but in terms of governance and rules for making policy choices.

1. EUROPE IN CRISES

Europe today finds itself in multiple crises: the euro and fiscal crisis, the failure of the European neighbourhood policy with the wars in Syria and Ukraine, new waves of mass migration to Europe, the first instance of exit from the EU. These crises reveal new conflicts and the importance of governance for the ability to maintain Peace. In terms of governance, Europe's crises are not unrelated. The arrival in Germany of ca one million asylum seekers in 2015 (many fleeing the wars in Syria and Iraq) roughly doubles its long-term unemployment,[2] posing an economic challenge. The mass migration to Greece alone of 30,000 people per week on average in November 2015 with a total of over 800,000 in 2015[3] presents a logistical and security challenge not unlike the anti-austerity demonstrations in the same country three years earlier, in which up to 500,000 people took part. No wonder that at the end of 2015 Turkey, the major country of transit for migrants on their way to Europe, benefited from unprecedented EU funds and concessions,[4] including acceleration of its accession to the EU. In the same year, Greece almost exited the euro, the Swiss voted in a referendum to end free movement of persons,

[2] 2% of the population in 2014, with 'long-term' defined as being out of work for longer than 12 months, Eurostat http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Figure_8_Unemployment_rates_by_duration_2014_(%25).png.

[3] Missing Migrants Project of the IOM (18.12.2015), http://missingmigrants.iom.int/sites/default/files/Mediterranean_Update_18_December.pdf.

[4] J Zaragoza-Cristiani, 'Analysing the Causes of the Refugee Crisis and the Key Role of Turkey: Why Now and Why So Many?' (2015) *European University Institute working paper RSCAS* 2015/95.

Iceland dropped its EU accession bid and, in June 2016, the UK voted to exit the Union. These developments have come on the heels of repeated rejections of Europe by its peoples (starting with the failed referenda on the EU constitutional Treaty, to the plummeting European Parliament (EP) elections turnout, to the rise of the so-called Eurosceptics). Union citizens not only fail to accept European policy choices but actively vent their disaccord. National constitutional courts are also in doubt.[5]

The claim of this book is that Europe's crises of governance are rooted in its constitutional design, a design that is largely based on now obsolete threats to Peace. This design needs re-conceptualisation in order to prevent and withstand future crises. This book unveils this constitutional design and the potential for revamping it, and shows to what extent this is being done already.

2. POLICY CHOICES AND CONSTITUTIONAL CHOICES

This book does not discuss substantive policy. Rather, it 'looks for the questions behind the question' of European policy choice.[6] It has been noted that Union law developed with no explicit constitutional theory.[7] The aim of this work is to render the implicit explicit. It is shown that starting from the Treaty of Rome, EU law contains implicit constitutional theory, which was used and developed by the Court of Justice of the EU. With the Treaty of Lisbon, the presence and substance of this theory comes out with new force.

This project began with the why and what questions. Why is there a difference in the individual–state relationship established in Union law between the internal market and the area of freedom, security and justice? What does this difference mean for the role of Union law? And for the structure of policy making in the EU legal order? To answer these questions, a distinction is made between constitutional choices and policy choices. The latter pertain to substantive Union policies that set a balance between competing interests in Union law. The former pertain to the rules for setting this balance. Whose interests are represented in the process of making policy choices—and whose interests are protected from the process of

[5] See EO Eriksen and JE Fossum, 'Bringing European Democracy Back In—Or How to Read the German Constitutional Court's Lisbon Treaty Ruling' (2011) 17(2) *European Law Journal*; J Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' (2012) 8(2) *European Constitutional Law Review*; P Kiiver, 'The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU' (2010) 16(5) *European Law Journal*; G Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor' (2011) 17(4) *European Law Journal*.

[6] R Van Gestel and HW Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20(3) *European Law Journal* 311.

[7] M Poiares Maduro, 'Three Claims of Constitutional Pluralism' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012) 67–68.

making policy choices? Union Treaties not only contain both constitutional and policy choices but, confusingly, in Union law, some policy choices perform a constitutional function. It is the constitutional function, the rules for making policy choices, that this book identifies and brings together for a coherent constitutional theory of Union law.

The study of constitutional choices—the rules for making policy choices—in the multicultural setting of Europe requires an interdisciplinary approach. Constitutions establish and stabilise polities by rendering predictable human interaction in the course of making policy choices. They do this by creating a practice for the development of shared experiences and understandings (political culture) that renders the discussion of policy choices possible. But the practice itself is embedded in past experiences and culture. Where the experiences and the meanings derived from them diverge, as in Europe today, shared meanings can be found in two broader expressions of culture: philosophy and psychology. Elements of both are combined with institutional and constitutional elements of Union law to outline such a foundation. Further, the theoretical aspect of this book draws on theories of transnational legal systems, European integration and constitutionalism. The focus on people and groups of people (polities) as opposed to the Hobbesian state, state institutions or their officials, makes evident the relevance of psychology and philosophy to constitutional law.

To identify the constitutive elements of EU legal order and trace their adaptation to the changing nature of conflicts, a comparative constitutional approach is used. Changes in the constitutional construct of Europe are exposed and explored through the analysis of the only EU policy that spans three constitutionally different areas. These three constitutional areas diverge in the structure and type of conflicts to be resolved in Union law: conflicts between the national polities, conflicts with actors not bound by Union law, and conflicts internal to every national polity. The substance of law—European policy choices—is used in order to distil the constitutive elements of EU legal order and therefore understand the EU's constitutional choice. Comparative analysis of policy choices in the three constitutional areas highlights their constitutional implications and explains the different approaches taken by the legislator and the Court. By distinguishing between policy choices (the *what*) and constitutional choices (the *how*), this work combines theory with legal analysis to flesh out a holistic constitutional theory of EU law.

3. WHAT'S IN A POLICY?

One EU policy is chosen to illustrate and detect constitutional adaptation. This policy is migration, understood broadly to include all the provisions that regulate mobility of people to and from Member States of the EU. It is unique for the convergence of the multiple factors that evidence Europe's constitutional construct.

First, migration is a highly conflict-prone policy characterised by high heterogeneity of interests and ideas about the best policy choice. The presence of two

different types of conflict—conflicts of interests and of ideas—enables comparison between the constitutional solutions adopted in Union law for each. It is also a policy where substantive policy choices are made both in Treaty law by unanimity and in secondary EU law subject to majoritarian political process. Further, migration law can be enacted under exclusive or shared competences of the EU. These features enable comparisons that reveal constitutive elements of the EU legal order.

Second, migration allows for comparative analysis between the internal and the external in the EU constitutional construct. In fact, it is the only policy that spans three constitutional areas: (1) the internal market, (2) external agreements of the EU, and (3) the area of freedom, security and justice. These areas diverge at the level of interdependence between the national polities and the type of actors involved in conflict. In terms of actors, there are three types of conflict: between Member States, between the Union and external actors, and within each national polity of the EU. These correspond to three potential sources of conquest: (1) conquest of one European people by another, (2) conquest by actors not bound by Union law, (3) conquest of a European polity by internal minority interests. In Europe, migration policy produces another deep tension: while it is used to eliminate conquest potential between Member States, it can simultaneously be used to subdue and conquer the Union.[8] This paradoxical relation requires a careful balance, enabling the discussion of how the two opposites compose the whole.

Third, comparison between constitutional and policy choices is possible thanks to the presence of three distinct groups as concerns the political process: members of Europe's polities (in their home Member State and in another Member State of the Union) and 'outsiders'. This enables a meaningful comparison between not merely the substance of rights but the reasons for the difference in substance. To the extent that migration law regulates human beings (who deserve the same basic rights) in the same situation of trans-border mobility but in a different situation as regards membership in different political communities, choosing this policy fixes one component of comparison while focusing on the differences in the other. Even when worded identically, rights provisions found in different constitutional contexts could have different constitutional functions and effects in terms of rules for making policy choices. This work reveals these different constitutional effects and the challenges to Peace that they address.

These unique features of EU migration policy allow for a highly comparative and holistic approach necessary to map how Union law regulates conflicts. One type of conflict remains outside migration policy due to its scarce reliance on technical expertise: the conflict between expert knowledge (technocracy) and politics (democracy). However, even this conflict, although not present in migration policy, can benefit from the conclusions presented in this work. Thanks to its belonging firmly within the sphere of politics, migration can showcase the

[8] On the use of migration as a tool to subdue a state, see KM Greenhill, *Weapons of Mass Migration. Forced Displacement, Coercion, and Foreign Policy* (Ithaca, NY, Cornell University Press, 2010).

difference between justice and liberty as an approach to EU constitutional law. Is the role of Europe to secure (political) liberty or (social) justice? The claim advanced in this book is that both are relevant, and that securing justice necessarily begins with liberty.

The analysis of migration law presented here explores the political as it emerges from substantive Union law. Through this analysis, the work reveals elements of EU constitutional order and their adaptation to the broader changes in and around the Union. This book compares how Union law addresses different types of conflict to advance our understanding of the legal order not in theoretical or 'desirable' terms but as it results from the legislative process and case law. Conclusions from this analysis are relevant for all Union policies and answer the question of *how* policy choices are made. The reader should not expect to learn from this book *what* immigration or asylum measures are to be put in place. Rather, a holistic understanding of EU constitutional order, where substantive justice relies on political liberty, comes to the fore.

4. ARGUMENT OVERVIEW

This book claims that the constitutional design of Europe presents both liberal and republican elements. As the nature of threats to Peace change, the balance between the two is shifting and constitutional adaptation takes place. Understanding this balance provides the foundation for a constitutional theory of EU law and is therefore key to all areas of Union law.

The book evolves in five chapters. It starts with a theoretical framework for conceptualising the constitutional in Union law. Constitutions regulate a society of people; regulating people requires understanding of how they think and act. For this reason, Chapter 1—'Liberty in the Constitutional Construct of Europe'—combines the elements of psychology and philosophy relevant for Western democratic societies. There is no claim that all the people in Europe share these ideas—merely that our political culture and way of thinking are to a large extent founded on them. A connection is made between the three aspects of liberty (negative liberty, positive liberty, liberty from domination), legitimacy of the EU legal order and loyalty between the peoples of Europe. Together, liberty, loyalty and legitimacy allow the 'quotidian character of practice' of EU law to be preserved.[9] Only a people that enjoys all the three aspects of liberty can exercise loyalty vis-à-vis other peoples. Liberty thus defines the constitutional function of EU law and acceptance of Union policies. The chapters that follow discuss each of the three aspects of liberty in turn.

[9] D Patterson, 'Methodology and Theoretical Disagreement' in U Neergaard, R Nielsen, L Roseberry (eds), *European Legal Method Paradoxes and Revitalization* (Copenhagen, DJOF Publishing, 2011) 236.

Chapter 2—'A Union of Polities: Negative Liberty'—proceeds to analyse EC law developed before the Treaty of Lisbon through a comparison between the internal market and mixed external agreements of the EC. It examines negative liberty secured in EU free movement law, reveals conflicts that this conception of liberty can and cannot address, and discusses why it is so. Substantive law and case law are analysed in order to identify what types of conflicts are being solved with the help of Union law. Internally in the Union, Peace is conceived primarily as avoiding conflicts of interests between European polities; it is achieved through reciprocal deregulation. As a result, non-interference between European polities is being enforced over their positive liberty expressed in mixed external agreements. Both, however, require liberty from dependence to be advanced in Union law.

Chapter 3—'A Political Union: Positive Liberty'—traces the emergence of positive liberty as the foundation for the area of freedom, security and justice (AFSJ). The abolition of physical borders between national polities introduced an external dimension into the internal policies of the EU, leading to reconceptualisation of Peace. Peace in Europe is now more likely to be undermined not by Member States but by external actors who are not bound by Union law. In Europe's Union defined by reciprocity of commitment, Peace through deregulation is impossible when actors are not bound by Union law. As regards such external actors, Peace between Member States is transformed from a tool for avoiding conflicts into a tool for solving them. Absence of functional objectives in Treaty legal bases reflects this constitutional change. With the abolition of functional objectives from the definition of shared powers, the European idea of positive liberty became subject to an ongoing process of policy choice in Union law. The Lisbon Treaty thus finalised the emergence of a European political space, and opened for Union law a thicker constitutional function as a regulator of politics.

Chapter Four—'Conflict in Union Law'—traces the reorientation of Union law from conflicts of interests to conflicts of ideas. This is evident in the division of powers both in the legislative process and as adjudicated by the Court. Elements of the republican model forcefully emerge. With the relative increase in the importance of external threats to the Peace of Member States, conflicts between them are increasingly about ideas rather than interests. This is translated into Union law, albeit only implicitly, with a shift from EU policy choice as an instrument of conflict prevention towards the increased role of Union law as a tool for continuous (re)solution of conflicts.

Chapter Five—'The EU Court and Liberty from Dependence'—examines recent CJEU (Court of Justice of the European Union) case law in order to trace the adjustment of general principles of Union law to the different types of conflict. Cases on citizens and third-country nationals are examined. The principles in focus are primacy, mutual recognition, solidarity and the scope of Union law. It is shown that with the changing nature of conflicts fundamental freedoms yield to constitutional principles that set shared rules for making policy choices. The major challenges for the Court are connected with the national constitutional identities of Member States, where a careful balance needs to be struck between

shared EU rules for the political process and the national political identity of polities in the EU. The identity of each people of Europe as an autonomous political community able to define and pursue its own idea of ideal life in the Union is a necessary precondition for loyalty and longevity of Union law. Liberty from dependence emerges as a key feature of the EU legal order, uniting the liberal and republican models for Europe.

The book's Conclusion—'Union Law As the Pacifier of Conflicts'—draws together the elements of EU constitutional theory that have emerged throughout this book into a holistic approach to Union law. It explains how the changing nature of conflict transforms the constitutive elements of the EU legal order.