



Book Review

Understanding the Euro Crisis

**Serge Champeau, Carlos Closa,
Daniel Innerarity & Miguel Poaries Maduro,**
*The Future of Europe: Democracy, Legitimacy &
Justice After the Euro Crisis*

Rowman & Littlefield, 2015.

Reviewed by Mark FENWICK

UNDERSTANDING THE EURO CRISIS

THE FUTURE OF EUROPE: DEMOCRACY, LEGITIMACY & JUSTICE AFTER THE EURO CRISIS

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LONDON: ROWMAN & LITTLEFIELD, 2015.

ISBN: 978-1-78348-113-2

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The sovereign debt crisis that has engulfed the European Union since 2008 has posed and - at the time of writing in early 2015 - continues to pose an existential threat both to the single currency and the whole project of European integration. Much has been written on the economic background, causes and effects of the crisis, but rather less on the meaning of the crisis from the perspective of political science, social theory and the law. The publication of *The Future of Europe: Democracy, Legitimacy & Justice After the Euro Crisis* is, therefore, to be welcomed as it brings together contributions from a number of disciplines to examine the unfolding crisis and the implications for the future of the euro from a “multi-disciplinary point of view”. Although the contributors seem sensitive to the dangers of talking about the “future” in the midst of the crisis, the resulting collection provides an important and thought-provoking snapshot of the current state of theoretical and normative debates on recent events and the future prospects for the EU.

This book has its origins in a conference organized in Bilbao in September 2013 funded by the Spanish and Basque governments. Speakers from a number of social scientific disciplines were invited to address the question, ‘What is the

current situation of the EU after the euro crisis and what might its future hold?’ A common feature of the collected responses is the suggestion that although the euro crisis is primarily an economic event, it is also important to understand the legal and political dimensions of the crisis. In fact, a central theme of the book is that the legal and political consequences of the crisis will have a lasting impact on the future governance of the single currency, but also the Union more generally.

In particular, the book offers various accounts of how the euro crisis needs to be understood as a crisis in, and challenge to, EU constitutionalism and the rule of law. The EU may trace its origins to a recognition of the collective benefits - both in economic and security terms - of pursuing a liberalization of cross-border trade, but the rule of law has provided the institutional means for achieving this goal. A commitment to constitutionalism and the rule of law has therefore been central to the evolving self-understanding and institutional architecture of the European Union. A central task in understanding the broader dimensions of the euro crisis is, therefore, the question ‘what does constitutionalism mean in the context of the EU and whether (and in what ways) has it been undermined by recent events?’ Most of the contributions hone in on this crucial issue, and although the answers are diverse in content and form, various common themes nevertheless emerge.

In developing an answer, a number of essays focus on the fact that all constitutionalism, whether at the national or regional level, involves what can be characterized as a pre-commitment strategy. Certain issues - most obviously an institutional structure and various fundamental rights and procedures - are fixed (or “petrified”, in the terminology of one contributor), and future generations are prevented from altering these structures and rights, at least without engaging in a pre-decided process of constitutional reform. Any change in the constitutional order that occurs outside of this framework is tantamount to the creation of a new legal order or - stated more dramatically - a revolution.

This strategy of constraining future generations is justified at the national level by the connected ideas of ensuring democracy and guaranteeing individual freedom. The purpose of pre-commitment is to ensure a democratic law-making process - to fix those structures and rules that make democratic decisions possible - and, in doing so, to thus ensure the preservation of fundamental individual rights. A slightly different question is how constitutionalism can be justified at the level of a regional organization such as the EU, and whether any additional normative justification for a pre-commitment strategy is necessary. One contributor suggests that, within regional organizations, pre-commitment can also be justified on the grounds of ensuring certainty and predictability in the obligations of member states (p.45). If the decision to join a regional organization is irreversible and irrevocable then there needs to be certainty as to the nature of the commitment that is being undertaken. This kind of justification shifts the normative basis of pre-commitment from a content-based justification (preserving democracy and human rights) to a more formalistic one (certainty of member state obligations). However, these two justifications are not mutually exclusive. And whatever the normative basis, pre-commitment is a defining feature of modern constitutionalism both at the nation-state and European level.

Those issues that are not constitutionalized in this sense are left in the hands of the legislature to change at their discretion. However, it is worth noting that even "ordinary" law making involves pre-commitment of a certain kind. Once the legislature has made a decision to regulate a particular issue in a particular way then there is a commitment to regulate the issue in that particular way until such time that the legislature changes the situation (i.e. by amending or repealing the law). In this way, the temporal stability of law is ensured. The fact that circumstances change or that violations of a particular law occur does not - in itself - provide a justification for ignoring or changing the law. In this way, the idea of pre-commitment is central to the normative character of law more generally, as well as constitutionalism and the rule of law.

Pre-commitment is important in this context because a crisis - such as recent events in Europe - involves, almost by definition, an event that was unforeseen or unexpected at the time the constitutional order was decided. As such, a crisis has the potential to undermine the previously decided order and create a “tension” between “crisis management and the rule of law” (p. 88). Political actors may find themselves obliged to make a tragic choice between responding to the problem (outside the framework of the existing rules) or maintaining a commitment to the previously agreed rules (and in doing so risk catastrophe). A crisis thus threatens the continuity of the existing institutional order and the rules structuring that order, and constitutes a potential “turning point” of “fateful” proportions that threatens the stability of the existing constitutional order and the rule of law (p.159). In this sense, the book can be read as a case study in “crisis law” and “crisis jurisprudence” (p. 79-80), and can be connected to broader debates on legal and political emergencies that have been emerged, particularly post-9/11 in the context of responding to terrorism and other political emergencies. The fact that this book is concerned with an economic emergency should not obscure the similarities in the issues raised. The distinctiveness of this book, however, is that it is a case study in emergency management at a *regional* - rather than a purely national - level.

Focusing on this idea of pre-commitment is helpful, as it points to one of the most important contentions of this book, namely that the EU has struggled to follow its own rules in responding to the crisis, and that the crisis has revealed significant flaws in the original institutional design for the governance of the euro. In the broader literature on political and legal emergencies the choice to stick to the rules in the face of crisis is often characterized as a “business-as-usual” approach”, and it is important to stress that this choice was available to the European Union and the member states. Advocates of a business-as-usual approach to political or economic emergencies suggest that the best way to respond to an emergency is to maintain the rules (even if those rules are incomplete or flawed, in some respect), as the long term benefits of maintaining

the rules (in terms of confidence in legal certainty, for instance) outweigh the potential short or medium term gains of abandoning what was previously agreed.

The main criticism of business as usual is that it is naive and ignores the realities of emergency management. It is often unrealistic to expect rules to be upheld by democratically elected politicians who will be under intense pressure to deal with the crisis, and citizens who will tend to place more emphasis on the political and economic dangers of an emergency, rather than the more esoteric concerns of upholding rule of law values and constitutionalism. The fundamental tension between the realities of emergency management and the rule of law and democracy is a central theme of this book, and the various essays provides ample support for the idea that states will abandon the rules during a crisis.

According to this kind of narrative, recent events have prompted an unraveling of the previously agreed framework, and the crisis has upset many of the decisions or “compromises” (p.27) that form the basis of EU constitutionalism more generally. The book provides numerous examples of issues that were previously decided that have nevertheless been set aside as a result of the economic pressures of the crisis, and a new - and different - set of policy choices have been introduced in their place. The exclusion of the Parliament and Commission from decisions related to the euro crisis, and the central role taken by Member States - most obviously, Germany - in formulating the policy responses is one obvious example of this “profound change” (p.37). A second example is the so-called “Germanization” (p.53) of the substantive policy agenda driving responses to the crisis, i.e. the displacement of a “social model” with demands for strict fiscal discipline (so-called austerity) and neoliberal economic reforms. A third example is the apparent retreat of the judicial branch of the EU in exercising review over these changes and the “displacement of legal by political reasoning” (p. 84-8). The crucial point is that each of these changes involve a derogation from, or transformation in, the existing constitutional order of the EU and, as such, amount to an *ad hoc* constitutional reform. Although

there seems to be some disagreement as to the future prospects for the EU, there is a broad consensus amongst all contributors that we can legitimately speak of “true constitutional disorder” (p.21).

Nevertheless, by presenting the decision available to political actors in an emergency as an all-or-nothing choice between “business-as-usual” or constitutional disorder there is a risk that alternative interpretations of the legal meaning of the response to the crisis are neglected. An alternative to the business as usual narrative that is often discussed in debates on legal responses to political emergencies (particularly in the context of the post-9/11 debate on emergency powers) are so-called models of accommodation. Advocates of accommodation argue that we should allow the law some flexibility in order to accommodate the special circumstances created by an emergency. Such accommodation permits a certain degree of flexibility in the law in recognition of the pressures exerted on the state during a crisis, while, at the same time, maintaining the ordinary rules as much as possible. This compromise, it is suggested, allows continued adherence to the rule of law and democratic values, on the one hand, while providing the state with appropriate measures to respond to the threat posed by the crisis, on the other. Although accommodation comes in different forms, including emergency laws, the simplest version focuses on interpreting existing legal rules in a way that is sensitive to the emergency, i.e. taking advantage of the open textured nature of language to accommodate a certain degree of flexibility. No explicit modification or replacement of any particular rule is made, rather existing laws are given a broader or more elastic interpretation that is motivated and justified by the context of the emergency. In this way, an expansive interpretation of existing norms transforms pre-existing elements of the legal system into norms that provide scope for responding to the crisis. This type of strategy is justified by the necessity of responding to the threat posed by the emergency. The law in the books does not change, but the revised interpretation of existing rules results in substantive changes in how the law operates in practice.

Some brief examples illustrate how the response of the EU and member states to the European sovereign debt crisis can be seen as the adoption of an accommodation model. It should be emphasized that this characterization is not offered as a defense of accommodation, merely to suggest that recent events can be interpreted as an instance of accommodation and that - for what it is worth - accommodation probably provides a better “fit” with the self-understanding of many of the actors involved in the Euro crisis.

In order to do this, it is worth briefly reviewing the strict operating conditions that various member states - notably Germany - demanded as a condition for originally establishing a single currency. These conditions focused on ensuring that Eurozone members did not engage in irresponsible borrowing or spending in the belief that other wealthier Eurozone members would bail them out in the event of economic difficulties:

- (1) The “Stability and Growth Pact” prohibiting euro members from running up “excessive” government deficits (as defined in various pieces of secondary legislation based on Articles 121 and 126 of the *Treaty on the Functioning of the European Union (TFEU)*);
- (2) The so-called “no-bail-out clause” prohibiting the Union or one member state from assuming the “liabilities” of another member state (*TFEU* Article 125);
- (3) The prohibition of monetary financing preventing a member states from enjoying “overdraft facilities” from either the ECB or member state central banks (*TFEU*, Article 123);
- (4) The prohibition of any measure extending to a member state “privileged access” to financial institutions (i.e. access that is not based on “prudential considerations”) (*TFEU*, Article 124); and,
- (5) Very limited provision for emergency financial assistance for member states limited to exceptional circumstances “beyond [the] control” of a member state (*TFEU*, Article 122).

Consider the first response of Eurozone members to the crisis, which involved bilateral loans. Take the Greek case, although similar loans were made to Ireland, Portugal and Spain. On 2 May 2010, Eurozone countries agreed to provide bilateral loans (at low interest rates) to Greece - “pooled and coordinated” by the European Commission - for a total amount of 80 billion euros to be disbursed over the period May 2010 through June 2013. This financial assistance was part of a joint package, with the *IMF* financing an additional 30 billion euros. On 14 March 2012, Euro area finance ministers approved financing of the second Greek economic adjustment program for an amount of up to 130 billion Euros until 2014, including an *IMF* contribution of 28 billion Euros, and the owners of Greek debt - mainly French and German banks - agreed to a voluntary “haircut” of 50%. These loans were released in “tranches” and the release was contingent on Greek economic reforms (the so-called “austerity package”, which include public sector reform, tax reforms & privatization of state owned enterprises).

Critics of these loans suggested that they were made in disregard of the strict operating conditions outlined above. Although - formalistically speaking - they are loans, in substance, they were not loans as everyone “knew” that there was a significant likelihood they would never be repaid. Rather, they were an attempt to bail Greece out in violation of Articles 123, 124 & 125. i.e. The loans (i) entailed the national banks of member states (Germany, France etc.) providing credit facilities to another member state (Greece); (ii) provided a member state (Greece) with “privileged access” to financial institutions of other member states (i.e. Germany, France etc.); and, (iii) violated the prohibition on member states (i.e. Germany, France etc.) assuming the obligations of another member state (Greece).

Advocates of these loans - notably member state governments - made recourse to an accommodation based defense. Member states are free to make bilateral *loans* to anyone they like – outside the framework of EU law. Moreover, the “loans” were not in violation of Articles 123, 124 & 125 as the loans were not

provided by national banks, but member states themselves; they were loans not grants or guarantees; and there was no evidence that any member states was becoming *directly* liable for Greece's debt obligations. Moreover, the loans were justified because there is no mechanism either to expel a member state from the Eurozone or for a state to leave voluntarily (and the moral hazard associated with bailing Greek out is less risky than the negative effects resulting from a disorderly Greek exit from the euro). A strategy of stretching the interpretation of the rules was therefore justified by reference to the economic context and the possibly catastrophic effects of inaction.

A similar debate can be seen in the discussion of the various so-called emergency facilities that have been created to deal with Eurozone members who counter severe difficulties. Pre-2010, there was no crisis mechanism to safeguard the financial stability of the Eurozone as a whole. Since 2010, three different mechanisms have been introduced, the *European Financial Stabilization Mechanism (EFSM)*, the *European Financial Stability Facility (EFSF)*, and the *European Stability Mechanism (ESM)*. Although they are slightly different, they all involve the creation of a legal entity that grants loans (with favorable interest rates) to troubled Eurozone members. These mechanisms are not backed by the EU budget; rather they are funded by direct financial support from Eurozone members. Moreover, they issue bonds, notes, debt securities and other instruments backed by guarantees of participating members (with no joint liability). Any loans made within the framework of these emergency mechanisms are also contingent on an economic reform program.

Are such mechanisms compatible with the treaty provisions related to the operation of the euro? The obvious question is whether the fiscal crisis in Greece and elsewhere are exceptional circumstances beyond the control member states, as required by Article 122. Article 1 of *Regulation 407/10*, creating the *EFSM*, for example, explicitly mentions the "serious deterioration in the international economic and financial environment" (i.e. the 2008 global

financial crisis) as the cause of the crisis. But does it stretch the ordinary meaning of Article 122 to imply that the debt crises in Greece and elsewhere were caused by the 2008 global financial crisis? Fiscal mismanagement, high deficits, excess borrowing, high public spending, poor tax administration and a bloated public sector were features of the Greek economy for decades. The attempt by member states to ground the *EFSM* on Article 122 seems problematic, but it nevertheless invokes a form of interpretive accommodation, in which the exceptional context justifies a more expansive interpretation of the rule.

Similar issues surround the emergency mechanisms and Articles 124 and 125. Article 124 restricts measures that create “privileged access” by EU institutions and member states to financial institutions. The emergency mechanisms all seem to violate the Article 124 prohibition, but an accommodation based defense would argue that easing borrowing problems for troubled states is “prudential”, in the sense that there is a systemic risk posed by sovereign default and the possible collapse of Euro and breakup of the EU. Regarding Article 125 – the “no bailout clause” – the emergency mechanisms could be considered little more than a means by which creditors fearful of buying junk rated bonds directly from troubled states, indirectly finance them at reduced risk courtesy of the Eurozone’s more stable members (i.e. as an indirect means of ensuring a bail out). Again, an accommodation based defense of these measures would argue that the loans are not gifts, since they are conditional on internal “reform” and if the troubled state defaults paying back the loans, the guarantors would only be liable for the mechanisms debts to third party creditors that bought the bonds.

Each of these examples illustrate the crucial question of how much flexibility needs to be afforded to the interpretation of the rules in responding to the crisis, i.e. when is accommodation justified? A key issue in understanding the legal dimension of the euro crisis is whether one should take this accommodation-based defense seriously or whether we should regard it as a *de facto* abandoning

of the rules. It is in this context that the concerns about the retreat of the judicial branch raised by several contributors become particularly relevant, as a strong court exercising independent review seems essential in policing the acceptable limits of any accommodation based response to an emergency.

This book is valuable precisely because it raises questions of this sort, i.e. it moves the debate surrounding the euro crisis away from economics to law and politics, and invites us to think through the implications of the sovereign debt crisis for the long term prospects for the rule of law in the EU. Recent experience has highlighted the tragic dilemma raised by economic as well as political emergencies, namely the challenge of navigating between a response that deals with the problem (or at least, avoids catastrophe), whilst ensuring that rule of law values are not fatally compromised. The main takeaway from the accounts gathered in this collection is that the complexities of emergency management - as well as the stakes - seem to be multiplied in the context of regional organizations.

Approved on 2 February 2015