COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

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Manuscripts should be submitted together with a covering letter to the Managing Editor. They must be accompanied by written assurance that the article has not been published, submitted or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Digital submissions are welcomed. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). Details concerning submission and the review process can be found on the journal's website http://www.kluwerlawonline.com/toc.php?pubcode=COLA

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BOOK REVIEWS

Review essay

Turkuler Isiksel, *Europe's Functional Constitution. A Theory of Constitutionalism Beyond the State*. Oxford: Oxford University Press, 2016. 304 pages. ISBN: 9780198759072. GBP 60.

Functional Constitutionalism of the EU

European integration is largely about institutional experimentation. It has remarkably developed important constitutional features like shared normative competences spanning many matters where Member States have ceded sovereign powers, competences that override and take primacy over internal laws. It has generated a legal order of its own, with directly applicable instruments subject to judicial review, and with individual rights guarantees in a complete system of judicial remedies. It mostly respects the federal understanding that underlies its composite polity, through principles like attributed powers, subsidiarity, proportionality, judicial dialogue through preliminary references by the ordinary judges of EU law, a single administration, Member State formal equality, respect for national (and regional) constitutional identities. It has developed the directive as an instrument of shared regulation, co-legislation. In some areas it legislates directly, replacing internal regulation, but in others it harmonizes Member State legislations and in others it only seeks, cautiously, to approximate their laws. It has developed its own budget and resources, direct taxation still pending. Its law-making procedures are formally democratic, and there is a *sui generis* separation of powers with some form of checks and balances, in a tension where Parliament is destined to prevail over Council, but not yet.

In spite of the failed ratification of the Treaty establishing a Constitution for Europe, the EU is a system of public institutions with sufficiently extensive powers to constitute a discrete political community (p. 71). Habermas forcefully and convincingly called for Europe to adopt a Constitution, which it needed (cf. *Why Europe needs a Constitution*, 2001). Of course Habermas knew that in Case 294/83, *Parti Ecologiste 'Les Verts',* the ECJ had declared already in the 1980s that this was essentially a constitutional system, a body of norms that governs the exercise of public power with a complete system of legal remedies within a body politic; this roughly corresponds to Neil MacCormick's idea of the minimal virtue of constitutionalism, i.e. the due respect of the conditional quality of powers conferred and observation of the interpreted conditions of the respective agencies' and institutions' empowerment (p. 62) (cf. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, 1999, p. 103). Even without a written document formally so called, few theorists of European integration question the existence of a constitution channelling political power through law. And yet …

Where does this system derive its "constitutional" legitimacy from? Why obey, why comply, why enforce? "Political thinkers of all ages have been preoccupied with accounting for the law's claim to authority, particularly when it comes into conflict with political will" (p. 34). Clearly, in liberal Dworkinian fashion, the EU system ensures individual liberty, the freedom of the citizens, and the control over the exercise of public power, understanding rights as trumps over policy (Dworkin, *Taking Rights Seriously*, 1977, *passim*), but does this, in itself, provide sufficient legitimacy and good reasons to obey and assume obligations other than through the fear of sanction? Liberal, rights oriented legitimation is necessary, but is it enough?

Under a constitutional system where norms are the practical understanding of a community of norm-users, rather than norm-makers, compliance would be secured if those norms were to be seen as our own laws (MacCormick, *Institutions of Law*, 2007, *passim*). Thus arises the alternative source of obedience, democracy, where citizens govern themselves. This legitimation highlights a system of collective self-rule or popular sovereignty, in the best

republicanist tradition. These two sets of questions provide the two ideal types of legitimacy in the polity: liberalism vs. republicanism. The application of these principles to the EU is not as straightforward as in the case of the sovereign nation-state, from which it evolves; although, sometimes even in the domestic level it may be difficult for them to reach equilibrium. Thus, Hungary's Prime Minister, Viktor Orban, whose Fidesz party belongs to the European People's Party (EPP), unashamedly defends "illiberal democracy", where the will of the people overrides the rights of those in a minority, and where the separation of powers is compromised. This is a totalizing dystopia of popular self-government with no self-limitation by human rights and the rule of law. The balance is difficult in the EU as well. In the EU, enforcement is indirect, in fact it is exercised by the national administrations, and representation is also largely indirect. Even if rights are secured in liberal fashion, democracy is weaker. In what sense are the citizens of the EU governing themselves? Is there a people of Europe? Where is this European *demos*? An additional source of legitimacy is needed in a system where republican democracy and liberal constitutionalism are in the process of finding accommodation beyond the State. And this is why *Europe's Functional Constitution* is such a welcome contribution.

Functional Constitutionalism

Elegantly written, convincingly argued and very well researched, Isiksel's book claims this is precisely where European integration constitutionalism innovates, with a third source of legitimacy, functionalism or *output* legitimacy (Scharpf, *Governing in Europe. Effective and Democratic?*, 1999, Ch. 1): "the EU has produced a qualitatively distinct form of constitutional practice, one whose authority is justified" not with reference to traditional principles of popular sovereignty and individual liberty, but rather "by a claim to govern effectively" (p. 6), in order to ensure the functioning of an internal market with only external frontiers and an economic union, thus addressing transnational challenges national regulators cannot adequately solve on their own. Member States establish(ed) the European institutions in order to secure a range of collective goods that they could not achieve on their own. In the spirit of the Spaak report, which Isiksel ably reconstructs, European metropolises lost their colonies and would need to compensate for those losses by forging economies of scale at home, by integrating in a larger, common market. This "teleology of economic union continues to dominate the EU's legal and institutional structure and thwarts other normative aspirations associated with the integration project" (p. 18).

This is not just a European phenomenon. At the international level, Isiksel observes the emergence of a dynamic constitutionalism shaped by an institutional practice codifying and expanding the binding obligations of States, adjudicating disputes and monitoring compliance, shaping domestic policy choices and constraining the autonomy of political communities: "Policy issues that were once subject to democratic control at the domestic level have been shunted into the domain of technocratic decision-making" (p. 19). This is not exclusive to the supranational experiment of the EU (p. 10), where it becomes paradigmatic. In Europe, the resulting dynamic system inevitably transforms the EU Member States' own domestic constitutional systems. "The result is the refraction of key principles of political legitimacy such as democracy, equality, and solidarity, and of key institutions such as representation, citizenship, and constitutionalism through the prism of economic union" (p. 19). Constitutionalism is thus transformed at all levels. As a result, there is a real plurality of constitutions in Europe – not only the constitutional pluralism, which she briefly discusses (pp. 80–82) but only as regards the EU and the ECJ vs. Member States' constitutions and constitutional courts.

This functional constitutionalism is a rationale, a reflexive justification of the system, more than its explanation. Isiksel's interdisciplinary approach, combining political and constitutional theory with political philosophy, institutionalist economics and international law accounts for an illuminating analysis of the EU's *ethos*: economic union. Isiksel's methodology is a rational and critical reconstruction which she calls *reflexive readjustment*, i.e. updating a normative concept in light of new, practical instantiations of it, while using the concept to subject the

practices themselves to critique (p. 25). This may sound abstract, but if you accept the critical framework, it works. Take as an example the free movement of workers, so controversial for all sorts of Brexiteers. Isiksel considers that this freedom remains only modest. She illustrates this claim "by showing that the EU has tended to rely on personal mobility as a market-based surrogate for social justice, encouraging jobless citizens to move to Member States that offer greater employment opportunities instead of creating social benefits for non-mobile citizens in need. As long as its enjoyment remains tied to mobility, EU citizenship will be a 'citizenship of aliens' that lacks all-important elements of civic obligation and solidarity". Another example of reflexive readjustment: "prohibiting discrimination does not necessarily engender universal inclusion or equal treatment; nor does it amount to a particularly generous framework of social protection" (p. 29).

The book has six chapters, an introduction and a conclusion that takes "stock of the EU's constitutional architectonics in view of the ongoing tribulations of its monetary union" (p. 30). The cases and the legislative materials are very well chosen and explained for the sake of the argument. Isiksel has a very good grasp of the ECJ's case law in the domains examined. The first chapter provides an overview of alternative normative grounds of constitutional authority as a background against which to situate the EU. The dilemma of reconciling liberalism and democratic republicanism are only two of the three horns of the trilemma of constitutional legitimacy. The third horn is effective government, the capacity of institutions to govern effectively. Chapter 4, which in my opinion would sit more easily in the earlier sections, "assesses the extent to which the EU relies on popular democratic autonomy as a legitimating principle and whether its democratic mechanisms are commensurate with its vast scope of authority" (p. 28): even the EU's most effective participatory mechanisms come to reinforce its functional constitutionalism. The second chapter develops this central concept of the book, the functional constitution as the normative basis of the particular type of authority of the EU, together with the technocratic competence required by (neo)functionalism. Chapters 3, 5 and 6 attend to the ways in which the EU has repurposed several familiar mechanisms of constitutional rule to reflect and advance the project of economic union "even in areas where the EU is said to have transcended that [economic] rationale" (p. 27) like the basic rights regime, fundamental rights and fundamental freedoms enshrined in the ECJ's case law (Ch. 3), free movement of persons and Union citizenship (Ch. 5) and non-discrimination on the basis of nationality and equal treatment rules (Ch. 6).

The finalité économique

As a medium for contestation, dialogue and democratic praxis (Tully, *The unfreedom of the moderns in comparison to their ideals of constitutional democracy*, 2002, 204), constitutionalism promises two equally basic principles, i.e. the rule of law and popular sovereignty, where the citizens are the authors and the addressees of the laws, at the same time legal subjects and bearers of inalienable rights and liberties that need to be protected against encroachment by the State (p. 39). But not only that. There are positive functions for the constitutional system to perform: e.g. good administration. Public institutions are not necessarily obstacles to liberty. A constitutional system structures the exercise of public power so as to ensure the safety and security of its citizens, resolve conflicts, facilitate material prosperity, collect public revenue, participate in the international system, in short enable effective government within the guidelines set by the people represented in parliament.

Applied to the EU, we see the possibilities for democratic participation and control as weaker than in traditional national constitutionalism (and that is why there is talk of democratic deficit), but policymaking decisions are just as important, especially in order to achieve economic productivity, competitive markets, consumer protection, health and safety standards, and sound environmental stewardship. To the extent that citizens' interests in these matters are effectively secured, there will be a legitimate constitutional system, complemented by that existing at the Member State level, where popular sovereignty is enhanced.

As a supranational composite polity, the EU is a particular kind of constitutional regime: "unlike domestic constitutional systems whose scope extends over the full range of public power within the body politic, the EU's legal system is functionally delimited" but enshrines the norms necessary to build an economic union between the Member States, espousing a detailed teleology with substantive objectives that need to be successfully realized if legitimacy is to follow (p. 78). The EU system of functional constitutionalism collapses the distinction made in domestic constitutionalism between defining the rules of the policy process in the constitution and stipulating its outcomes in legislation. In the EU, both functions are prescribed in the Treaty. "In contrast to democratic and rights-based models, the EU's constitutional system relies disproportionately on a commitment to effective government" positing productivity, competitiveness and higher standards of living as superordinate goods (p. 91). If the EU consistently fails to deliver these goods its claim to exist is at risk.

Trilemmas

Liberal democracy has managed a hard-won equilibrium between respect for the will of the people and respect for minorities' rights. In the context of the national State, this equilibrium seemed to manage the challenges brought by transnational dynamics, initially at least. But, when globalization accelerates, and the decision-making centres are removed outside the national polity, and when control over these centres dilutes, the classical redistributory welfare functions of national administrations become overwhelmed by the external decision-makers, be they regulatory, financial-lenders, investors, or military. Is democratic liberalism then seriously at risk? Have the EU Member States sacrificed their democracy or their sovereignty? To put it in the words of another Turkish scholar who has theorized globalization on the basis of a genuine trilemma, Harvard's Dani Rodrik: "My generation of Turks looked at the European Union as an example to emulate and a beacon of democracy. It saddens me greatly that it has now come to stand for a style of rule-making and governance so antithetical to democracy that even informed and reasonable observers like Ambrose Evans-Pritchard view departure from it as the only option for repairing democracy." Leaving aside the weakness of his *ad hominem* argument, Rodrik's trilemma posits the mutual incompatibility of three horns: democracy, redistributive welfare (national sovereignty) and global economic integration; we can combine any two of the three horns, but never have all three simultaneously and in full (Rodrik, *The Globalization Paradox,* Norton, 2011). Isiksel could have profited from Rodrik's view in order to enhance her own version of a constitutional legitimacy trilemma the horns of which are not mutually incompatible, logically, but rather fuzzy. She has not established that one cannot have all three, liberalism, popular sovereignty and functionalism, at the same time.

Indeed, Member States' national governments cannot solve on their own many of the current challenges posed by the globalization of commerce and communication, of economic production and finance, and by the spread of technology and weapons, and above all by ecological and military risks (p. 52). Member States need a special cooperation with reciprocal fulfilment of duties based on mutual trust and mutual constraints on their sovereign power. This can be achieved by delegating competence to a supranational authority (p. 54) and this "supranational delegation insulates policymaking from domestic reversal, electoral alternation, and popular mobilization, curtailing democratic autonomy" (p. 55). For example, *Laval* (C-314/05) and *Viking* (C-348/05) illustrate how the rights of market citizens under EU law weaken the domestic socioeconomic safeguards on which "old-fashioned" citizens rely, empowering some constituencies at the cost of others and constraining the extent to which democratic publics can manage the social consequences of the single market, its burdens and benefits (p. 144).

Globalization thus challenges national sovereignty and liberal democracy, but this is a factual challenge, not so much a normative one. The ideological or normative challenge to liberal democracy comes from interpretations of those factual limitations of national

sovereignty, from both right and left. From right-wing populism, and nationalist versions of republicanism, some rely on religion to reject liberal tolerance towards different practices and beliefs, others question equality, and climate change, most question immigration and see its implied multiculturalism as a threat. These risks are identified with people and "benefits-tourism" and that is why the "global movement towards economic liberalization aims for unhindered movement of money, goods and services, but steadfastly excludes the free movement of people" (p. 156), and tends to build fences and securitize the borders. European integration denies such restrictions: "since the late 1980s, the Court has interpreted free movement provisions as obligating Member States to extend social and welfare coverage to citizens of other Member States who were legally present in their territory" (p. 174, Isiksel mentions as examples of this trend: Case 186/87, *Cowan,* C-85/96, *Martinez Sala* and C-184/99, *Grzelczyk*). As Isiksel aptly observes, "constitutional unions typically allow for personal mobility as a juridical bond between constituent units of a composite body politic. For these reasons, personal mobility bolsters an interpretation of the EU as a political community in the making rather than a loose alliance of States" (p. 157). Indeed, according to a cosmopolitan interpretation, the *ethos* guiding European integration is "the inclusion of the other" (p. 185). That is probably why anti-immigration Brexiteers reject the EU, which paradoxically offered them an *exit* option (Art. 50 TEU).

But challenges to liberalism also come from new (left-wing) radicals. The critiques hold liberalism responsible for structural inequalities as regards race, gender, class, but also for its unwillingness to tackle internal and worldwide inequalities. "The EU has opted for a weak, voluntarist, and negative norm of equality over richer conceptions of social inclusion that might include reciprocity, stronger social assistance, and fair equality of opportunity" (p. 188). The rationale of the EU and its ECJ has been to facilitate market access by eliminating barriers to cross-border commerce, rather than ensuring equal treatment. Although the EU proclaims the values of respect for human dignity, freedom, democracy, equality, the rule of law, respect for human rights, especially minorities' rights, "little of the EU's institutional structure pertains directly to realizing these lofty aspirations. Rather, much of that structure has been designed to secure the conditions of material prosperity" and the goal of economic union (p. 55). Likewise, citizenship of the Union is a form of market citizenship, a teleological form of political agency that seeks to further the goal of economic union (p. 140) and free movement.

On the other hand, EU personal mobility rights risk jeopardizing domestic social assistance schemes that depend on long-term reciprocity between contributors and recipients, and exclude third country nationals. "The EU often replicates policies of exclusion familiar from the nation-State context" (p. 184). The ECJ protects the interests of mobile EU citizens against discrimination or abuse that might result from their political disenfranchisement in the Member State in which they do business (p. 142) but has little to offer static citizens. In the absence of more effective democratic institutions at the supranational level, market citizenship is no substitute for inclusive and equitable forms of political participation (p. 146), it is still anchored in personal mobility rights protecting and empowering those who move but inert for those who stay (p. 158). "Framed as a right of non-discrimination, moreover, EU citizenship offers little to citizens who have not exercised their mobility rights" (p. 195) and the purely internal situation doctrine is precisely what distinguishes EU's functional and pluralistic constitutionalism from domestic rights-based constitutionalism.

Therefore, contestation of this EU model, based on liberalism and free movement comes from populisms, right and left, for different reasons, but with a shared feeling: the loss of democratic control over decisions adopted elsewhere and the loss of self-government. Borrowing from consumer economics scholar Albert Hirschman's *Exit, Voice and Loyalty (*1970), we could characterize this as the loss of *voice*, which erodes mutual trust and federal loyalty. The offered alternative is *exit*, leaving the EU, an issue Isiksel does not fully address in her book. But how can the EU avoid exit? If effective supranational government is to override other values and commitments, if it is to resist democratic contestation, it had better be successful.

Epistocracy

The functional constitutionalism of the EU from its very inception required a special type of governance with a particular know-how. "Supranationalism was conceived not only as an extension of domestic constitutionalism but also, crucially, as its conditio sine qua non" (p. 216) ensuring that the sovereign State commits to constitutional principles and conforms to the rule of law not only in the domestic sphere but also in its external behaviour, through interdependence and institutional design, thus reconciling the tension between constitutionalism and sovereignty. The EU system of functional constitutionalism has succeeded in constraining sovereign States (p. 219) but it has also favoured *epistocracy*, i.e. viewing public policy as a matter of value-neutral competence, impartial judgement and expert knowledge (p. 221), and it has failed to consider citizens as competent judges of matters of public interest (p. 222), thus curtailing opportunities for democratic revision (p. 220).

"All modern bureaucracies, domestic as well as post-national, face the challenge of reconciling the demands of technocratic competence with the ideal of democratic self-rule" (p. 149), and although the EU affords various innovative channels for citizen participation in decision-making, these still reflect and reinforce the cardinal objective of forging a common economic space. Citizens are not mobilized to "challenge and revise the constitutional tenets of economic union" (p. 154). But this should come as no surprise; even at the national democratic level, such experiences are rare. The EU is not unique in foreclosing democratic contestation, and it is not the only polity where decision-making is not fully participatory or representative, but its complex decision-making structure also fails in its attempt to be deliberative, or procedurally legitimate: its "extensive archipelago of committees" (pp. 146–147) do not give a wide range of interested parties opportunities for participation, nor do they afford visual representation to the full spectrum of stakeholders. "Although the Commission asks expert groups to consult as many stakeholders as possible, it still gets to choose which interests matter in any given policy decision", and committees are not answerable to a parliamentary assembly. Existing structural imbalances favour business or groups that possess technical expertise and economic clout (p. 152). This structure of technical governance tends to disguise the presence and importance of political decisions and the exercise of power by giving an impression of the Schmittian formula of "things governing themselves" (Schmitt, *Legality and Legitimacy*, 2004). Political accountability is diluted by this totalizing canon of depoliticized rationality, this apparently neutral expertise and efficiency of new governance.

The financial crisis

The limits of functional constitutionalism have become more visible with the financial crisis, and the exceptionalism that austerity politics have brought along in the Economic and Monetary Union. There are new configurations of power that sideline the European Parliament disregarding Europe's commitments to democracy and the rule of law: an international agreement – the Treaty on Stability, Coordination and Governance (TSCG) -, a European Stability Mechanism (ESM) – also established outside the EU legal order, which generates "memorandums of understanding that codify, down to the minute detail the structural reforms that cash-strapped Member States must adopt in exchange for much-needed financial assistance" from the ESM (p. 227) -, an EU regulatory framework – a.k.a. six-pack and two-pack -, and an ECB programme for Outright Monetary Transactions to purchase sovereign Member State bonds on secondary markets, arguably against the wording of the TFEU, but the legality of which was later confirmed by *Gauweiler* (C-62/14). All these instruments are "intended to consolidate fiscal coordination and monitoring, and further tighten existing constraints on domestic budgets and macroeconomic policy" (p. 224).

The teleological rationale for this "executive emergency constitutionalism" (p. 228) stretching or circumventing the norms and procedures codified by the treaties and minimizing public debate was to keep the monetary union afloat, to save the euro. The trade-off for this Schmittian exceptionalism has been a compromise on the values of Article 2, "the rule of law,

democracy, and egalitarian reciprocity between Member States" (p. 228). The idea that "EMU created an extensive community of fate, without however, establishing the fiscal, social, and political infrastructure necessary for fairly allocating its risks, burdens and benefits" (p. 229) is in my view correct, but it might also be an argument for a better functional design of EMU instead of a denial of its norms; perhaps what it needs is other norms to ensure development, employment and social inclusion, and a coherence-based systematic interpretation of the whole Treaty, starting from Articles 2 and 3 TEU.

Isiksel's verdict

European integration has engendered supranational mechanisms of deliberation, negotiation, concerted decision-making, and compliance, making war unthinkable among the Member States and establishing a "new legal order of international law" the subjects of which are not only the Member States but also the citizens of the Union to be treated equally and without discrimination, free from arbitrary decisions. AND YET, the elusive pledge of "ever closer union" has so far delivered little more than f*inalité économique* in the world's largest economy, "a regime of commercial mobility, market liberalization, unfettered competition, monetary union and unforgiving fiscal discipline" (p. 213). "The EU is still seen by its Member States and citizens as a source of goods rather than values" (p. 223). The EU should then move beyond economism – in this case strict austerity, the timely repayment of loans and inflation control as the ultimate value – and its guise of non-ideological and value-neutral governance if it is to build a civic sphere, save the social welfare model (p. 231) and successfully combat euroscepticism, resentful populism, and virulent xenophobia (p. 232). I find it hard to disagree with this verdict.

Critical Appraisal

Sociological studies of constitutions and constitutionalism in their national, supranational and transnational contexts have flourished in recent years, under the influence not just of (neo)functionalism but also of systems theory, an approach Isiksel does not explore in her book. A recent collection of essays on Europe's self-constitution has come to the interesting conclusion that "EU constitutional politics may be in crisis, yet constitutionalizations of the different subsystems of European society evolve beyond and independently of EU policy making" (Priban, *Self-Constitution of European Society. Beyond EU politics, law and governance*, 2016, p. 4–5). Therefore, there may well be interesting developments to explore in European constitutionalism not only beyond the EU (Member) States but even beyond the EU. In this sense there is indeed a plurality of constitutions in Europe, which Isiksel somehow downplays to focus almost exclusively on the EU. She could have profited, greatly, from the work of Kaarlo Tuori, who has theorized the many constitutions of Europe (*European Constitutionalism*, Cambridge UP, 2015), or from the concept of the composite constitution (Besselink, *A Composite European Constitution. Een Samengestelde Europese Constitutie*, 2007). This constitutional pluralism comprises, vertically, the transnational European constitution and the national Member State constitutions, but there is also a diversity of constitutional dimensions within transnational constitutionalism, functionalist in their policy orientation: the juridical and political constitutions which frame transnationalism, and the more sectorial economic, social and security constitutions.

Europe, generally, not just the EU, features in the title of Isiksel's excellent book *Europe's Functional Constitution*, and a reader who would like to enquire about major projects of European constitutionalism other than the EU might be disappointed to find next to nothing on the Council of Europe and its European Convention of Human Rights. The ECHR dimension is missing from the whole functionalist rational of European integration. In a sense, it is a relevant counterpoint, based on the liberal values. The legitimation of this supranational polity comes precisely form the liberal conception of "rights as trumps on State action" and from the modest, but noble *telos* it embraces.

Isiksel does not completely neglect the ECHR. She does point out the different systems of access to judicial review: unlike the ECHR, neither the Charter nor the EU judiciary can be relied on by Member State citizens to challenge domestic abuses of basic rights when the offending measures do not fall within the ambit of EU law (p. 110). Isiksel also briefly discusses the (heretofore unfulfilled) mandate on the EU to accede to the ECHR, with a rather punchy remark: "in areas such as asylum law and extradition, it is far from obvious that the standards prevailing in the EU are up to ECHR standards" (p. 119). But the very possibility of European integration combining a broader vision of a market-oriented EU relying on functional legitimacy with a Council of Europe based on legal and political cooperation and drawing its legitimacy from rights-based liberalism is a lost opportunity, a gap in the analysis. This requires assuming that European society, even European polity, is something broader and more complex than the EU. As Priban argues, there are many self-constitutions of Europe, "differentiated and pluralistic constitutionalizations of specific organizations, regimes and operations evolving within European society" today (Priban 2016).

There are moments in the argument where this ECHR dimension could have contributed with nuance and counterpoint to the conclusion that the influence and power which the EU exercises over Member States in the economic sphere barely extends to the constitutional values enumerated in Article 2 TEU (p. 223). Isiksel considers accession of the EU to the ECHR would give the EU judiciary an incentive to be more diligent in its application of human rights standards and encourage the ECJ to be more judicious in assigning relative weight to the market objectives *vis-à-vis* other important ends, values, rights and freedoms (p. 121). But this would probably go against her very point of functional constitutionalism, since if the EU can remain free from Strasbourg control it will ensure the primacy of economic integration and the market freedoms whenever they clash with fundamental rights. In spite of judgments like *Kadi* (C-402 & 415/05 P), where individual rights protection and judicial review blocked Member State governments' attempts to use the EU institutions to implement the UN unaccountable sanctions regime, these governments are increasingly relying on EU institutions to pursue their restrictive policy preferences regarding terrorism, immigration and asylum, organized crime, extradition, border control, and intelligence and data gathering (p. 122). Incorporating the ECHR perspective could have helped explain some of the criticisms made of the EU's excessive emphasis on market f*inalité* and its lack of a real political *telos,* as argued in the previous paragraph.

One cannot really criticize Isiksel for not putting forward a proposal of what the EU should be or should have been, for that is not her aim. Utopian thinking is not her line, even if those who conceived the European post-war integration model did perform a leap of faith into institutional functionalism akin to wishful thinking, and which is slightly downplayed in the book. Two notable exceptions where Isiksel is openly moving into normative discourse are her discussions on the EU reaction to the euro-crisis, mentioned above, and her discussion of the EU law on non-discrimination.

This is where the method of reflexive readjustment might have been stretched to its limits. For example where Isiksel, following Conant (*Justice Contained. Law and Politics in the European Union*, 2002) argues that what is needed, if we are to change the EU's gendered, social and cultural forms of domination, is not just non-discriminatory enforcement of the law but to break the inherently patriarchal, hetero-normative, ethnocentric or ablest pattern of domination, adopting more creative policies that respond to the specific needs and circumstances of the dominated group, such as tailored social assistance programs, opportunities for political participation, mobilization, advocacy resources to marshal available supranational legal remedies, educational initiatives, public awareness and outreach campaigns, positive discrimination, and the affirmation and accommodation of difference (pp. 209–210). But is the pursuit of these noble objectives incompatible with the functional constitutionalism of the EU? Perhaps, "the EU can continue to play a supporting role . . . by establishing benchmarks, enumerating shared norms, and naming and shaming the laggards", but Isiksel concludes that "the scope of its power in these domains [inclusion of marginalized groups] is nowhere near as transformative as it is in the sphere of the market" (p. 210).

Isiksel might well have stretched the functional aspect of important EU and ECJ developments to make her argument that even domains as advanced as citizenship of the EU and non-discrimination law are ultimately also inspired by the logic of the market. Perhaps this is a consequence of her "reflexive readjustment" methodology. She does concede that "the EU's championship of sex equality has given the supranational legal system a clear social dimension [pushing] Member States to raise the standards of domestic legal protection they afford their own citizens". Isiksel also mentions the Race Directive (2000/43, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) as an example of this expansion of the domains of social protection, education and public goods provision, in addition to employment and occupation, and she could have mentioned other domains like consumer law, where this protection is also noteworthy. But even in these domains Isiksel insists that there are limitations in using the paradigm of non-discrimination, which still bears the imprint of the market logic, "rather than a substantive standard of equality before the law" (p. 204). Today, the EU is a post-national organization with an increasing and expanding power, which, as Priban argues ("The concept of self-limiting polity in EU constitutionalism" in Priban 2016), "is not matched by a growing sense of responsibility for the lives of the people living in it", even less so of the people migrating to it; it is rather concerned with providing the legal and economic preconditions for the creation of a market where they can freely trade, establish and move as economic operators.

For the reader interested in a critical reconstruction of the EU's current legal structure, i.e. in a critical account of its framing principles, and in a deeper understanding of the issues of legitimacy in a supranational context, this book is spot on, whether one does or does not share the author's view that these principles are wanting and inadequate for sustaining a democratic union with enhanced and extended political commitments and responsibilities. Isiksel has captured the essence of the existing literature on EU constitutionalism and has applied her functionalist account to those domains of EU law where this functional reconstruction seemed *passé*.

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COMMON MARKET LAW REVIEW

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