Routledge-Giappichelli Studies in Law

EUROPEAN ECONOMIC LEGAL ORDER AFTER BREXIT

LEGACY, REGULATION, AND POLICY

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G. Giappichelli Editore

ROUTLEDGE

PREFACE

At the beginning of the third decade of the 21st century, the legal systems of the EU and the UK face challenges of epic proportions.

Never before have the two ***legal orders*** *been confronted with the simultaneous impact of a series of events:*

- *The effect of the "divorce" between the two regulatory systems caused by the UK's withdrawal from the EU legal order. The expiry of the transition period triggered the start of two separate legal systems* as of January 1, 2021.
- *The impact of the coronavirus shock on all European economies. The effect is a substantial change of political perspective in EU legal orders. It is being addressed with the "Temporary Framework" for state aid, the "Escape Clause" in the Stability and Growth Pact (SGP) and the "Next Generation European Union Recovery Fund" for the creation of new common assets.*

The dramatic relaunch of the debate on ***identity*** *issues throughout Europe, the EU institutions' response to the pandemic shock and the impact of this response on European monetary policy are all addressed in this book within the framework of a "Public Regulatory Law" text.*

The book questions the effect resulting from the ***legacy*** *(Part One) of an historical period in which the EU and the UK were part of a "single legal order", the impact on* ***market regulation*** *of the striking events of our time (Part Two), and the consequences on* ***policy*** *(monetary, fiscal and trade) of the current convulsive political and financial landscape (Part Three).*

Its "file rouge" is the idea – developed throughout the book – that ***terminology, concepts*** *and* ***models*** *originating from two historically different experiences, the Anglo-Saxon and the continental (with all the variety of the latter), have cross-fertilized each other. This forms the*

*basis of the shared platform for the **Future Relationship**, the title given by the UK Parliament to the **Act** that on 30 December 2020 ratified the **Trade and Cooperation Agreement**, sealed by the EU and the UK on Christmas Eve 2020 and which entered into force on January 1, 2021.*

*The regulatory system born out of this mutual fertilization is now a reservoir the Parties may rely on to feed their **"separate markets"** and their "**distinct legal orders**": mutual debts due to mutual **intellectual influence** are the only real foundations for fair co-operation and competition, reaching far beyond the terms of a deal so long negotiated and shrouded in vague formulas open to conflicting interpretation.*

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January 1, 2021

ACKNOWLEDGMENTS

This book has been inspired by a unique period in which the EU and the UK were part of a "single legal order".

On a personal level, that period, by now an historical one, is marked by the temporal coincidence of having spent my post-graduate education at Oxford in the years following the "first" referendum on UK accession.

The extraordinary cultural milieu of St. John's College and the Oxford Faculty of Law suggested paths for exploring the contamination among cultural sources far beyond the specific law study field.

With some of my contemporary students at St. John's College – such as, and above all, the philosopher Richard Shusterman (currently Eminent Scholar in the Humanities at Florida Atlantic University) – the dialogue continued throughout this time.

Beyond a circle of personal acquaintances, I owe a specific debt of gratitude to Prof. Patrick Gèrard (Directeur de l'École National d'Amnistration, Strasbourg), Prof. Veronique A. Lafon-Vinais (Professor of Business Education at Hong Kong University of Science and Technology), Prof. Carolyn Kadas (Professor of Economics of Transition in Eastern Europe at University of Bologna) for suggestions deriving from different angles and perspectives.

For all the others from whom I have drawn suggestions or hints over time, without mentioning them all, my feelings can only be expressed in the following Shakespearean verse:

"I count myself in nothing else so happy / As in a soul remembering my good friends" [Richard II, Act 2, sc. 3].

Introduction
IDENTITY

"We are with Europe, but not of it.
We are linked, but not compromised.
We are interested and associated,
but not absorbed"
(W. CHURCHILL, 1930)

From a "Moral Idea" to an "Economic" Issue

The underlying concept of the above quoted famous words is obviously a reaffirmation of "identity".

In general constitutional terms, "identity" is a challenging word that bases its legitimacy on the popular vote.
In political terms, identity politics is – in the words of Francis Fukuyama – a ***"moral idea"*** *from which "we cannot get away":*

> *"It focuses on natural demand for recognition of our dignity […] expressing the resentments that arise when such recognition is not forthcoming"* [F. FUKUYAMA (2019)].

A moral idea formed in the constitutional order that is far from being exclusive to the UK. Political theorists stress the need to not underestimate the deep implications of the notion itself of identity for national communities in contemporary times:

> *"Souvent tournées vers la défense d'identités anciennes menacées, nourries de protectionnisme et de nationalisme, elles font l'apologie des identités et des racines, ressenties comme des valeurs stables dans un monde précaire"* [J. ATTALI (2018)].

At the extreme limit of its consequences lies the concept of ***secession****, a term that refers to the territory of a state (as in the Scotland and Catalan*

claims) and which is obviously different from "withdrawal" from a supranational membership. However, the logic of ***withdrawal*** *from the EU and secession from the territory of a state have one thing in common:*

> *"a failure of the rationalist project of sharing a polity out of rational choice, and the will of doing so".* [C. CLOSA (2017)]

This failure of the ***rationalist*** *project of* ***sharing a polity*** *was made explicit in the position paper published on 27 February 2020 by the UK government with a view to negotiating the new partnership with the EU following the Withdrawal Agreement:*

> *"at the end of the transition period provided for in that agreement, the UK will fully recover its economic and political independence" [****UK's Approach to negotiations****, sec. 2].*

A distinctive notion of identity emphasized by the prospective to "embark on an exciting new phase as an independent trading nation" (as remarked in the subsequent **UK Internal Market White Paper**, *July 2020) and finally proudly underlined in the Foreword by the UK Government to the* ***Trade and Cooperation Agreement:***

> *the "Agreement means that the UK will fully recover its national independence […] restoring national sovereignty"* [UK **TCA Summary**, *Foreword from the Prime Minister*, December 2020].

On a more general level,

> *"nationalism promises a source of identity and security: a return to full sovereignty will supposedly stem the global forces responsible for today's uneasiness "* [E. CAMPANELLA, M. DASSÙ (2019)].

The theme is not at all exclusive to the UK.

Also significant – along these lines – is the fact that all the ***popular votes*** *that have been held in EU Member States on Europe's issues since the early years of the new millennium have had a* ***negative outcome****. The popular votes have all had to do with central issues: monetary, constitutional, fiscal and eventually membership. Obviously a referendum (including the Brexit case) tends to be dominated by internal political issues, but in any case, the European* ***democratic deficit*** *can*

be seen above all in the fact that, when they have had the opportunity, European countries have repeatedly rejected integration policies.

The list begins with the Danish referendum on Economic and Monetary Union (EMU) in September 2000 with a negative result for EMU membership. Previously Denmark had also rejected the Maastricht Treaty; then approved it when it was granted the right, through a special Protocol, to not join the single currency. Subsequently, Sweden also voted in September 2003 to not join EMU.

The worst came with the "Constitution for Europe" signed (as it had already been for the 1957 Treaty) in Rome in October 2004 and rejected without hope of repackaging by referendum in France and the Netherlands in May and June 2005.

Ireland voted against the Lisbon Treaty in 2007. In 2015 the Greek electorate voted to reject the conditions imposed by the bailout programme.

In other cases, such as the treaty establishing the European Stability Mechanism (ESM) designed to rescue Eurozone Member States in financial difficulty (and relaunched in the current pandemic crisis for health security interventions) the choice to establish the mechanism through an international agreement instead of amending the EU treaties was due to the fact that the treaty amendments "would have required politically difficult referenda in a range of member states" [D. HOWARTH, L. QUAGLIA, in C.J. BICKERTON, D. HODSON, U. PUETTER (2015)].

All the referenda results can lead to the "obvious conclusion" that "the public opinion which governs a country is the opinion of the sovereign, whether the sovereign be a monarch […] or the mass of the people" [A.V. DICEY(1917)].

In all cases ***identity*** *has played a central role.*

On the contrary, and perhaps as a paradox, stand the only two plebiscites held in the United Kingdom before 2016. One was held in 2011 on changing the voting system for members of parliament, and the electorate voted in favour; the other was held in 1975 on membership in the (then) European Community and two thirds of the electorate voted to stay. An impressive difference was the fact that in 1975 "support in England was higher than in any other part of the United Kingdom" [B. SIMMS (2013)]: in 2016 England made the difference in favour of withdrawal.

The Quest for Identity

The "constitutional order" of the EU is based on an essential principle: *"the primacy"* of EU law *"in areas where legislative power had been conferred by Member States to their common institutions"* [G. AMATO, in J. BELL, C. KILPATRICK (2006)]. The *primacy* of EU law together with *direct effect* and *mutual recognition* are the **constitutional pillars** of the European legal system.

At the same time, the existence of reserved areas of state sovereignty is preserved in the treaties with particular reference to the ***national identities*** of states (Article 4 (2) TEU).

Any legal reference to national identity can be widely controversial as to its actual meaning. As historians point out

> *"There is a kind of circularity: the nation state represents national interests effectively because its very existence defines those interests"* [J. BLACK (2019)].

In any case, since these interests belong to the *political process* – and the dynamics of interests in the EU context demonstrate the *lack* of a *living concept* of ***European polity*** – they are used by nation states: at least at present it is far from clear that a European political community can successfully carry out the same function.

Indeed, national identity has always been an issue in the European integration project:

> *"The search for a common European identity has been hugely problematic throughout the history of the EU. It is widely interpreted as a kind of nation-building that both conflicts with and challenges the interests of nation-states"* [M. SHACKLETON, in B. MARTILL, U. STAIGER (2018)].

As for the UK, it is not surprising that the debate on the issue of *"national primacy"* preceded the referendum debate. National primacy had already been reinforced by the role of parliamentary procedures for the enactment of EU rules (through the Westminster *European Select Security Committee*) acting – at least for primary legislation – *"as a form of substitute Sovereignty"* [D.J. GALLIGAN (2014)] on the basis of *"parliamentary accountability for EU affairs"* [A. CYGAN, in A.J. CORNELL, M. GOLDONI (2017)].

In the British legal and constitutional experience, the point was subject to *acrobatic theories* in order to give priority to the economic benefits over the constitutional implications of EU membership:

> *"Instead of conceiving European Law as an "autonomous" legal order that directly applied within the United Kingdom* […] *the official view continued to insist that absolute – British – supremacy remains untouched. For instead of locating the supremacy of (earlier) European law over (later) Westminster legislation in the European legal order, the British view came to locate it in the (English) common law"* preserving *"the supremacy of British over European law"* [R. SCHÜTZE, in R. SCHÜTZE, S. TIERNEY (2018)].

In fact, the doctrine of parliamentary sovereignty throughout the period of UK membership has been an endless refrain, including – as already mentioned – the acrobatic effort to support the assumption that EU law primacy was not in conflict with Dicey's classical doctrine: the primacy of EU law is

> *"a constitutional development which fundamentally operates so as to preserve the sovereignty of Parliament"* because it *"is a reconfiguration, and not a repudiation, of the idea of legally unlimited legislative authority"* [M. GORDON (2015)].

Again, the **European Union (Withdrawal) Act 2020** approved by the British Parliament on 23 January 2020 considered it necessary or in any case useful to reiterate – precisely at the end of EU membership – the principle that the UK Parliament is sovereign even during the (now expired) transition period, *"notwithstanding directly applicable or directly effective EU law continuing to be recognized and available in domestic law"* (sec. 38 (2)(a)).

Significantly, the section ends with a clear emphasis:

> *"Accordingly, nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom".*

An enphasy on identity reinforced, if possible, by the plural concept of "nation" as in the **White Paper 2020** on **Internal Market** (July 2020) that outlines plans for a new UK internal market among the "*four constituent nations*" (one of which, Northern Ireland, continues to comply with EU customs rules), enabling the "*seamless*

functioning" of commerce among the four nations (embraced in the *"unitary state"* concept).

A "Judicial secession": the Case of the German Constitutional Court

In any case, the apparent record of institutionalized *exceptionalism* that accompanied the British constitutional commitment to EU obligations is by no means exclusive. Its approach to the *constitutional issue* of sovereign and national identity is widely shared by several Member States.

Without using the same wording, but using the same concepts, several national constitutional courts have spoken out, saying that there must be limits to European integration, limits that are imposed by national constitutions as certain areas are too essential for the *sovereignty* or *identity* of the state.

Specific *national constitutional requirements* can filter out the application of European public law when – as a German constitutionalist stated –

> *"national constitutional courts or supreme courts with constitutional jurisdiction can review treaties as to their compatibility with the national constitution"* [D. GRIMM (2016)].

It is sufficient to recall the case law of the German Constitutional Court of Justice (*Bundesverfassungsgericht*, *BVerfG*), over the last three decades, starting with a very clear judgment on the limits of integration on the Maastricht decision [*BVerfG*, 2 BvR 2134/92 (1993)].

The Court stated that Germany's ***constitutional identity*** requires a legitimate democratic government and therefore democratic representation of the type found at state level is necessary to regulate or legitimately govern areas of EU competence. The Court concluded that within the *current constitutional framework* there would always be certain areas of competence that should remain within the sphere of national democracy, giving a constitutional basis to the notion of *"multi-level structure"* [E. SCHMIDT AßMANN (2015)].

A further transfer of competences would go against the consti-

tutional identity of Germany, or, rather, would imply the risk of diluting the state into a *less democratic supranational entity*. Neither the German Constitution nor the Court would allow this:

> *"while the BVerfG has never prevented the ratification of an EU treaty so far, its case law has restricted the room of negotiation for the German government on EU affairs. In its Lissabon Urteil, BVerfG 123, 267 (2009), the BVerfG has identified a core set of competences which belong to the heart of state sovereignty and which cannot be transferred to the EU"* [F. FABBRINI (2017)].

Other decisions taken over the years concern the legal limits of the European Central Bank (ECB) [*BVerfG*, 2 BvR 1390/12 (2012)] or the ECB's policies on stabilization of the euro, as was the case for *outright monetary transactions (OMT)* [*BVerfG*, 2 BvR 2728/13 (2016)] and for *quantitative easing* [*BVerfG*, 2 BvR 859/15 (2017)]. In light of the above rulings, the independence of the ECB

> *"est vue comme une exception au principe de démocratie, exception devant naturellement être justifiée par une raison particulièrement forte. La Cour constitutionnelle fédérale allemande (Bundesverfassungsgericht) justifie cette exception par l'objectif de stabilité monétaire"* [J.H. KLEMENT, in G. KALFLECHE, T. PERROUD, M. RUFFERT (2018)].

The same pattern has been followed in the latest judgment [*BVerfG*, 2 BvR 859/15 (2020)] in which the ECB was asked to justify the legal grounds for the bond purchase programmes pursued by the ECB in recent years. The ruling is framed in reasoning focused on criticism of a previous CJEU ruling on the issue [Judgment of 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000]. The criticism seems to allow a national constitutional court – such as the *Bundesverfassungsgericht* – to rule on the consistency of the CJEU judicial reasoning and this on the assumption that the CJEU judgment in this specific case is "*untenable from a methodological perspective*". On the basis of this assumption, a court of a Member State argues that:

> *"the interpretation of the principle of proportionality undertaken by the CJEU, and the determination of the ESCB's mandate based thereon, exceed the judicial mandate conferred upon the CJEU"* [*BVerfG*, 2 BvR 859/15 (2020)].

Therefore, a national constitutional court may claim the constitutional **authority** to review a CJEU decision (belonging to a supranational legal order and as such independent from Member States' national legal orders), and then apodictically conclude on the point that:

> *"In light of the aforementioned considerations, the Federal Constitutional Court is not bound by the CJEU's decision but must conduct its own review to determine whether the Eurosystem's decisions* […] *remain within the competences conferred upon it under EU primary law"* [*Ibid*.].

These words, which expressly reject the primacy of EU law and the primacy of the CJEU as regards its interpretation, appeared to external observers as *"an act of judicial secession"*. This is particularly significant given the parameters of seizure of power and political influence of the country to which the BVerfG belongs:

> *"Divergences between courts of the member states as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order"* [M. WOLF, *German court decides to take back control with ECB ruling*, *Financial Times*, 12 May 2020].

It is clear that any significant step towards *further economic* and *fiscal integration* will be closely *monitored* by the BVerfG in the future, resulting in an *ultra vires* challenge (as an allegation that supranational institutions have gone beyond the powers granted by the treaties). A perspective in which future amendments to the EU treaties – or new interpretations of them – could be considered capable of influencing the "*reserved domains*" is identified by the BVerfG.

With regard to the relationship between the BVerfG and the *Court of Justice European Union* (CJEU), the last judgment confirms – as stated by German lawyers – that

> *"the Constitutional Court considers the relationship between the two courts as a form of 'cooperation', although it is quite unclear what this means exactly. In practice, the Constitutional Court therefore refrains from a review of Community acts but still keeps its review powers as a kind of Damocles-sword in reserve, thereby forcing the European*

Court of Justice to take the views of the Constitutional Court of Justice into account" [W. HEUN (2011)].

The Case for "reserved constitutional domains"

In other Member States the constitutional courts are equally attentive to these developments, referring – albeit in more nuanced terms – to similar **reserved domains**. Some of these courts base their reasoning on the need for explicit democratic legitimacy, while others just argue that certain areas are part of the core of state sovereignty.

The signing of international treaties is a devaluation of sovereignty, to which the constitutionalism of Member States reacts in various ways.

It suffices to mention the case of Denmark (the country that after the UK's withdrawal holds the record for the highest number of explicit opt-out agreements). The national identity provision is used here to justify a form of derogation from the "indivisibility" totem of the four freedoms.

One example of non-compliance with the principle of full movement and non-discrimination is the legal limit on the purchase of a second home by nationals of other Member States.

"In particular, this allows for 'protection' from the Treaty provisions on free movement of capital and services, which in principle would otherwise have the effect of ensuring that EU nationals can buy property in other Member States"[U. NEERGARD, in A. BAKARDJIEVA ENGELBREKT, X. GROUSSOT (2019)].

This approach, legitimated by a special bilateral EU-Denmark protocol, allows the Danish Supreme Court to reinvigorate a kind of **judicial activism** by explicitly choosing to reject parts of EU law, *"thus undermining a cornerstone of the EU acquis by failing to apply the principle of the supremacy of EU law"* [*Ibid*].

The above succinct picture gives an idea of the **fragmentation of the institutional order** of the European Union, depicted by German scholars as one of the *"major crises of political order in European history"* [J. NEYER, in A. BAKARDJIEVA ENGELBREKT*et al.* (2019)].

Asymmetries at national level are the result – or the consequence – of constitutional constraints due to the fact that:

> *"EU decision-making is limited by the very nature of the constituent Treaties. National constitutions constrain political choice. It is inherent in their very nature"* [P. CRAIG, in A. BAKARDJIEVA ENGELBREKT *et al.* (2019)].

The Quest for an Overarching Polity

The UK withdrawal represents the first *reduction in the size* of the EU's external institutional borders. The oft mentioned case of Greenland's withdrawal in 1985 is not significant, as Greenland was not a Member State but a territory within the state of Denmark.

In political terms, Europe is currently defined by the **borders** of the European Union. The political borders remain uncertain depending on future accessions, since Europe *"est une notion géographique sans frontières avec l'Asie et une notion historique aux frontières changeantes"* [E. MORIN (1987)].

Going back in history, as is well known, the theme of reconnecting **national identities** with an **overarching polity** has been a recurring one. The origins of this theme can be traced back to the Carolingian empires which emerged in the 9th century, several centuries after the collapse of the Roman Empire. A recurring theme throughout the centuries recalls the *Landfrieden* of the Holy Roman Empire, as well as the *Universitas Christianorum,* which constituted the *"chief model"* [B. HEUSER (2019)] of a global political system on the continent. Instead

> *"the political and historical use of the term Europe and the use of European as a noun/adjective began to circulate and actually gained a foothold at a time that coincided with the period between the Renaissance and the Enlightenment"* [G. GALASSO, in G. AMATO, E. MOAVERO-MILANESI, G. PASQUINO, L. REICHLIN (2019)].

On the English side, the quest for an "overarching polity" has followed a totally different path, pursuing other meanings of the notion. Throughout the 19th century, English statesmen had a clear

idea that sovereignty was not at all antithetical to what Pitt the Youngest called a sort of *"public law of Europe"*.The concept was reinforced by the conviction

> *"that the tide of events in Europe was heading inexorably towards nationalist and constitutionalist modernity along English lines"* [B. SIMMS (2016)].

The events of mid-century Italian unification in 1860-61 strongly influenced English statesmen, suggesting the hope that the British example would inspire new and old European states to introduce constitutionalism.

Sovereignty, *liberalism* and *constitutionalism* were closely interconnected in the political sense of the *public law of Europe*: a concept stemming from

> *"two themes which were to remain a constant in English, and later British, strategic debate: fear of the domination of the continent by a single power, and England's role as a balancer"* [*Ibid*].

The coexistence of national identity and overarching polity (the "public law of Europe") was therefore – at least theoretically – well rooted in the ideas of liberalism and constitutionalism emerging in the 19th century.

In this sense, recalling a *"common heritage"* and *"the formative influence on constitutional thought"*, it can be stated that:

> *"Among the approaches that contribute to contemporary ideas, the British tradition merits a special place for the constitutional legacy it has left"* [D.J. GALLIGAN (2014)].

Sectorial Constitutionalism

In current times, the relationship between **European constitutionalism** and the **legal orders** of the Member States is made up of complementarity but also conflict.

Issues of "national identity" are largely absorbed by **constitutional pluralism.** In the current era of "post-national law", conflicts of authority are inevitable.

> *"National law adheres to the territorial principle of authority and claims universal jurisdiction in its territory. By contrast, transnational law's claim of authority is substantially or functionally defined and limited"* [K. TUORI, in A. BAKARDJIEVA ENGELBREKT *et al.* (2019)].

While the above definition underlines the breadth of any constitutional theory of the *Staatenverbund* or the federal union, it also raises the issue of the intellectual foundations of the *Verfassungsbund,* e.g. *complementarity* between *legal orders* and *post-national law*.

The dialectic between institutional **identity** and **supranationality** is clearly reflected in the functioning of the EU institutions.

Tension has always existed between the *community principle* and *intergovernmentalism*. The *community principle* is that the Commission takes initiatives and the Member States, through the EU Council, composed of representatives of Member State governments, shall approve or disapprove proposals. *Intergovernmentalism*, on the other hand, relies on governments to take and negotiate initiatives. Recent years have witnessed a shift to intergovernmentalism, often overwhelmed by the dominant role of the two largest member countries.

Ultimately the search for national identity has led to a "plural form of differentiation" that has given rise to different **sectorial legal orders**, although none of these (defence, justice, foreign affairs, social welfare) have the "institutional" richness and completeness of the European Monetary Union (EMU) as an adequate and autonomous legal order based on the single currency.

Thus, *national identity* has nurtured all the various forms of closer and more rigorous *intergovernmental cooperation*, i.e. all powers remain in the hands of national officials and any cooperation often has to be agreed unanimously rather than by the majority of all participants.

Several *enhanced cooperation* clauses and *derogations* have played an appropriate role in *"alleviating tensions"* for a *"troubled membership"* (non-exclusive of the UK) [C. CLOSA (2017)].

All these clauses aim to achieve European ***governance without government***, a *networked*, *non-hierarchical structure*. Rather than concepts of sovereignty or representation, this form of EU governance is based on procedures of *negotiation*, *bargaining*, *sector agreements*, *and joint decisions*: