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## CRISES, EVOLUTION, AND THE FUTURE OF EU CONSTITUTIONALISM

Matej Avbelj (ed.), *The Future of EU Constitutionalism*,  
Oxford, Hart Publishing, 2023

The monograph *The Future of EU Constitutionalism*, edited by the anthology editor Prof. Dr. Matej Avbelj (New University, Ljubljana), offers a comprehensive examination of the critical issues of constitutionalism within the European Union (EU). The book consists of a collection of eleven thought-provoking chapters written by the leading scholars of EU law. Each chapter contributes to a unique perspective on the EU constitutionalism discourse and elaborates on the book's main question and essence – is there a real and meaningful future for EU constitutionalism? The monograph delves into the perplexing nature of the EU's constitutional framework and its contemporary challenges, be it both endogenous or exogenous. *Inter alia*, these challenges include the intra-EU political schisms, the financial crisis, the migration crisis, the COVID-19 pandemic, as well as broader geopolitical events (e.g. migration crisis, war in Ukraine).

The authors highlight the need to reevaluate the EU's constitutional foundations, the importance of common values, and the role of dialogue in resolving constitutional conflicts. The Conference on the Future of Europe (the Conference), which the EU institutions organised from April 2021 to May 2022, was seen as a unique opportunity for addressing these issues and shaping the EU's path forward. This Conference ran parallel to the research project<sup>1</sup> from which this book resulted. The research project thus had an excellent insight into this "democratic experiment", which was organised in the form of the Conference. However, it needs to be noted that the constitutional mandate for the big 'C' formal

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1 The Integral Theory of the Future of Europe, Slovenian Research Agency Research Project J5-1791 (A), (<https://eufuture.nova.uni.si/en/home/>).

constitution-making process was missing from the Conference. Thus, it (unfortunately) did not follow the Ljubljana Initiative from April 2016, where the European Faculty of Law, New University, organised the Conference on the new constitutional process and the new draft treaty establishing a constitution for the EU.<sup>2</sup>

In substance, the book first opens with a theoretical debate on EU constitutionalism, followed by chapters addressing the EU's constitutional values. This is followed by the EU's formal, political, and economic constitution and concludes with a question of sovereignty in the EU, a foundational concept of modern constitutionalism.

As mentioned earlier, the future of the EU is uncertain as it faces several challenges of different natures. Avbelj convincingly argues that the *status quo*, marked by pragmatic *ad hoc* responses to crises, is unsustainable. The recent Conference has indicated the need for more fundamental changes, not limited to potential EU Treaty revisions. However, a unified stance by the MSs on the extent of these changes is missing to achieve the revitalisation of the EU. For example, France has proposed a more ambitious vision of an EU political community that includes non-EU countries committed to democracy and the rule of law. Avbelj predicts that the burden of EU constitutionalism will continue to grow due to increased integration in various domains. This should ultimately lead to a new constitutional settlement; however, the latter's timeline is undefined.

As part of the introductory debate, Neil Walker engages with the paradox of EU constitutionalism and the nature of the EU's constitutional development. The latter can be described as incremental and has been characterised by accumulating specific institutional and policy competencies without a broader constitutional framework. Several crises the EU has faced recently highlighted the need to address unresolved integration and polity identity questions. While the EU has managed to survive these challenges, it faces the ongoing dilemma of whether to confront and resolve broader constitutional questions for the sake of its legitimacy.

At this crossroads the EU is facing now, the answer to the underlying dilemmas might be in the common values in the EU and revisiting their role in addressing legitimacy concerns. Alun Gibbs advocates that common values are essential for legitimising EU governance, but they alone cannot resolve the deeper issue of the uncertainty of the political form. Furthermore, Gibbs suggests that common values can contribute to developing

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2 The Ljubljana Initiative on new constitutional process and new draft treaty establishing a Constitution for European Union, (<https://www.politico.eu/wp-content/uploads/2017/01/The-Ljubljana-initiative.pdf>). The Ljubljana initiative was first signed by Borut Pahor, then the President of the Republic of Slovenia.

political solidarity and a common constitutional space, but this requires overcoming the challenge of constructing values rooted in the EU's shared political experience rather than individual MSs' traditions. Thus, the Conference was a welcomed democratic consultation and an opportunity to foster dialogue, if not the big 'C' formal constitution-making process.

In the next chapter of the book, Matej Avbelj elaborates on the idea that a federal culture may be seen as a prerequisite for European integration and achieving this big 'C' constitutionalism. Moreover, the federal culture, which includes common public ethos and commitment to the EU, should be the building stone for pursuing and achieving a deeper integration. However, building such a culture faces challenges, as it should be embraced by the EU citizens and be broader than purely economic or functional integration. Thus, the Conference and other similar events in the future may help assess the extent of this federal culture. However, it must be noted that the federal culture awareness may likely vary among MSs. Avbelj thus suggests a model of differentiated integration with a formal constitution for MSs, which gravitates closer to the centre of several concentric circles and a treaty framework for those MSs with weaker federal cultures and thus lower intensity of integration – i.e. further away from the centre of concentric circles.

Mattias Wendel then tackles the EU's formal constitution and the autonomy of the EU's legal order. In this regard, the impact and resolution of the Public Sector Purchase Program (PSPP) conflict highlights the underlying conflict concerning the constitutional foundations of the EU. Ultimately, as Wendel shows, this boils down to the question of *Kompetenz-Kompetenz*, which cannot be legally resolved. In the end, this conflict was settled politically through, firstly, what Wendel calls "constructive misunderstandings". It was clear to both the European Commission and the German Federal Government that this conflict could not reach a final solution in legal terms, so the Federal Government ultimately used the strategy of appeasement and refrained from issuing a legally detailed response to the Commission. Secondly, as Wendel proved, such conflict required an ongoing dialogue.

Very relevant in this regard is also Martinico's chapter which provides an intriguing study of the historical relationship between Thomas Jefferson and John C. Calhoun concerning secession and nullification. *Historia magistra vitae est* – the author draws parallels between the pre-Civil War United States and the EU today, emphasising the enduring relevance of concepts like nullification and the intricacies of federalism. This chapter encourages readers to consider the EU's evolving federal dynamics in a Jeffersonian context when American federalism was developed.

The book then continues with chapters focusing on EU constitution from the political and economic sides. Sacha Gerben dives into the EU's constitutional issues by focusing on three crucial political issues – firstly, the lack of popular sovereignty; secondly, normative hierarchy imbalances (fundamental market freedoms are over-constitutionalised); and thirdly, the under-constitutionalisation of EU integration. Gerben advocates that the contemporary quasi-constitutional order of the EU is not sustainable in the long term. He believes it is necessary to address these problems comprehensively and, preferably, simultaneously, as these issues are of existential importance to one another when pursuing the ultimate goal of the EU – a stable constitutional democracy. More drastically, the EU could also abandon its constitutional aspirations, effectively and significantly reducing the EU's authority.

Federico Fabbrini's chapter, on the other hand, investigates the economic predicaments of the EU constitution through the prism of the transformative changes resulting from the wide-ranging impacts of COVID-19. The latter is considered pivotal for the EU and the Europeans. Consequently, the EU adopted unprecedented measures, *inter alia*, in the field of economic governance, which, as opposed to other aspects of EU integration (most prominently, the free movement of people and workers), accelerated the integration within the Economic and Monetary Union (EMU). Especially innovative in this regard was the Next Generation EU (NGEU). The latter empowered the EU to borrow money and allocate resources to the MSs, bridging the economic and monetary pillars of EU fiscal integration.

Cormac Mac Amhlaigh's chapter examines the EU's decade-long crises and the issue of legitimacy. However, despite the crises, as the title of the chapter says: *Eppur Esiste*. The history of the EU is a showcase of persistence and existence despite challenges or opposition. Amhlaigh offers a fresh perspective by adopting a political realist approach based on Bernard Williams's philosophy to manage crises effectively. Amhlaigh's contribution calls for reevaluating EU legitimacy in a more practical and context-appropriate manner.

In the last two chapters, Daniel Augenstein and Katarina Vatovec focus on the issues of sovereignty in the EU. Augenstein delves into the multifaceted nature of EU sovereignty within the global context of economic globalisation, highlighting sustainability and social responsibility. He warns against the neoliberal emptying of democratic welfare-state regimes and imposing predominantly economic EU regulatory standards in the MSs if the EU sovereignty would be strengthened. Katarina Vatovec, on the contrary, presents a more positive stance on the issue of EU sovereignty. Vatovec highlights the

need for legislative adaptations in the EU's approach to extraterritorial sanctions and the importance of a unified EU stance. However, this should not be pursued by emphasising the MSs' sovereignty, considering the globalised nature of the challenges, as this would further add to the fragmentation and disunity. To the contrary, this should be addressed by a comprehensive and efficient normative response on the EU level and facilitated by achieving a broader dialogue on extraterritorial sanctions.

Although the book clearly shows the concept of the EU and that constitutionalism is a multifaceted issue, there is a clear red thread that connects the book's content in a very compelling manner. Even though the book addresses various issues, it does so adeptly in a holistic manner as it addresses the historical context, contemporary challenges, and potential solutions. Drawing upon the past crises and their impact on EU integration, the book proves that the EU is a unique political project. The prospect of preserving the EU's existence has frequently served as a consequence and an incentive for furthering the integration, highlighting the notion of "perseverance" as a core driving force. Most recently, these examples include geopolitical events, such as the war in Ukraine, which sparked the discussions on potentially creating the EU armed forces<sup>3</sup>. This would be rather unimaginable before the start of this war.

In summary, the future of EU constitutionalism is uncertain and subject to ongoing political and legal developments. Whether there will be a real and meaningful future for EU constitutionalism depends on how the MSs and EU institutions navigate between the Scylla and Charybdis regarding the complex issues of integration, sovereignty, democratic governance, and adaptation to changing circumstances. It is a dynamic process which continues to evolve. The book offers valuable insights for scholars, policymakers, and anyone interested in EU constitutionalism's ever-evolving nature.

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3 EU leaders approve updated military plan, (<https://www.politico.eu/article/eu-leader-approve-defense-military-plan/>, 3. 11. 2023). Defense: Is the EU creating a European army?, (<https://www.europarl.europa.eu/news/nl/headlines/security/20190612STO54310/defensie-creeert-de-eu-een-europees-leger>, 3. 11. 2023).