

EUROPE'S SECOND CONSTITUTION

The process of European constitutionalization is met with extensive scepticism in current national legal and political spheres and in broader circles of public opinion across Europe. By shedding light on these concerns, this book reveals the widespread misunderstanding of constitutional federalism that permeates the Member State courts, popular media and many academic communities. A failure to address confusion over this fundamental concept is leading us towards impoverished development of the EU's 'Second Constitution', and even ensuring that the role of both domestic and European courts in enriching the constitutionalization process is overlooked and undervalued. In a bid to avoid such consequences, this book explores how federalism and further constitutionalization – rightly understood in a dialogue of the European courts – may actually change this process and allow a clearer advance towards Europe's Second Constitution for, but also with, the people of Europe.

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EUROPE'S SECOND CONSTITUTION

Crisis, Courts and Community

MARKUS W. GEHRING

University of Cambridge



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PREFACE

In both the court of public opinion and modern legal scholarship, the Europe of today appears to lurch from crisis to crisis, driven by socio-political, environmental and economic challenges. How might the European Union overcome these crises? Which obstacles should become Europe's central concerns? Which opportunities should be explored? To date, many political debates focus on the next feeble incremental steps to be taken towards formal inter-governmental amendments of the Constitutional Treaties. Yet to overcome what are, in their foundations, a series of constitutional crises shaking the EU, a more considered approach to further constitutionalization is required. In this book, I turn to an under-researched dimension of EU constitutionalization, one that not only provides opportunities to help overcome the current series of crises but also presents a new approach to integration that takes seriously the perceptions and understandings of European jurisprudence with regard to federalism and the European public sphere.

Through a detailed analysis of Member State court jurisprudence and associated literature, the study evaluates the most important *demos*, *civitas* and *ius* dimensions of European constitutionalization. *Demos* focuses on the populace of a democracy, as a self-perceived, aware and organized political unit, and the European *demos* dimension of European constitutionalization concerns the political cohesion of the people of the Union. It also concerns the potential for Europe to develop a common European citizenship, rely on common values and develop a common attitude towards religion. The analysis highlights the lack of a common European public space for deliberation and effective communications through discussions in intelligible working languages. *Civitas* stands for the collection of citizenship duties attributed to a member of a community, and in later years more broadly to a state, and the *civitas* dimension of European constitutional development invokes the potential for a functioning EU institutional citizenship as characterized by EU democratic elections, European political parties, the role of the president

in the EU, the function of the Council and the European Parliament, and the role of a foundational document. *Ius* refers to the rule of law and respect for rights, which also includes more broadly the mandates of legal authorities and the effective functioning of courts of justice, taking into consideration common structures in the law based on EU law, any general principles *Ius Commune Europaeum*, and the collection of rules and rule-making in Europe. In this sense, the *ius* dimension of European constitutionalization discusses the potential for a single rule of law in Europe, the structure of the EU court system, the criminal law and police force, the system of human rights protection and external relations law in the EU.

In these three dimensions, EU constitutionalization has been judged by many periphery courts to be either non-existent or deficient. At the root of these opinions, my research has revealed an impoverished understanding of federalism and its potential role in further European constitutionalization. Through case law analysis, it is revealed that many Member State courts on the periphery do not fully appreciate either the constitutional nature of federations or the lived experiences of federalism in other jurisdictions. This work demonstrates that the litany of obstacles commonly raised by Member State courts and academics have nearly all been overcome, or were never challenges in the first place.

Once many common concerns have largely been dismissed, my research identifies the most significant and potentially fatal remaining obstacle to EU constitutionalization: the absence of a strong and vibrant trans-European public sphere in which transparent, legitimate policy debates can occur, and corollary challenges such as lack of a pragmatic number of working languages, lack of unitary elections, and important gaps in the European central court's *Kompetenz-Kompetenz*. Overcoming *this* obstacle and its related challenges would do much to address the constitutional crisis and set Europe on a healthier path towards further constitutionalization.

This research leads me to further conclude that while a European 'constitutional moment' might be the most straightforward next step, it is not currently on the political horizon. Other constitutional adaptive mechanisms do, however, offer certain opportunities. Incremental formal treaty amendments and fundamentally changed constitutional practices have helped to address certain early obstacles. However, given embedded Member State privileges, they are unlikely alone to be effective in addressing *this* remaining hurdle. Rather, in conclusion it is argued that there is a crucially decisive challenge to be taken up in the

jurisprudence itself. Further constitutionalization can, in essence, be *prepared* by the concerted efforts of more courageous centre and periphery courts, through engaged and legitimate dialogues between the Courts of Europe themselves. Only by enabling and strengthening a vibrant pan-European public policy debate can Europe's Second Constitution one day become a reality.

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Finally, I am deeply indebted to the law team of Cambridge University Press, especially Finola O'Sullivan, for their encouragement, and also to the reviewers for their helpful comments. This book is about crises inside the European Union and now for the first time outside it, too. The Brexit process in the UK, that is, the process of one Member State leaving the Union, remains in my view one of the strongest expressions of the constitutionalization obstacles discussed in the volume. It serves as both a warning and a reminder that most constitutional structures change over time.