

Book review: *Europe's Functional Constitution*, T. Isiksel (Oxford University Press, 2016, ISBN 9780198759071); xxiii+265pp, £60.00 hb.

The nature of the European Union as a polity and its position in relation to sovereign states has sparked considerable debate among legal¹ and political science² scholars alike. The intricacies of Brexit serve as a vivid example of the difficulties surrounding the nature of the EU.³ Attempts to answer this question have markedly been characterised by a fallacy that Neil Walker calls ‘the problem of translation’:

Just because the ‘state constitutionalism’ is the default determinant, and because the destination language of ‘non-state constitutionalism’ is under-developed, there is a danger that both scholars and actors in the integration process presume an isomorphism between the EU and their respective national polities.⁴

While many others followed suit in recognising this problem,⁵ it appears there was a lack of a clear idea that would reboot our understanding of the EU as a constitutional polity.⁶ It is this gap that Isiksel’s book

¹ See, for example (not in any particular order of relevance), N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999); G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011); N Walker, J Shaw and S Tierney (eds), *Europe's Constitutional Mosaic*; K Tuori, *European Constitutionalism* (CUP 2015).

² For a detailed presentation of the dominant theories (neofunctionalism, liberal inter-governmentalism and multilevel governance), see Mark Pollack, ‘Theorizing the European Union: International Organization, Domestic Polity, or Experiment in New Governance?’ (2005) 8 *Annual Review of Political Science* 357; Antje Wiener and Thomas Diez (eds), *European Integration Theory* (2nd edn, OUP 2009); and Dirk Leuffen, Berthold Rittberger and Frank Schimmelfenning, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan 2013).

³ The very centre of the legal question before the UK Supreme Court hearing the appeal in *R (Miller) v Secretary of State for Exiting the European Union* is whether the Government alone can trigger article 50 TEU in order to start its exit from the EU (meaning that exit from the EU is to be considered concluding an international treaty), or whether it will change the law of the land (thus warranting Parliamentary scrutiny and consent). The question can hardly be settled if we remain in the domestic/international dichotomy, explaining (at least in part) why the case has been given so much constitutional importance.

⁴ N Walker, ‘Postnational Constitutionalism and the Problem of Translation’ in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 40.

⁵ J Shaw, ‘Process and Constitutional Discourse in the European Union’ (2000) 27 *J Law & Soc* 4, 20; Renaud Dehousse, ‘Beyond Representative Democracy: Constitutionalism in a Polycentric Polity’ in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 136; N Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law* (OUP 2010) 35ff. In the political science literature, see also I Bache and M Flinders (eds), *Multi-Level Governance* (OUP 2004) 78.

⁶ For a recent attempt to reconceptualise the EU constitutional vocabulary, see M Dawson and F de Witte Dawson, ‘Self-determination in the Constitutional Future of the EU’ (2015)

aims to fill, by reconceptualising the notion of constitutionalism in the EU context. In particular, Isiksel aims to interpret and criticise (p 7) the normative values that have guided the EU's normative structure, through its idiosyncratic constitutional practice. The analysis of constitutional theory that precedes the creation of an EU constitutional vocabulary shows great caution towards the proper use of the term 'constitutionalism', warning against an extensive and unwarranted conceptual renovation in new institutional contexts (p 2).

With these premises in mind, Isiksel's main contribution is the introduction of the notion of *functional constitutionalism*, through which she aims to capture the teleological legitimation behind the European project, as opposed to liberal and democratic principles that generally lie behind state constitutional systems (p 27). The notion is introduced following a detailed analysis of the genesis of the European project, its initial and core aims which lie in economic prosperity, and the guarantee of peace among the founding Member States, which have conditioned a particular type of constitutional legitimation. The book starts from the premise that the EU itself was built from the viewpoint of mistrust towards 'populist mobilisation and national sovereignty' (p 12), which conditioned the creation of different types of processes and institutions at the European level that sourced their legitimacy on competence and pragmatism, rather than popular support. The main argument of the book is that the economic rationale that has originally driven European integration is still at the centre of its legal and institutional structure,⁷ resulting in a lack of democratic control of issues that were previously handled at the domestic level (such as human rights, citizenship, migration policy and non-discrimination, p 19).

In this context, Isiksel seeks to define *functional constitutionalism* by first characterising *constitutionalism* as a 'system of public institutions whose powers are so extensive as to constitute a discrete political community, without, however, stipulating as a definitional matter that any constitutional system properly so-called must be configured in line with strong democratic principles' (p 71). In addition, she turns to the term *functional*, which she instantly seeks to differentiate from the functionalism and neofunctionalism as ideas of comparative constitutionalism. The term *functional* for the purposes of the book, and the emergence of a new EU-specific constitutional vocabulary, refers to a system (1) where the EU powers are functionally limited, unlike state sovereign power which is horizontal and absolute; (2) which embraces a detailed teleology in

21(3) European Law Journal 371; M Dawson and F de Witte, 'From Balance to Conflict: A New Constitution for the EU' (2016) 22(2) European Law Journal, 204.

⁷ Perhaps most vividly explained in relation to the different mechanisms introduced in order to tackle the economic and financial crisis, 224-230.

comparison to national constitutional systems, relying on the goal of the economic union over democratic contestation; (3) the legitimacy of which depends on the successful discharge of these aims, rather than any type of democratic legitimation present in nation states (p 78). Drawing upon the tradition of constitutional pluralism, the author convincingly argues for a co-existence of the EU's functionally limited powers and the Member States' absolute constitutions, claiming that they can operate when their relationship is understood as 'intersectional, heterarchical, and pluralistic, rather than exclusive, comprehensive, hierarchical, and monistic' (p 81).

The book then turns to exploring this idea further through four substantive chapters that explore areas of constitutional rule that traditionally do not follow market logic, but which have been repurposed through EU action. In particular, Chapter 3 explores the EU's regime of fundamental rights, and, more specifically, their relation to and difference from fundamental freedoms, which form the peculiar EU-based rights in the case law of the Court of Justice. The argument of the chapter, underlining economic teleology as dominant in the EU's constitution, is that fundamental freedoms are constitutionally foundational, whereas fundamental rights are purely auxiliary (p 122). While the EU could bolster its legitimacy through increased safeguards in the area of protection of fundamental rights, the author is critical of its reluctance to do so (p 114 onwards).

Chapter 4 explores the manner in which citizenship has been treated and safeguarded in the EU. Specifically, Isiksel argues that aside from the EU's troubles in increasing citizen participation, it is lacking in ensuring equal political participation through reinforcing functional constitutionalism logic (p 130). Models of participation are strongly connected and restricted to the advancement of market integration, thus failing substantively to ensure that the voices of those who do not share the same goals are equally heard. This lack of equal participation results in a failure of the EU to provide for democratic contestation of both its basic aims and more individual policies.

Chapter 5 discusses free movement and how it conditions the scope of EU citizenship and its political significance. The author warns against an overreliance on the significance of mobility and how it has affected the position of supranational citizenship (p 167). She concludes by stating that as long as supranational citizenship is tied to mobility, it can hardly achieve the universality necessary for full and equal civic participation in the EU.

Finally, Chapter 6 discusses the principle of non-discrimination and its expansion into areas of exclusive Member State competence. The au-

thor finds that, unlike the three areas addressed in previous chapters, the principle of non-discrimination is capable of being a more comprehensive political project than market integration (pp 186-187). Nevertheless, the way it has been applied in the EU demonstrates a lack of universal inclusion and equal treatment, relying predominantly, as explained in Chapter 5, on personal mobility, resulting in a restricted scope. The author concludes that the principle of non-discrimination has itself resulted in discriminatory effects, towards third-country nationals and towards immobile EU citizens (p 199).

Besides the obvious contribution of this book to further the debate on the nature of the EU's constitution, critics may find that the wish of the book to cater to research of both law and political science falls short. At times, the analysis in the substantive chapters may leave legal academics and researchers somewhat disappointed, as it focuses mainly on the political aspects of particular issues under analysis,⁸ and could benefit from a more nuanced analysis of the consequences that took place in the case law of the Court of Justice, and in EU legislation. Furthermore, the book in its aims restricts itself to interpretation and criticism, without normative prescriptions (p 7). While this particular project would be overly ambitious to include also a normative framework or at least insight into a desirable shift towards improvement, the reader is left somewhat unsatisfied. In particular, the book finishes with the following statement: 'Economic union does not exhaust the horizons of the European project, but the challenge remains that of bringing those horizons into focus' (p 232). We are left wondering which horizons are to be included, how and why, for the EU to achieve its full constitutional potential.

More importantly, nevertheless, the innovative approach to defining the EU constitution and its intricacies renders this an important contribution to any academic interested in the EU, but also in the broader questions related to constitutionalism beyond the State.

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⁸ See, for example, section I of Chapter 4 concerning the analysis of citizen participation as a mode of democratic legitimation, 131-152.