
Fichera, Massimo

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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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BOOK REVIEWS


Recent events in the development of the EU polity have shown how new interpretations, or re-considerations, of the constitutional nature and purpose of transnational integration are required. Many popular approaches and well-established theories are either incomplete and need refining, unsatisfactory or simply wrong. In Republican Europe, Kocharov, who completed her PhD dissertation at the EUI, offers precisely what was missing: a fresh perspective on EU constitutionalism – which, as Kocharov implies, should not be dismissed too easily (as some scholars eagerly do). Instead, if we go to the very origin of the European project of integration, we realize that what lies at its core is a shared idea of “positive liberty”, conceived as the individual capacity for self-fulfillment. This remark may appear at first sight self-evident or trite. Yet it speaks to the reflexivity of our staying together. For, as Kocharov explains, promoting European integration “as a virtue” does not equal promoting it “as a value”. In the first scenario, integration is furthered for its own sake – a mere commitment to a common project of individual freedom, regardless of the persons who are entitled to such freedom. This is the case of the ECHR, a “union of shared virtue”. In the second scenario (European integration as a value), integration requires a more intense form of commitment, a sort of intimacy based on the sense of a “We”. For this to happen, we are told. Loyalty must develop. Hence, it will not be enough to merely ensure the proper functioning of the internal market, but it will also be necessary to re-negotiate a shared European idea of positive liberty, in such a way that each national polity can accept it.

This is the challenge facing the EU: since its role is to ensure peace, the ideal of a polity can only be advanced if two types of conflict are addressed successfully. On the one hand, “static conflicts”, which take place between the national polities, can be avoided through reciprocal non-interference by way of deregulation: this is the essence of the liberal model. Each national polity is left free to pursue its own idea of positive liberty. Co-existence can thus be accomplished through legal constitutionalism, which ensures the judicial enforcement of individual rights. On the other hand, “dynamic conflicts”, which concern diverging ideas of positive liberty, can only be managed by constructing a proper European political space: this is the essence of the republican model. Here political constitutionalism is required, built as it is on counter-minoritarian guarantees and the political process as a source of legitimacy. Kocharov suggests that both models are present in the process of European integration. In particular, whereas prior to Lisbon the European project was predominantly liberal, as it emphasized protection of individual rights, after Lisbon the weight of republican features – which are centred upon the common good of the polity and the collective self-determination of its citizens – has increased. How and why has this occurred?

One of the book’s merits is that, of all forms of legitimacy which may be analysed, it emphasizes social legitimacy, corresponding to the support that a polity as such enjoys. If this is true, then the added value of republican legitimation is precisely its reliance upon Loyalty. Legitimation, in other words, functions in such a way that a loss of elements of positive liberty may be compensated for by acquiring other elements, expressed by the value placed by individuals on the continued relationship with each other. Of course, that this should ensue from the development of a polity is by no means self-evident. In order to illustrate this reality, Kocharov combines originally Albert Hirschman’s “Voice-Exit-Loyalty” model with Quentin Skinner’s work on liberty. Her starting point is simple. The members of a polity are prepared to accept living within it only as long as the polity is able to satisfy their interests. However, being part of a polity also means accepting majority rule, with inevitable (at least partial) loss of Voice. Since not all citizens’ interests may be satisfied, ultimately continued membership is
ensured only if its benefits somehow outweigh the costs associated with it. This generates the so-called “paradox of Loyalty”, which may not be explained merely by way of a trade-off between Voice and Exit. In other words, there must be some special reason for the outvoted minority to keep supporting the legal and social framework which underpins the EU polity. Normally, low levels of output legitimacy may be tolerated, as long as input, formal and adjudicative forms of legitimacy are provided, i.e. whenever (respectively): (a) interest representation is high, (b) procedural and constitutional guarantees are sufficiently complied with, and (c) the rule of law and protection of individual rights are ensured. However, EU law has been considerably amended since the early stages. It is not merely a matter of EU enlargement and related cultural and political issues. In fact, a number of factors, e.g. the passage from unanimity to qualified majority voting in the Council, the politicization of the European Commission, and further transfer of national competences to the EU level, have contributed to reducing Voice in the EU. However, by emerging as mere “interest in being members of the group, in relationship with others”, Loyalty represents an alternative to the loss of interest deriving from reduced Voice, i.e. it emerges as the added value, which introduces an additional cost to Exit. Thus, only a thicker understanding of Loyalty, one that is closely connected with liberty, sheds some light on how the legitimacy of the European liberal project may be preserved. This is why the Hirschman model needs to be integrated with Skinner’s distinction between positive liberty, negative liberty and liberty from domination or dependence. Whereas positive liberty essentially corresponds to Loyalty, negative liberty amounts to freedom from interference by others (Exit) and liberty from dependence corresponds to Voice. The legitimacy of the majoritarian rule may thus only be ensured if benefits associated with positive liberty are higher than the costs associated with reduced Voice and Exit.

The book’s focus on the idea of conflict management is certainly a valuable contribution to the debate on European integration, and immigration and asylum policies are a good example. One cannot help but notice Hegelian ideas scattered across the book. The author does not engage with them explicitly, and it would have been interesting to know more about her view – in particular on the relevance of participatory freedom for the development of the EU polity. In addition, the normative claims of the book, for instance on the extent to which a commitment to the duties and virtues of Sittlichkeit is acceptable, or effective, are not always necessarily clear. Kocharov rightly points out that the area of freedom, security and justice (AFSJ) has achieved some degree of independence from the internal market – although one may doubt that it has achieved full independence. This requires a holistic approach on the expansion of EU competences, for example as regards the link between citizenship and the AFSJ. As noted in the book, as opposed to the internal market (which pursued specific policy choices by way of directly effective rights and establishing functional objectives), the AFSJ, operating under co-decision and majority rule, opens up a space for political contestation and negotiation of diverging visions of ideal life. However, while identifying the predominantly republican features of the AFSJ, the book does not perhaps dwell enough upon the paradoxes of the AFSJ, i.e. the fact that, while expressing a political space, it still seeks to portray itself as a neutral space, thus concealing its internal tensions and contradictions and the epistemic incommensurability of some of its claims. Ultimately, placing value on the continuity of the EU for its own sake may be self-defeating. Yet the book, by making clear that “primacy of EU law cannot be unconditional”, exhibits a strong commitment to strengthening national democracy. Political liberty and social justice must go hand in hand. By providing a thorough and sharp analysis of the roots of the EU constitutional design, this book elucidates Europe’s crises of governance as very few have done in the past. It is a major contribution to our understanding of the increasingly complex EU machinery.

Massimo Fichera
Helsinki
The significance of the contribution will be apparent also to readers outside the specific

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Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. +31 71 5277549
fax: +31 71 5277600

Establishment and Aims

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