

Introduction

1 Solidarity in Times of Crisis: COVID-19 and Postpandemic Recovery

In the early hours of July 21, 2020, Charles Michel and Ursula von der Leyen, President of the European Council and of the European Commission respectively, entered one of the austere conference rooms of the Europa building in Brussels. The continent is in the middle of an unprecedented pandemic and it is in front of an empty room that their historic announcement is made. “We did it!” the former Belgian Prime Minister proudly declares. It took the European Council a marathon session of five days, the longest in its short but already tumultuous history, yet the heads of State and government managed to beat the odds and reach an agreement on an ambitious recovery plan for Europe, set to heal the wounds the pandemic inflicted to the continent.

The plan is called “Next Generation EU” (NGEU). It foresees that between 2021 and 2026, EUR 750 billion will be raised by the European Commission in the EU’s name, and then redistributed, in the form of loans or grants, to European Union (EU) Member States on the basis of their needs. EUR 750 billion to avoid the collapse of European economies. EUR 750 billion to fund postpandemic recovery on the continent. EUR 750 billion to precipitate the advent of more resilient socioeconomic structures, fit for the future challenges of the green and digital transitions.

The NGEU plan primarily stands as an incredible token of European solidarity. In a time of great need, European States were able to set their disagreements aside, join forces and pool resources to support those hardest hit (especially in the South) by a crisis of an extreme violence and to invest in a collective recovery project. More fundamentally,

NGEU also suggests the possibility of a much more integrated Union, based on joint debt, mutualization and increased redistribution and risk-sharing. Was the adoption of NGEU in July 2020 Europe’s “Hamiltonian moment”? It is certainly too soon to tell if NGEU will pave the way for more structural transformations. The initiative is however unprecedented by its sheer size and the level of ambition it embodies and it has all it takes to become a critical juncture in the Union’s political trajectory.

2 A Decade of Crises and the Transformation of EU Economic Governance

Beyond its exceptionality as a policy initiative, NGEU also stands as the latest step of a longer process of in-depth transformation of the EU’s economic governance system, which started a decade ago, in the aftermath of the Eurocrisis.

Each in their own way, the sovereign debt crisis and the COVID-19 crisis have confronted the Union with novel challenges, testing the very existence of the Economic and Monetary Union (EMU) as a political and economic project, and have forced the EU and its Member States to engage in an exceptional reform effort to fix the structural deficiencies of the Eurozone.

The sovereign debt crisis put an end to a decade of “europhoria,” self-congratulation and “irrational exuberance,”¹ and brought the currency union close to implosion. The Eurocrisis laid bare the structural unviability of a currency union “flawed at birth”² and the fundamental mistakes committed by its designers. It precipitated the adoption of an exceptional set of crisis management measures, best embodied by bank bailouts, the unconventional monetary policy of the ECB or the emergence of a new financial assistance function for sovereigns. The Eurocrisis also led to a serious overhaul of the entire architecture of the Eurozone designed to enhance its soundness and resilience. In the economic and fiscal policy field, a broad set of reforms was passed to strengthen the economic pillar of the EMU, improve fiscal and socio-economic convergence and sustainability within the Eurozone and increase the overall macroeconomic resilience of the currency union altogether. Between 2011 and 2015, the Stability and Growth Pact went

¹ Ashoka Mody, *EuroTragedy: A Drama in Nine Acts* (Oxford University Press 2018) 156.

² Joseph Stiglitz, *The Euro and Its Threat to the Future of Europe* (Penguin Books 2016) 7.

through a major overhaul. New procedures for macroeconomic and budgetary surveillance were set up. A new framework was launched to monitor and synchronize the conduct of economic policies in the EU and new fiscal tools were created at the EU level to deepen integration.

Ten years after the Great Financial Crisis and the economic and political turmoil that ensued, the COVID-19 pandemic confronted the Union with yet another existential test. Because of its exogeneity, symmetry and rare violence, the macroeconomic shock and the sudden recession it precipitated were of a whole different nature and magnitude than that which the Union had experienced a decade earlier. But the pandemic shock also blatantly revealed that the EU's ability to react to economic emergencies and engage in large-scale fiscal stabilization remained limited and that the reform process initiated by the Eurocrisis had not gone far enough. From this perspective, COVID-19 also constituted a "perfect storm," which forced the Union and its Member States to overcome their historical disagreements, design a fiscal response of an unseen level and take policy initiatives that many would have deemed unthinkable before the health crisis broke out. Most emblematically, with NGEU the Union endowed itself with a dedicated fiscal capacity, designed to finance the economic recovery and support a new European industrial strategy.

Taken altogether, the past decade of crises and the numerous reforms it brought about have radically transformed the Union's economic governance system, i.e. the set of rules, organizational principles, policy processes and institutional arrangements through which fiscal and economic policy choices are carved out in the European Union.³

The overall ambition of these reforms has been to correct the structural asymmetry between the economic and monetary pillars of the EMU – that many considered as one of the main causes of the

³ In the specific case of the Eurocrisis, see Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016); Mark Dawson and Floris De Witte, "Constitutional Balance in the EU after the Euro-Crisis" (2013) 76 MLR 817–844; Koen Lenaerts, "EMU and the EU's Constitutional Framework" (2014) 39 ELR 753–769. For a different view, see Bruno De Witte, "Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?" (2015) 11 EuConst 434–457.

Eurocrisis and a crucial point of contention in the unfolding of the COVID-19 crisis – by substantially strengthening and upgrading supranational coordination and surveillance of national economic and fiscal policies. Reforms were thus passed to consolidate fiscal discipline and surveillance in the Union, to expand the scope and depth of EU economic coordination and monitoring and to increase the institutional, procedural and financial resources of the EU. Combined with the practice subsequently developed by EU institutions, they initiated a true metamorphosis of economic governance in the Eurozone, transforming the nature, scope and philosophy of supranational action in the field of economic policy. The economic governance of the EU today is making inroads in almost every single area of national public action (taxation, wage policy, labor law, social security, etc.). We are experiencing a substantial intensification of the means and methods of action of the EU in the field, with the emergence of an actual law of fiscal and macroeconomic integration and the development of an action capacity that enables the Union to build up an autonomous economic policy. The EU can now rely on a much more diverse set of compliance-inducing mechanisms and a whole new level of constraint and pressure to have its policy preferences passed on to the national level and to work towards the progressive harmonization of fiscal, economic and social policies in the Eurozone. In so doing, the past decade of crises precipitated a dual evolution of existential importance: not only did it radically remodel the ways through which economic and budgetary choices – that is answering the question of how resources should be allocated and distributed across societies (a political exercise *par excellence*) – are made in Europe, but it also, indirectly yet resolutely, impacted the very substance of these choices.

The Union's economic governance system, and the metamorphosis it underwent over the past decade of crises, constitutes the focus of this book. This book looks into the depths of the rules, policy processes and institutional arrangements that make up the new EU governance system for economic and fiscal policy. In the area of EU economic governance, this book concentrates on what I coin “standard” economic governance, that is the system formed by the governance structures, the institutional arrangements and the norms underlying them that apply equally to all Union and Eurozone Member States. The focus is thus on the generic, classic prongs of EU economic governance that apply across the board.

This primarily means that the exceptional regime of “extreme” economic governance that we have seen unfolding in the framework of financial assistance programs vis-à-vis bailed-out States⁴ does not form an integral part of my enquiry, but it is only to be addressed in its relationship with the standard economic governance framework. Another important precision is in order. Although this feature has been given less prominence recently,⁵ the field of economic and fiscal governance, and more generally the entire EMU, remains characterized by a great degree of differentiation. Within the realm of standard economic governance, substantial differences exist between the regimes applicable to the nineteen Member States whose currency is the euro (the Ins), to the Member States whose currency is still not the euro but that are under a legal obligation to adopt it in the future (the pre-Ins), and those States that enjoy an opt-out (the Outs). For example, some procedures and rules apply solely to Eurozone countries and exclude the pre-Ins and Outs from their scope. Others apply to all, but they contain Eurozone-specific components (on sanctions and enforcement, for instance). The focus of this book is clearly on the currency union and the States that form it. My view is that there is still something inherently specific to the Eurozone, to the economic, social and political ties its members share and to the rules that govern them. It constitutes a distinct community, separate from the wider EU community and it is worth analyzing in and of itself. As a result, where relevant this book primarily approaches “standard” EU economic governance from a Eurozone-specific perspective.

⁴ The emergence of a new financial assistance function within the Eurozone and its substantial reliance on strict conditionality brought about a new kind of economic governance through which far-reaching loan conditions touching a great diversity of policy domains are bilaterally negotiated between the Member State concerned and its creditors (represented within the infamous Troika) and subsequently implemented nationally under intense international monitoring. There are many reasons why I deem it fit to coin such economic governance as extreme. Not only does it reflect the stark contrast with the standard and softer arrangements for economic policy coordination (the multilateral surveillance procedure set up by Article 121 TFEU, the excessive deficit procedure organized by Article 126 TFEU, the Stability and Growth Pact, etc.), but it also echoes the unprecedented level of constraint, scope, intensity and precision displayed by EU policy actions in that context and the limited margin of manoeuvre retained by assisted Member States in implementing their conditionality-related commitments.

⁵ Policy initiatives prompted by the COVID-19 crisis, and most notably NGEU, do not differentiate between Eurozone and nonEurozone countries and apply on a Union-wide basis.

3 The New Economic Governance of the Eurozone: A System in Need of Constitutional Enquiry: Fundamentals of the Book

If the past decade of crises set profound transformations in motion and brought about a new economic governance system, it did so without formal amendment to the EU constitutional charter and without any meaningful constitutional assessment of the ongoing metamorphosis, thus signaling a clear scientific gap. More than ever in the postcrisis era, there is a real need to approach economic governance in the Eurozone from a constitutional perspective. As just hinted at, the crisis and its offspring beg many fundamental questions of a constitutional nature. They have impacted the relationship between the Union and its Member States in the economic and fiscal fields and challenge the competence allocation system that organizes their interactions. They will have a durable influence on the overall trajectory of the European integration project. At the supranational level, they affect the institutional balance between the EU organs and reshape the power equilibria within the Union. The transformations at play also raise the issue of the respective importance of expertise and political deliberation in the determination of the major economic and fiscal choices for the Eurozone. Particularly, the ability and legitimacy of legal rules, monitored by technocratic bodies, to frame economic policymaking has come under intense scrutiny. In that framework, the status of the individual and of its rights and entitlements is also increasingly called into question. Economic governance in the postcrisis era also challenges the possibilities for external review of EU action and, more particularly, the role and position of courts in the EU polity. More generally, the new economic governance of the Eurozone was born out of emergency and reveals new ways of conducting EU action, which challenge the canons of EU law and supranational politics and can but imperfectly be apprehended through the traditional categories and models of our discipline. These fundamental questions and issues underline the necessity to make sure that economic and fiscal governance in the Eurozone is reflected upon in constitutional terms and meets the basic requirements of “integration through law.” It is true that EU economic and fiscal policy has, from its very inception, grown as an underlegalized and underconstitutionalized policy field. Because of its technicity, the policy processes through which it is brought about and the nature of its main outputs, it has long remained broadly

dissociated from the language of law and even more so from the language of constitutional law.⁶ This strange feeling of a deep disconnect may well have been there since the launch of the EMU in the early 1990s, but it only became more acute with the Eurocrisis, the COVID-19 crisis and the deep mutations that they precipitated. This book seeks to end this estrangement.

The approach of this book is thus resolutely constitutional. Within the realm of the constitutional discipline, I chose to rely my analytical framework on a concept most central in every liberal constitutional order and of particular importance in the EU legal order: the rule of law. The content of the notion may well be fundamentally ambiguous and contested, the general ideal it conveys is not: politics ought to be governed by laws rather than by men. At its core lies the normative ambition to free societies from arbitrary rule. Transposed at the supranational level, the rule of law stands as an antihegemonic ideal, which promotes fair, balanced and regulated interstate relationships. The rule of law therefore expects legal systems to offer safeguards against the abuse of public power: sufficient levels of legal certainty, predictability and equality, credible constraints on the powers of the government, the protection of individual freedom from excessive interference and avenues for external review of government action.

This choice is not self-evident and alternative benchmarks may naturally have been favored. There are however multiple reasons for singling out the rule of law and building a normative framework upon that principle. First, as a potential yardstick, this principle has been rather overlooked so far in the literature.⁷ Since it provides the first “rule of law” assessment of the new economic governance of the Eurozone, this book closes a gap in the field of EU studies. Secondly, and more fundamentally, the centrality of the concept as a cornerstone of both the

⁶ In that regard, see Mark Dawson, “Transforming into What? New Governance in the EU and the Managerial Sensibility in Modern Law” (2010) 2 *Wisconsin Law Review* 389–439.

⁷ In a literature review conducted at the start of this project, I observed that most constitutional analyses of postcrisis economic governance solely focus on infra-constitutional issues, pertaining to the compatibility of crisis reforms with the Treaty framework (and the related case law of the Court of Justice in cases like *Pringle* or *Gauweiler*). When assessments rely on structural principles of EU constitutionalism, the democratic lens or that of fundamental rights is most often favored. Rule of law, as a potential standard against which the new EMU settlement could be tested, remains generally overlooked (for notable exceptions, see Tuori and Tuori (n. 3) 241–247, and in the specific case of the bailouts, Claire Kilpatrick, “On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Value in Europe’s Bailouts” (2015) 35 *OJLS* 325–353).

European integration project at large, and the economic and monetary integration agenda more specifically, makes it a highly relevant benchmark against the background of which the deep revamping of the governance structures of the Eurozone ought to be appraised. We will come back to the pivotal role played by the law, both as an agent and an object of integration, in the EU project,⁸ and to the significance of the rule of law in the constitutional charter of the EU and the case law of the Court of Justice. The “rule of law” philosophy is also, as will be shown, particularly central in the constitutional architecture of the EMU. Just like other integration projects (such as the Single Market), the EMU was very much conceived and designed as a rules-based regime, strongly influenced in this sense by the German *ordo-liberal* thinking of the Freiburg School. It is thus because the rule of law stands as the overarching constitutional principle within the EU legal order that I rely upon it. As a *primus inter pares*, it ties together all other components of the EU constitutional fabric. It best embodies the core objectives of European constitutionalism and the essence of the integration project.

This book’s main ambition is thus to determine if the new economic governance of the Eurozone, which the past decade of crises and reforms brought about, lives up to the EU’s constitutional commitment to the rule of law. In substance, the book examines if the evolutions that EU economic and fiscal governance has gone through in the aftermath of the Eurocrisis and the COVID-19 crisis have been accompanied by a parallel redefinition of its underlying constitutional compromise and “rule of law” credentials. In order to do so, this book proceeds in a three-step process. First, it briefly elaborates on the analytical framework, drawn from the rule of law principle, on which it relies. Second, it investigates the evolutions and shifts that occurred in the field of EU economic governance over the past decade and offers a conceptualization of the postcrisis economic governance model (as compared to the precrisis model). Third, the transformations observed and the new governance model hence brought about are assessed in light of my “rule of law” framework. More specifically, I investigate whether these transformations have triggered (or not) a parallel redefinition of the constitutional “rule of law” compromise on which the original governance model of the EMU rested so far and whether the current system now relies on strong

⁸ See in this regard, the seminal work on “Integration through Law” by Weiler, Cappelletti and Secombe. Mauro Cappelletti, Mark Secombe and Joseph Weiler (eds.), *Integration through Law* (De Gruyter 1986). See also Pierre Pescatore, *Le droit de l’intégration* (Stijnhoff 1972).

“rule of law” guarantees. My approach is both analytical and normative, meaning that where gaps and discrepancies are identified, potential avenues for change are investigated.

This book constitutes an excellent opportunity to look back, reflect upon the new era that the past decade of crises opened for EU economic governance, take stock of the profound transformations at play and critically assess the constitutional solidity and the “rule of law” credentials of the system through which EU economic and fiscal policy is currently being conducted. Such an endeavor is all the more timely that reform in the Union and in the EMU are far from over. Ongoing processes such as the “economic governance review” conducted by the European Commission or the Conference on the Future of Europe will provide new momentum for reform. Eurozone governance and issues such as the evolution of fiscal policy rules or the establishment of a permanent fiscal capacity will be high on the political agenda. To a large extent, upcoming discussions will come down to the question of whether the structures, processes, rules and their underlying philosophy that were inherited from the crisis should be further consolidated or whether another direction ought to be taken. Against this background, this book, with the critical assessment and the policy recommendations that it offers, constitutes a useful addition to the debate and provides helpful guidance to think ahead.

4 The Rule of Law as an Analytical Benchmark: Some Theoretical Underpinnings

The ambition of this book is to use the rule of law, a fundamentally polysemic notion, a “complex evaluative concept,”⁹ as a legal benchmark to assess the new economic governance of the Eurozone. This section outlines the operational understanding of the rule of law that it favors, an understanding that is both theoretically grounded and in resonance with the nature and specificities of the EU as a polity and the distinctive features of the policy field under investigation here. This operationalization process brings about a set of clearly defined criteria, on the basis of which the postcrisis economic governance framework of the Eurozone will be later audited.

⁹ Jeremy Waldron, “The Concept and the Rule of Law” (2008) 43 *Georgia Law Review* 47.

4.1 *What Rule of Law? A Teleological and Contextual Approach to the Rule of Law*

Traditionally, doctrinal accounts of the rule of law are divided between formal (or thin) and substantive (or thick) versions.¹⁰ This founding dichotomy can be summarized in the following way: whereas formal theories are primarily focused on legality (its sources and its form) with no regard for the substance of the law, substantive conceptions go beyond the formal attributes of the rule of law to include material requirements about the content of the law. Formal theories emphasize the necessity that law is capable of being obeyed, of guiding the behavior of its subjects and be obeyed and complied with by those same subjects. Under such an understanding, the core concern in relation to the rule of law must be to produce certainty and predictability through generalizable and stable expectations. Proponents of a substantive account of the rule of law consider that the principle must go beyond these formal requirements and include material specifications, so that it can have a bearing on the intrinsic quality and the substance of the laws produced by a certain legal system. A first trend, best embodied by Jürgen Habermas's "discourse" theory and proceduralism, establishes a strong connection between the rule of law and democracy.¹¹ A second trend, most famously outlined by Ronald Dworkin,¹² relies on a rights-based approach to the rule of law.

This book moves beyond this traditional dichotomy between formal and substantive versions of the rule of law and proposes an understanding of the rule of law which is both *purposive/teleological* and *contextual*, that is an understanding of the rule of law that is shaped by the founding objectives of that principle and the politico-cultural environment in which it is applied.

¹⁰ In that regard, see Paul Craig, "Formal and Substantive Versions of the Rule of Law: An Analytical Framework" (1997) *Public Law* 467–487. See also Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 91–113. As proponents of the formal version, see, among others, Lon Fuller, *The Morality of Law* (Yale University Press 1964) 33–94; Joseph Raz, *The Authority of Law* (Clarendon Press 1979) 210–229.

¹¹ See Jürgen Habermas, *Beyond Facts and Norms* (MIT Press 1996) 449. See also Jürgen Habermas, "On the Internal Relation between the Rule of Law and Democracy" (1995) 3 *European Journal of Philosophy* 12–20.

¹² See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).