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Can the EU's constitutional framework accommodate democratic politics?

by

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Abstract

The robustness of the EU's constitutional framework – and its ability to accommodate democratic politics – is challenged as never before. The growing disconnect between formally democratic procedures and substantive choice is well illustrated by the Greek crisis. Since its first bailout in May 2010, Greece has held four general elections and a referendum. Yet, the anti-austerity preferences of the Greek electorate have not been effectively translated into policy.

This article uses the Greek crisis to analyse the EU's democratic deficit, and the related issue of the locus of legal and political sovereignty in the EU. It argues that the EU's constitutional framework is not sufficiently responsive to changing material conditions or to the changing preferences of Europeans. Thus, EU constitutionalism needs to be refashioned in order to strike a better balance between democratic and technocratic governance, as well as between the needs of individual citizens, national citizenries, and states.

Key-words

constitutionalism, democracy, democratic deficit, euro crisis, Greece



1. Introduction

The European integration project has been beset by a series of economic and political crises for the past several years. Crisis, in and of itself, need not be cause for existential alarm. After all, on many occasions in the past, crises have provided the European Community/European Union (EC/EU) with opportunities to achieve integration in new areas (Jones 2012). The robustness of the EC/EU's judicially-constructed constitutional framework was often a major factor in enabling it to overcome hurdles. This was the valuable insight provided by integration through law (ITL) scholarship (Scicluna 2015: 1-8). For decades, law functioned as one of the most effective agents of integration, able to drive the process forward (particularly by removing barriers to the effective operation of the single market, i.e. negative integration) even when political support lagged behind.

Today's crises are different. Unsustainable public debts in Greece, the near collapse of the euro, an unprecedented influx of migrants and refugees from the Middle East and North Africa, the rise of euroscepticism across the bloc, and impending Brexit have all challenged the EU's institutional capacity to respond to changing material facts, as well as to the changing needs and preferences of European citizens. To be sure, these are not solely legal problems. Every one of these crises reflects, above all, a failure of political will. In each case, the two-level games played by member state governments inhibit cooperation at the European level, since solutions that are potentially both just and effective are rejected as politically unacceptable to one or more domestic constituency (Bellamy and Weale 2015).

Nevertheless, the EU's constitutional framework – that is, the scaffolding constructed by the treaties and by the Court of Justice of the European Union's (CJEU) treaty interpretations – is also implicated. The limitations of the legal-constitutional paradigm when it comes to capturing the nature of European integration have become apparent in the post-Maastricht period. The Maastricht Treaty inaugurated a bold new era of European unity, facilitating both a deepening and widening of the integration project. It built on the identity-building initiatives of the mid-1980s, including the official adoption of an EC flag, anthem, and the establishment of 9 May as 'Europe Day', thereby aiming to render the integration project visible to European citizens. EU integration, indeed, has been progressively politicised over the past twenty-five years – both because more policy areas are legislated at



the supranational level, and because people are more aware of the Brussels institutions and their activities. However, democratisation (i.e. the ability of citizens to meaningfully influence EU-level policies) has not kept pace with the increased salience of such policies among voters (Scicluna 2014). Moreover, Economic and Monetary Union (EMU), which was one of the bold new projects introduced by Maastricht, was framed in such a way that law had little agency, and so little capacity, to overcome political intransigence. Thus, the integration-through-law paradigm that explained so well the judicially-led integration of the 1960s-1980s (Stein 1981, Weiler 1994), is not as useful when it comes to defining post-Maastricht integration and, particularly, integration in the present era of crises.

This article focuses on the weaknesses of the EU's constitutional paradigm when it comes to accommodating democratic politics, as expressed by the Greek debt crisis. I start in section 2 by framing the recent crises of European integration in relation to the EU's constitutional paradigm. Section 3 recapitulates the key facts of the Greek crisis, while section 4 uses the crisis to illustrate the EU's democratic deficit across three dimensions – within member states, between member states, and at the European level. Section 5 turns to the 'sovereignty paradox' that the euro crisis has brought into sharp relief. That is, European integration has reached a point where individual national governments cannot effectively formulate policy alone, and yet are reluctant to cede further competences to the supranational level. Finally, I will conclude with a sketch of future scenarios: what is desirable, but unlikely and what might be more likely, if less desirable.

2. The political-legal framework of Economic and Monetary Union

Like the EU as a whole, EMU is constituted by treaties, its parameters circumscribed by law. But the law that governs EMU is itself circumscribed – this is law as *object*, rather than law as *agent*. The kind of neofunctionalist momentum that law was able to generate in the single market; that is, CJEU-driven functional spillover; was not possible within the euro area. Instead, the split between supranational monetary policy and national fiscal policy meant that economic convergence among euro states could only occur via concerted political action. Indeed, the decision to allow Greece to join the euro area on 1 January 2001, despite not meeting the entry criteria, illustrates the role played by political discretion in the operation of EMU's regulatory framework (Gibson et al. 2012: 499-502).¹





Thus, the operation and enforcement of EMU's fiscal policies, though they were set out in legal documents including the Maastricht Treaty and the Stability and Growth Pact (SGP), was heavily reliant on the political will of the member governments. Key requirements, including that euro area states keep their budget deficit below 3% of GDP, and debt to GDP ratio below 60%, proved insufficiently enforceable well before the crisis hit. Although the SGP was originally proposed by German Finance Minister Theo Waigel in the mid-1990s; a decade later, large member states such as Germany and France were able to violate the Pact, 'seemingly with impunity' (Chang 2006: 107). The politicisation of SGP enforcement – with Ecofin often resisting Commission attempts to implement the excessive deficit procedure – and differential treatment of large and small states led to a loss of credibility for the Pact in the lead up to its reform in 2005. That reform, in turn, increased the 'flexibility' with which the SGP's rules were interpreted, further weakening its stringent fiscal requirements (Chang 2006).

Monetary policy, on the other hand, was supranationalised, with responsibility for its administration given to the newly created European Central Bank (ECB). This, of course, affected the ability of national governments to effectively react to adverse economic conditions, despite their retaining control over fiscal policy settings. In particular, since euro area states did not have recourse to currency devaluation in order to improve their economic competitiveness, this had to be done by means of an 'internal devaluation'. During periods of recession, then, a national policy toolkit already limited by membership of the common currency was further emptied by poor economic conditions. National authorities were driven, almost inexorably, towards public spending cuts, tax hikes, and other forms of austerity, giving citizens the impression that political choice – and, thus, democracy – has been 'pre-empted' (Armingeon et al. 2015: 2) by technocratic facts.

We may take two lessons from EMU's hybrid design. Firstly, as is now uncontroversial from the point of view of many scholars and policy makers, monetary union without fiscal union cannot work. Secondly, that in inter-state relations, even within a highly integrated body such as the EU, politics trumps law – even if the democratic quality of the former is degraded by the excessive formalism of the latter. Thus, the Eurozone's 'half-finished' status produced a number of anomalies that contributed to the sovereign debt crisis. For example, even though the ECB was originally conceived as an independent, apolitical and technocratic institution, it has transformed over the past several years into one of the Eurozone's most



powerful political actors. Perhaps the best evidence of this transformation is the fact that it was Draghi's famous promise, made in July 2012, to do 'whatever it takes' to save the Eurozone (later backed up by the announcement of the Outright Monetary Transactions (OMT) programme in September 2012), which calmed markets right at the moment when it seemed the currency union might collapse.

Many scholars have argued that Draghi was right to take the initiative when the euro's continued existence was in the balance and the Council appeared too divided to act decisively (see, e.g., Borger 2013, Petch 2013, Wilsher 2013). Arguing against those who claim that the crucial ECB policies were illegally adopted outside of the Bank's mandate, De Witte (2015) suggests that they are merely indicative of a growing variation of institutional practice within a flexible but stable constitutional framework. Indeed, the constitutional validity of the OMT programme has subsequently been upheld by both the CJEUⁱⁱ and the German Federal Constitutional Court.ⁱⁱⁱ Nevertheless, the empowerment of the ECB is problematic from a democratic perspective. The discomfit arises from the Bank's unusual lack of accountability to any government. It has, of course, been common practice for decades for national governments to delegate monetary policy to independent, non-majoritarian central banks, in line with the neoliberal consensus that monetary policy making ought to be treated as a technical, rather than a political, matter. Even so, the ECB is particularly 'politically and socially "disembedded"' (Majone 2012: 14), given the absence of a corresponding fiscal governance apparatus at the European level.

Thus, inconsistencies in the constitutional framing of the single currency are at the heart of the Eurozone's current problems. The elaboration of fiscal rules relating to debt and deficit limits in the Maastricht Treaty and the Stability and Growth Pact gave the impression that the economic dimension of EMU was effectively legally constrained. Yet, the discretionary enforcement of those fiscal rules meant that, in reality, EMU departed significantly from the constitutional model of the single market, where direct effect and supremacy combine to ensure court-driven, depoliticised enforcement of EU law. Moreover, the ultimately political approach to the economic dimension of EMU was also at odds with the administrative approach taken in relation to the monetary dimension, where policymaking was delegated from member states to the ECB.

These inconsistencies have inhibited effective resolution of the euro crisis. As David Marsh (2013) argued, solutions that may make good economic sense – such as creating a



fiscal union with budget, taxation and redistribution competences that are under the jurisdiction of the CJEU – are politically unfeasible. Even debt relief for Greece, which has been increasingly vocally advocated by the International Monetary Fund (IMF), continues to be strongly resisted by creditor states such as Germany, where the government has one eye on federal elections in 2017 (Wallace et al. 2017). Citizens in creditor states do not want to see their taxes endlessly transferred to debtor states, and debtor states are reluctant to give up further control of their economic policies to outside forces. This is the dilemma that now traps Greece and other euro states, and to which I will return in section five of this article.

3. The evolution of the sovereign debt crisis in Greece up to the 2015 referendum

The poor economic situation in Greece came to a head in early 2010 when the new government revealed that the country's budget deficit was far worse than had been previously reported. Once financial markets began to doubt the government's capacity to service its debt, Greece's access to capital markets dried up (Louis 2010: 971–72). A Greek default would have had dire consequences, not only for Greece, but also for the European banking system, market confidence in other heavily indebted Eurozone economies, and the strength of the currency more generally. Thus, EU leaders began to discuss the possibility of putting together a Greek 'rescue package', though in a way that would avoid the potential legal roadblock of the TFEU's 'no-bailout clause' (Article 125). After much hesitation and uncertainty, euro area heads of state and government agreed the details of a financial assistance package in May 2010. Notably, this bailout took the form of a series of bilateral loans between Greece and its Eurozone partners, meaning that it formally bypassed the framework of EU law, though supranational institutions such as the Commission were also involved (de Witte 2011: 5).

Therefore, from the very start, the Greek crisis exposed serious flaws in the Eurozone's legal framework. As with circumvention of the 'no bailout clause', EU leaders had to bend, if not break, the rules in order to keep Greece from crashing out of the euro. This seeming disregard for legality explains a lot of the popular anger and bewilderment towards bailout policies, particularly in Germany, but also other so-called 'Northern' euro states, where the



political culture tends to emphasise strict adherence to formal rules (Auer 2014: 326-328), and where the rule of law was an important source of the EU's legitimacy.

A full explication of the details of the Greek rescue packages, and the conditions attached to them, is beyond the scope of this article. Suffice to note that the first bailout of May 2010 was only ever envisaged as a temporary fix, and certainly not as a sustainable solution to either Greece's or the Eurozone's structural problems. Thus, already by late 2011, Greece required much more financial assistance, leading to the negotiation of a second bailout package of approximately 164.5 billion euros (including undisbursed amounts from the first bailout).^{IV} The second bailout was signed in March 2012. It was only secured at the price of the resignation of the then-Greek prime minister, the centre-left George Papandreou, and his replacement by the former ECB official Lucas Papademos, at the head of a technocratic administration (Feldstein 2011: 4). Greeks were also required to accept a series of harsh cost-cutting and tax-raising measures, which have fueled unrest and discontent ever since, especially as the economy has not significantly improved.

In sum, the underlying problems plaguing both Greece and the Eurozone, as a supranational economic and political construct, were never solved. Seven years after the first Greek bailout, the Eurozone is still a monetary union without a fiscal union; Greece's creditors are still reluctant to grant debt relief; and Greece is still unwilling to accept major economic reforms. After a lull, Greece's debt crisis returned to centre stage at the start of 2015, following the election of the far-left Syriza government in January of that year. Given that Syriza had campaigned heavily on an anti-austerity platform, the new government, led by Prime Minister Alexis Tsipras, was keen to be seen to be extracting a better deal from the country's creditors than his predecessors had managed. There followed several months of intense and often acrimonious negotiations between Greek officials and representatives of the IMF, EU and member state governments, during which both sides were reluctant to compromise.

The most dramatic moment came at the end of June 2015, when Tsipras announced that he would hold a referendum on the terms of the next Greek bailout, apparently in an attempt to break the negotiating stalemate. In response to that news, the ECB – which had been supplying Greek banks with the Emergency Liquidity Assistance (ELA) needed to counter the large-scale capital flight engendered by the crisis – announced that it would not increase the amount of that assistance. Once again, it is worth noting that it is deeply troubling from



a democratic perspective that such an important *political* decision was left to the technocratic and notionally apolitical ECB. The ECB's decision had swift consequences, forcing the Greek government to introduce capital controls, including limits on cash withdrawals and on the amount of money permitted to be transferred abroad. Greek banks were also closed for three weeks.

This is the context in which the referendum took place. Not only was the range of choices available to Greek voters constrained from the outset, but the ECB's actions illustrate the extent of the pressure which supranational institutions are able to bring to bear on national democratic processes. Thus, the next section analyses the Greek crisis in relation to the question of how democracy is practiced in the EU and how it relates to the discourse on the EU's constitutional paradigm.

4. Democracy and choice

'Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number.'

The above quote is taken from Thucydides' account of Pericles' funeral oration. It was chosen by the European Convention, headed by former French President Valéry Giscard d'Estaing, to open the 2003 Draft Constitutional Treaty. The words were meant to invoke the ancient (Greek) roots of Europe's commitment to democracy, their symbolic quality amplified by their presentation in ancient Greek, a language that very few Europeans read. In fact, the quote, as presented in the draft constitution, was a mistranslation of the original, which does not use the word 'constitution' and in which Thucydides has Pericles 'presenting "democracy" and "liberty" as antithetical' (Canfora 2004: 7-8). As Armin von Bogdandy (2005: 300–301) astutely observed, the quotation used by the Convention may be better described as a 'picture', rather than words; that is, as an image evoking ancient Greek culture and democracy as Europe's founding myth.

The commitment to democracy, the rule of law, fundamental human rights, and peaceful cooperation is very much at the heart of modern European values and the EU's efforts to create its own identity and its own story. European integration was born out of the horrors of fascism and the utter destruction of the Second World War, and the European project is



a deliberate repudiation of that brutal history. While nation-building projects typically rely on processes of geographical ‘othering’, the EC/EU was deliberately constructed in opposition to a temporal other – Europe’s other is Europe’s past (Diez 2004: 325-326). In this regard, the integration process mirrors constitution-building in post-war Western Europe. Particularly in countries such as West Germany and Italy, where fascists came to power in the 1920s and 1930s through manipulating the existing political system, the (re)construction of robust post-1945 democracies drew explicitly on lessons of the past, including the need to mediate and moderate majoritarianism through the creation of non-majoritarian checks and balances, such as a strong constitutional court (Müller 2011). To some extent, the national and European-level processes were linked – the creation of the ECSC and EEC, with their supranational institutions, was yet another check against the re-emergence of domestic demagogues. It was also the beginning of a decades-long attempt by EC/EU leaders to supplement national identities with a shared European identity.

The ill-fated attempt, in the mid-2000s, to adopt a constitution for the European Union revived the identity debate, explicitly seeking to base EU identity on normative values such as democracy. Metaphorically, therefore, the draft constitutional treaty reached back beyond Europe’s bloody recent past, to the continent’s ancient history in order to reclaim democracy as a founding value of the postwar project of peaceful supranational integration. Indeed, the commitment to democracy-promotion was central to the admission of post-authoritarian Greece, Spain and Portugal to the then-European Community in the 1980s. Safeguarding the democratic transitions of the post-communist states of Central and Eastern Europe was also a major impetus behind the enlargements of 2004, 2007 and 2013.

Without diminishing these positive contributions to the consolidation of democracy in Europe since the end of WWII, we may ask to what extent the commitment to democracy is reflected in either the administrative or constitutional paradigm of EU law today. We may also question how successfully the EU lives out its democratic values, and whence it derives democratic legitimacy. Democracy implies choice, but the euro crisis continues to illustrate just how lacking real, substantive choice often is in Eurozone governance. The crisis-driven turn to technocracy is an extension of the administrative logic that partly frames EMU. In other words, it is for experts (in the Commission, in the ECB, etc), rather than politicians to prescribe solutions to the debt and deficit problems of certain governments. Thus, in the Eurozone’s periphery, national governments of both left- and right-wing persuasions have



been forced to accept harsh austerity in exchange for EU and IMF support. As a result, ‘voters experienced that it did not matter who was in government and that the preferences of a majority of the citizens would not be translated into policies’ (Armingeon et al. 2015: 2). This has led to a large number of citizens in these peripheral states losing faith in both national-level and European democracy, and consequently disengaging from mainstream politics (Armingeon et al. 2015: 2).

The referendum that was held in Greece on July 5, 2015 illustrates these troubling developments well. Like Pericles’ quote introducing the draft constitutional treaty, the Greek referendum could also be conceptualised as an *image*, or symbol of democracy. However, I would argue that this image – while formally potent – was substantively hollow; a kind of democratic performance in which the scope for real choice was severely limited. Indeed, rather than symbolising the vitality of democracy in the EU, the Greek referendum symbolised its deficit across three dimensions. Firstly, the democratic deficit within Greece, secondly the democratic deficit between euro area states, and thirdly the EU-level democratic deficit. I will briefly consider each of these in turn.

4.1. The democratic deficit within Greece

The question posed on the referendum ballot paper was ‘whether to accept the outline of the agreement submitted by the European Union, the European Central Bank and the International Monetary Fund at the Eurogroup of 25/06/15’. In other words, Greeks were asked whether or not they accepted the proposals of the country’s creditors, which the Syriza government itself had rejected. The creditors’ proposals, in turn, were connected to a progress review under the second bailout. The EU and IMF were concerned about Athens’ lack of progress in implementing fiscal reforms since Syriza took office in January 2015. The Greek government had to accept the proposals in order to get the next instalment from the second bailout. Since it did not, the second bailout expired at the end of June 2015.

From the point of view of organisation and procedural legitimacy, several aspects of the referendum were problematic. The second Greek bailout actually expired at the end of June, five days before the referendum. This meant that, technically, there were no proposals for Greek voters to accept or reject, as that deal was no longer on the table. Moreover, the vote was called with barely one week’s notice. This was hardly enough time to allow voters to





assess the situation and make a considered and informed choice, again indicating that the vote was more performative gesture than genuine opportunity for democratic engagement.

Indeed, there are broader questions to consider about the role of referendums in modern democracies. An in-depth discussion of this topic is beyond the scope of this article; nevertheless, some comparisons with the Brexit referendum of June 2016 are warranted. Referendums – in which major policy decisions are turned over directly to citizens – do not always sit comfortably with contemporary forms of representative democracy. This incongruity is well illustrated in relation to the UK, where a major rationale for leaving the EU was that Union membership is incompatible with the British constitutional doctrine of ‘parliamentary sovereignty’ (Wellings 2010). It is ironic, then, that politically, at least, the decision to leave the EU was made not by the sovereign parliament, but by the British people.^v

Both the Greek and British referendums may be regarded as somewhat drastic reactions to the perception that it is not possible to influence EU policymaking through more regular means. In the Greek case, Tsipras was seeking a mandate to strengthen his hand in negotiations with Greece’s creditors – a ploy that, by and large, did not work. In the British case, internal party politics played a large role in David Cameron’s decision to put the UK’s EU membership to a vote, as he sought to stave off a rebellion by Eurosceptics in his own Conservative party. Nevertheless, the fact that 52% of voters opted to leave, indicates Britons’ disillusionment with EU governance and lack of faith in the Union’s ability to respond to citizens’ concerns with meaningful reform. While it is easy to point to the role of misinformation from both political figures and the tabloid press, the Brexit referendum ought to prompt serious debate on the strengths and weaknesses of the EU’s constitutional paradigm. The extent to which Britons can ‘take back control’ by extricating themselves from the EU is yet to be seen. Nevertheless, with Brexit negotiations formally initiated, the British attempt to reassert national sovereignty is certainly less chimeric than the Greek attempt to end austerity via popular vote.

Indeed, the futility of the Greek referendum may be judged by the result. A majority of 61% of voters responded ‘no’, as against 39% who voted ‘yes’. This was not only a resounding rejection of the specific proposals of the progress review but, more significantly, a rejection of austerity politics more broadly. Nevertheless, we may ask what impact the ‘no’ actually had on either Greek policy making or on the creditors’ attitudes towards Greece.



Despite seemingly gaining a mandate for continued defiance of EU and IMF demands, Tsipras very soon compromised, conceding nearly all of the creditors' demands on further spending cuts and tax increases in exchange for an emergency bridging loan, agreed on 20 July, and, later, a third bailout.

This appeared to confirm the pattern of the previous five years of Greece-EU negotiations. As noted previously, the second bailout was only secured at the expense of the replacement of a democratically-elected prime minister with a technocratic one, as well as the acceptance of a series of hugely unpopular austerity policies. What, then, does democracy mean in Greece today? All of the appropriate procedures are in place – Greeks are able regularly to express their opinions via electoral processes. On paper they have choices; they can choose 'yes' or 'no' in referendums, and they can choose between parties and candidates in general elections. Nevertheless, these choices are illusory. As long as they are dependent on external financial assistance, the room to manoeuvre of Greek governments will remain highly constrained, and many of the choices that Greek citizens may wish to make will remain unavailable.

To be sure, this problem is not unique to Greece, or to the Eurozone. State-based democracy is everywhere challenged by processes of globalisation that rob governments of initiative by forcing them to respond to market driven phenomena that operate beyond the state (Rodrik 2011). Nor do I deny that successive Greek governments must take a large share of the blame for the situation in which Greece finds itself. As noted above, the crisis was sparked by the revelation that the country's debt levels had been significantly understated. The democratic deficit in Greece is, thus, also a product of the dishonest behaviour of the country's political class and its tendency to make promises to the electorate that are economically unrealistic and unsustainable. However, this paper's focus is not on the pathologies of Greek political culture, but on EMU's shortcomings insofar as it relies on a combination of administrative and political control to facilitate currency union between a large and diverse group of economies. Indeed, the fact that Greeks are able to attribute their problems to EU figureheads and institutions – German Chancellor Angela Merkel, the European Commission, the ECB – rather than their own government, only compounds the perception of loss of sovereign democratic control.





4.2. The democratic deficit between euro states

Moving beyond Greece, we must also consider the perspectives of other euro area states when evaluating the efficacy of democratic procedures within the Eurozone. One of the most troubling aspects of the Eurozone crisis is the way it has pushed Europe's democracies into competition with each other. Even if Greeks have the democratic right to reject austerity for themselves, do they have the concomitant right to compel other citizens in other Eurozone countries to contribute their taxes towards a bailout?

The situation is further complicated, from the point of view of redistributive justice, by the fact that some of the Eurozone states contributing to bailouts, such as Slovakia and the Baltic states, are poorer than Greece in terms of per capita GDP and per capita income, and that they also have much less generous welfare states. For example, Greek GDP/capita in 2013 was USD21,903 compared to Slovak GDP/capita of USD18,064.^{VI} The Greek average monthly net wage in 2014 was 1262 euro compared to 665 euro/month in Slovakia.^{VII} Thus, the euro crisis has also highlighted how difficult it is to manage multiple national democracies within the political and legal framework of EMU, and to design democratic procedures that will balance the needs and desires of different electorates, in a way that is just and equitable. In essence, the legal and administrative paradigm that frames EMU (with its focus on public debt and deficit levels as the markers of fiscal health) is ill-equipped to address equity issues that are fundamentally political.

Recall Thucydides' quotation: 'Our Constitution is called a democracy because power is in the hands not of a minority but of the greatest number.' The quote encapsulates the gap between the EU's self-image, as projected by its leaders, and the image that animates a considerable proportion of popular opinion. A series of setbacks for the integration project, from the failure of the constitutional treaty in 2005 to the Brexit vote in 2016, illustrate the difficulty of applying this conception of democratic constitutionalism to the European polity. Part of the democratic failure uncovered by the euro crisis was that 'no effective mechanisms were available to ensure that the fiscal policies of a Euro-Member State would take into account the interests of the other Member States' (Maduro 2012: 3). It is pertinent, then, to ask what is the 'greatest number' when it comes to the EU polity, or its many constituent parts (Bellamy and Weale 2015). Can a majority of Greeks overrule a majority of Slovaks? Can Germans overrule Greeks? How to constitute a democratic majority remains one of the great unsolved challenges of EU governance. Addressing this challenge will likely involve



increasing the role of national parliaments in the supranational lawmaking process, as well as increasing the horizontal accountability of member states to one another, thus better harnessing the EU's 'democratic' potential (Nicolaidis 2012).

4.3. The European-level democratic deficit

Finally, there is the European-level democratic deficit. This concept far predates the euro crisis and incorporates debates over the 'no *demos*' thesis, i.e. the question of whether there is a 'European people' to whom democratic mechanisms can meaningfully be addressed (Grimm 1995, Habermas 1998), as well as debates over the extent to which the political contestation that takes place at the national level may serve as a useful model for EU reform (Hix 2008). Key features of the European-level democratic deficit include the fact that the EU's institutional structure privileges the executive branch of government at the expense of the legislative branch, that national parliaments' loss of policymaking and oversight power is not compensated by the European Parliament (EP), and that EP elections remain 'second-order' contests, which are marked by low turnout rates and in which voters are often motivated more by national than EU-level concerns (Follesdal and Hix 2006).

Though these deficiencies are longstanding, they are exacerbated by the euro crisis. For example, the crisis has magnified the EU's tendency to privilege national executives, with the European Council becoming the Union's preeminent decision making body (Dawson and de Witte 2013: 818), while the directly elected European Parliament is sidelined (Fasone 2014). There is some irony in this development, since, on paper, the EP is more powerful and more involved in policy making than it has ever been in its history. Nevertheless, in practice the key decisions regarding crisis management have been made by a small number of elite figures – the heads of the IMF, ECB and Commission, and the leaders of the most powerful member states, above all Germany.

Therefore, the crisis is exposing the relative paucity and weakness of supranational democratic mechanisms in the EU. In many member states, populist parties are seizing on anti-EU sentiment to fuel their political campaigns. The Brexit referendum was a particularly potent example of the traction that can be gained by linking EU membership to a loss of control over national destinies. Similar rhetoric has been espoused by populist leaders such as Marine Le Pen in France and Geert Wilders in the Netherlands, and forms part of an increasingly strident critique of the EU from governing parties in Poland and Hungary. The





populist depiction of the EU as remote, elitist and an external ‘other’ leads me to another concept that may help us to understand the shortcomings of EU constitutionalism – that of a ‘sovereignty paradox’.

5. The sovereignty paradox

It is a conventional wisdom of EU scholarship that the European Union is a unique construct; neither an ordinary international organisation nor a federal state. Arguably, this indeterminate status – entrenched in the EU’s constitution of ‘bits and pieces’ (Curtin 1993) – is the cause of many of the EU’s current problems.

This point may be explicated specifically in relation to the Eurozone. Although many aspects of EMU governance are dealt with at the supranational level (most notably, monetary policy, which is subject to the administrative paradigm of EU law), EMU does not have a true government. This results in a sovereignty paradox – states have already shared and/or delegated many of their lawmaking competences. They have already pooled so much of their sovereignty that they can no longer achieve their policy objectives, particularly macroeconomic objectives, alone. And yet, euro area states continue to resist compromise (e.g. on the question of the mutualisation of euro area debt) and to jealously guard their remaining competences. The result is often paralysis: national governments cannot succeed alone, yet they struggle to effectively cooperate. They cannot re-nationalise the powers they have already given up, but they are unwilling to give up further powers (e.g. over taxation), as would be needed to find EU-level solutions (Marsh 2013).

As a result, the EU’s unique status – as a kind of confederation of sovereign but interdependent states – becomes a burden. To understand why this is so, we may turn to the insights of the 18th century American scholar and statesman, Alexander Hamilton, who argued forcefully in favour of the creation of a strong American federal state in *The Federalist Papers*. Hamilton’s (1787) critique of ‘government over governments’ was informed by the economic, political and security weaknesses of the American confederation, which he blamed on the coercive incapacity of the national government and its resultant dependence on the states; each with its own level of ability and willingness to enforce national law. Hamilton analysed the consequences thus:



‘The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme, which has, at length, arrested all the wheels of the national government, and brought them to an awful stand ... The greater deficiencies of some States furnished the pretext of example and the temptation of interest to the complying, or to the least delinquent States. Why should we do more in proportion than those who are embarked with us in the same political voyage? Why should we consent to bear more than our proper share of the common burden? ... Each State, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall upon our heads, and to crush us beneath its ruins.’

Much of this analysis can be applied to the legal design of EMU. The experience of the single currency illustrates the pitfalls of pushing for high levels of integration in one area without an overarching federal structure in place. The creation of a currency union without the centralised oversight and administration of a finance minister and without effective enforcement mechanisms meant that individual national governments were able to pursue very different fiscal policies for too long without sanction (Louis 2010: 978–80). Thus, the failure to bring EMU fully within the constitutional paradigm in which laws are made following the community method, and enforced by the CJEU in accordance with direct effect, undermined the ECB’s single monetary policy over a number of years, leading to the crisis. The crisis, in turn, has undermined the EU’s constitutional balance, insofar as solutions have been sought outside of the framework of EU treaty law (e.g. the Fiscal Compact which was adopted as an international treaty, and the European Stability Mechanism (ESM), which was established as an intergovernmental institution under public international law.)

6. Concluding remarks

Where does all of this leave the European Union and its project of a single currency? Now, more than ever, European integration is a project in search of an identity. Could a revived constitutionalism furnish the EU with such an identity? On one view, the current conflagration of crises could well be the catalyst for a ‘constitutional moment’ – that is, general recognition of the need for transformative legal and political change (Scicluna 2015: 128-129). But seizing such an opportunity would require inspiration and charismatic leadership at the EU-level, and/or the strong support of national governments. Both elements seem to be lacking in the EU today.



The Greek crisis has taken up enormous amounts of the time and resources of EU institutions and national leaders. But it is a distraction from greater problems that confront the European project. Even resolving Greece's debt situation (which is proving so difficult in itself) would not solve the underlying constitutional crisis. Doing that will take major reform – including either creating a true economic union (in which law enjoys agency comparable to what it has in the single market) to match the monetary union, or repatriating powers to the individual member states, perhaps via legalisation of the political principle of subsidiarity.

The chances for such massive reform are slim. The EU's inability to deal coherently and decisively with other pressing concerns, such as the migrant crisis, the conflict in Ukraine, the security threat posed by terrorism, and Brexit, all militate against a broad-ranging and open discussion of the Union's future, which would include potentially large-scale treaty change. Instead, the most likely scenario is that the EU (and the euro area) will continue to 'muddle through', by delaying much-needed major reform and only dealing with individual problems as they arise. It is possible that the EU could maintain this course of action, which may also be described as 'permanent crisis management', for many years. However, it is not a solution to either the democracy deficit or the sovereignty paradox.

'Muddling through' is not a solution to the democracy deficit because it concentrates power in the hands of a small number of decision makers that are not accountable to the vast majority of EU citizens (*contra* the optimistic quote that opened the draft constitutional treaty). And it is not a solution to the sovereignty paradox because such a piecemeal approach encourages retreat into narrow national self-interest and discourages deeper cooperation. Instead, as it passes the sixtieth anniversary of the Treaty of Rome, the European Union ought to refocus on big questions, prime among them the role that law has to play in framing a union in which further integration and stronger democratic accountability go hand in hand.

This process of reflection and reform should involve constitutional consolidation. In other words, crisis management initiatives that were adopted outside of the auspices of the EU treaties – including the Fiscal Compact and ESM – should be brought fully within them. Brexit may even make this process easier, given that British opposition was largely responsible for the Fiscal Compact's adoption as an international treaty in 2013. Such a consolidation would increase the congruence between the constitutional paradigm – rule-of-law bound, judicially driven – that frames the single market, and the administrative paradigm



– expressed through the delegation of authority from member states to technical bodies such as the ECB and ESM - that frames monetary union. It may even be a first step towards a fully fledged fiscal union, incorporating both greater financial integration between member states, and the judicial (rather than political) enforcement of fiscal rules. In relation to the former, Miguel Poiars Maduro's (2012: 1, 12-16) suggestion that financial solidarity ought to come not from transfers between member states, but from new EU own resources, offers a way forward that will not exacerbate the democratic deficit by 'putting national democracies on a collision course'. Unless this kind of broader constitutional consolidation takes place, 'muddling through' may amount to the slow decay of the integration project.

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^I Greece's debt-GDP ratio was close to 100% at the time of its acceptance into the euro area, but was allowed to join on the basis that the ratio was on a declining path (Gibson et al. 2012: 501).

^{II} Case C-62/14, Peter Gauweiler et al. v Deutscher Bundestag (OMT case).

^{III} BVerfG, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 decision from 21.06.2016.

^{IV} The EU contribution of 144.7 billion euros came from the EFSF, while the IMF contributed 19.8 billion euros. 153.88 billion euros had been disbursed when the bailout expired in June 2015.

^V Legally, the referendum was non-binding, since British constitutionalism does not make provision for binding referendums. After some contestation on the question of whether the government could trigger Article 50 of the Lisbon Treaty without parliament's authorisation, the decision to leave the EU was indeed ratified by parliament's passage of the government's Brexit Bill in March 2017 (Asthana, Mason, and O'Carroll 2017).

^{VI} IMF World Economic Outlook Database, available at <https://www.imf.org/external/pubs/ft/weo/2015/01/weodata/weoselgr.aspx>.

^{VII} Eurostat figures.

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