

EUROPEAN UNION LAW (LL205)

Course duration: 54 hours lecture and class time (Over three weeks)

LSE Teaching Department: Department of Law

Lead Faculty: Dr Michael A. Wilkinson and Dr Floris de Witte

Pre-requisites: Introduction to Legal Methods or Equivalent

INTRODUCTION AND OVERVIEW

This course aims to develop your understanding of EU law and politics as well as your capacity to critically evaluate the institutional, substantive and constitutional dimensions of European integration.

The course covers: (i) constitutional aspects of EU integration; (ii) institutions of the EU; (iii) substantive law of the EU. This will provide an overview of the judicial architecture and political structures of the European Union, the authority of EU law, law-making processes, and the relevant case law in free movement, citizenship, and fundamental rights, while at the same time introducing more complex questions about the dynamics and direction of the integration process, particularly since the Euro crisis.

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The course will challenge you not only to understand, but also to critically assess the structures, methods and content of EU law. It will include discussion of the current state of the Union and its likely future trajectory, and involve practical problem-solving skills such as moot court exercises.

The course is therefore aimed at those interested not only in the law of the EU, but also in understanding the functioning of the EU institutions and the broader project of European integration. It is not restricted to those with a background in law but will also appeal to those with an interest in European politics, history and economics and international relations.

The basic reading for this course will consist of the following textbook in EU law: Chalmers, Davies and Monti, 'EU Law: Cases and Materials' (CUP, 2014), which will be supplemented by case-law or specific articles related to the topic of the class.

The seminars will be used to allow you to work with the material, in teams and engage with EU law from different angles.

The course is taught by Dr Michael Wilkinson (m.wilkinson@lse.ac.uk) and Dr Floris de Witte (f.e.de-witte@lse.ac.uk). It will consist of 12 lectures of three hours each, and 12 seminars of one and half hour each.

The course focuses on three dimensions of EU law, as follows:

- **Constitutional** issues: how the European Union has developed into a unique supranational system (and the role of law in this process), how its political and legal authority is shaped and challenged, and how it has responded to issues of fundamental rights, democracy and constitutional identity.
- **Institutions and Law-Making**: a detailed legal and political analysis of the role and functions of the EU institutions, the legislative process, and the judicial architecture of the European Union (including the law and governance of the Eurozone).
- **Substantive** fields of EU law, in depth analysis of the case law of the Court of Justice on free movement of goods, free movement of services, and citizenship. We will conclude by exploring the EU's engagement with current problems, most notably the Euro-crisis, and considering its future trajectory.

The general programme of lectures – which may be subject to minor revision - will be as follows:

- Lecture 1: History of European Integration and Basic Concepts in EU Law
- Lecture 2: Institutions and Law-Making
- Lecture 3: The Judicial System of the EU and Enforcement of EU Law
- Lecture 4: Free Movement of Goods and Services
- Lecture 5: Free Movement of Persons and Citizenship
- Lecture 6: Authority of EU Law
- Lecture 7: Fundamental Rights
- Lecture 8: Democracy in the EU
- Lecture 9: Area of Freedom, Security and Justice
- Lecture 10: Law and Government of the Eurozone
- Lecture 11: Authority after the Euro crises
- Lecture 12: The Future of the European Union

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Recommended Text:

Students are advised to acquire the following text:

- Chalmers, Davies and Monti *EU Law* (Cambridge University Press, 2014)

A broad range of additional readings, as well as recommendations for in-depth analysis of the separate topics of the course will be set in support of lectures, and as preparatory readings for classes. These will be made accessible over the Moodle site for the course (<https://shortcourses.lse.ac.uk/>).

Assessment:

Students will be set one summative piece of coursework comprising an essay of 1,500 words maximum on one of a number of set themes. The other aspect of the summative assessment for the course will take the form of an unseen examination paper.

Teachers:

Dr Mike Wilkinson is Associate Professor of Law in the Department of Law at the LSE, where he teaches and researches in EU Law, Jurisprudence and Constitutional Theory. He has been EU-US Fulbright Research Fellow at Columbia and NYU, visiting professor at Cornell University, Université Panthéon-Assas (Paris II) and National University of Singapore (NUS), and is a member of the Bar (Lincoln's Inn). You can find more information here: <http://www.lse.ac.uk/collections/law/staff/michael-wilkinson.htm>

Dr Floris de Witte is Assistant Professor of Law in the Department of Law at the LSE. He teaches several EU law courses in the LL.B and LL.M, and his research focuses on the institutional and normative challenges thrown up by the Euro-crisis and on the interaction between free movement law and political theory. You can find more information on Floris on his staff page: <https://www.lse.ac.uk/collections/law/staff/floris-de-witte.htm>

LECTURE 1: HISTORY OF EUROPEAN INTEGRATION AND BASIC CONCEPTS IN EU LAW

The purpose of this introductory class is threefold. First, to get a sense of the idea of Europe and what, if anything, it means to be European, in cultural, political and social terms. Second, to think about the nature and role of the European Union, of its relationship with its member states and to consider what the EU does, or should, add to the lives of Europeans. What is the EU's *raison d'être*? Third, we will consider some themes and theories of European integration, which attempt to explain the dynamics of the EU and how and why it changes over time. Running alongside these three threads, is the question that will preoccupy us for the remainder of the course: what is the role of law in the process of integration? How does the EU affect our traditional understanding of law and related concepts, such as sovereignty, authority and public power?

The introduction to Van Middelaaar's book offers a good starting point. He sets out three very general ways in which we can think about the EU: (i) as serving the purposes of the governments of the Member States ('Europe of States'), (ii) as serving certain functional purposes ('Europe of Offices'), or (iii) as being the start of a democracy beyond the state ('Europe of Citizens'). Each of these understandings is reflected in different elements of EU law, and each is supported by different political and social groups. Each of these three has distinct disadvantages and benefits, and we will come back to these three paradigms throughout the course.

The purpose of today's lecture and class is to help you see a bigger picture – the social, political, economic and cultural context of EU law – and the different interpretations of it that are on offer. You will return to these introductory themes at later stages in the course, and they will help you to understand, locate and make sense of discrete topics as a part of this bigger picture. Getting some sense of what the European Union is, in any case, seems necessary before we can begin to understand EU law.

Background Reading

– Chalmers, Davies and Monti, Chapter 1

Class Reading

Luuk van Middelaaar, *The Passage to Europe* (Yale University Press, 2013), pp 1 – 9.

E-book accessible here: <https://catalogue.lse.ac.uk/Record/1456676>

Class Questions

1. Is there such a thing as a European identity? A European citizen? A European polity? What do you think might be the implications, if any, of your answer to these questions for understanding the European Union and its law?
2. What, in your opinion, are the most significant events in the history of the European Union? Why?
3. Why did law assume an increasingly important role in the process of European integration? For each of Van Middelaaar's conceptions of the EU:
 - a. what role do you think law plays in developing them?
 - b. And how does law relate to the role of politics – on either the national or European level?
 - c. What are the advantages and disadvantages of each?
4. Why did the Constitutional Project fail, and what have been the consequences of its failure? Does the Lisbon Treaty replicate the failed Constitutional Treaty? And if so, what does that tell us about the process of European integration?
5. What do you think the current crises in the Eurozone, Brexit and the migration crisis might mean for the future of European integration?

LECTURE 2: INSTITUTIONS OF THE EU AND THE LEGISLATIVE PROCESS

In this lecture we will look at the institutional machinery of the EU and focus on what can be seen as its “political process”. It is generally recognised that there is no classical separation of powers in the EU, between the legislature, executive and judiciary. Instead, each institution exercises a combination of these roles and their powers are further blurred by the distinction between national and supranational level of government. Understanding this proves fundamental to anybody interested in practising EU law or involvement in EU politics.

The Council therefore acts as the EU’s legislator but comprises of the representatives of Member States’ executives. The European Parliament is elected by European citizens but the Commission, let alone the Council, is not accountable to it. The Commission is closest to the EU government but as we will see, it is largely controlled by the Members States.

The legislative process in the EU in an attempt to balance between these three institutions in a way that ensures the democratic nature of law-making in the EU, but also ensures the efficiency of the process. We will assess the ordinary legislative procedure (Article 289 TFEU), delegated law-making (Article 290 TFEU) and implementation of law-making (Article 291 TFEU). In particular, we will focus on the distinction between the formal mechanisms that exist and the informal use by the institutions.

Background Reading

- Chalmers, Davies and Monti, Chapter 2 and 3

Class Reading

Institutions and Legislative Procedure - Christopher Lord, ‘The democratic legitimacy of codecision’ (2013) 20 *Journal of European Public Policy* 1056-1073

E-journal article: <http://www.tandfonline.com/gate2.library.lse.ac.uk/doi/abs/10.1080/13501763.2013.795400>

Class Questions :

1. What is the “institutional balance” in the EU?
2. Is it true that in the ordinary legislative procedure the European Parliament has equal power to that hold by the Council?
3. What is “trilogue”? Is it somewhat problematic, or is it an indispensable tool to make the EU law making effective?
4. What are the problems of the ordinary legislative procedure from the point of view of democratic theory?
5. What is the difference between delegated and implementing acts? Should the European Parliament be involved in the scrutiny of both?

LECTURE 3: THE JUDICIAL SYSTEM OF THE EU AND ENFORCEMENT OF EU LAW

In this lecture we will look at how EU law is enforced, and the particular role of court – both national and EU – in this process. We will discuss four different methods of enforcement. The first goes to the nature of rights in the EU legal order. These have been given ‘direct effect’ which allows individuals to challenge Member States for violations of EU law in courts. The second is called the ‘preliminary reference procedure’, which allows national courts to refer questions relating to EU law to the European Court of Justice. The third is ‘infringement procedure’, through which the Commission can take a Member State to Court for breach of its EU law obligations. And finally we have ‘judicial review’ through which the decisions of EU institutions can be challenged for conformity with EU law. We will go through these in detail in the lecture.

The class reading discusses what all this means for the role of the ECJ. It seems to be completely insulated from political interference. Is this a good thing or not?

Background Reading

- Chalmers, Davies and Monti, Chapter 4 (p. 164-183), Chapter 7 (291-323), Chapter 8 (p. 357-374) and Chapter 10 (p. 443-454). NOTE: All elements discussed in Chalmers will be discussed in the lecture. Please use these references only if you do not understand a particular point or want to know more.

Class Reading:

- R. Daniel Kelemen, ‘The Political Foundations of Judicial Independence in the European Union’ [\(2012\) 18 Journal of European Public Policy 43-58](#)
- Roman Herzog and Lüder Gerken, ‘Stop the European Court of Justice’ *Frankfurter Allgemeine Zeitung*, 8 September 2008 [[English translation](#)]

Class questions:

1. What is a reference? How is it different from an appeal?
2. When are national courts obliged to refer? What is the doctrine of acte claire? Consider the argument for a broader acte clair doctrine.
3. Should the Court of Justice have the power to refuse references from national courts? When can it do so at the moment?
4. Do all Treaty provisions have vertical and horizontal direct effect?
5. Identify the number of ways in which the ECJ has sought to promote the legal effectiveness of EU law in the absence of direct effect.
6. ‘The legitimacy of the ECJ’s case law depends on a transparent methodological approach in developing and applying general principles of law. The ECJ’s method in *Mangold* and *Kücükdeveci* does not promote legitimacy, but it does create legal uncertainty’. Discuss.
7. Is judicial review an appropriate method to protect individual rights?
8. Should private parties have more rights in the infringement procedure process?

LECTURE 4: FREE MOVEMENT OF GOODS AND SERVICES

Ever since the inception of the EU, one of its main objectives was the creation of a 'single market without internal borders'. This has been given legal 'bite' by way of the free movement provisions, which allow firms, companies, and individuals to challenge regulatory obstacles imposed by Member States that restrict the free movement of goods, services and workers. This judicial challenge to national regulations, however, has an important constitutional dimension. The regulation of the 'single market without internal borders', after all, decides on very important and normative questions: (a) who gets to regulate this internal market? Is it the EU legislator, the Member States or the Court?; and (b) what level of regulation do we want for the internal market – a liberal market, or a regulated 'social market economy'; and what does the answer to (b) entail for the answer to (a)?

We will also consider the most problematic of the free movement provisions – the free movement of services. The importance of services is not just economic (they account for 70% GDP in the EU) but also legal (in so far as services require more sophisticated analysis of the cross-border dimension, given that it can be either the service provider, the service recipient or the service itself (internet!) that travels across borders) and normative (it potentially touches on many sensitive public services, such as education or healthcare). We will discuss the evolution of the free movement of services, discuss in detail the recent rulings in *Viking* and *Laval*, and analyse why these are among the most criticized judgments in the history of the CJEU.

Background Reading

– Chalmers, Davies and Monti, Chapter 17 and 18

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Class Reading

- J. Snell, 'The Internal Market and the philosophies of market integration' in S. Peers and C. Barnard (eds.), *European Union Law* (OUP 2014) 300-324

Class Questions

1. Which three models for regulating the internal market does Snell set out?
2. What are the limits of harmonisation? Can harmonisation alone create an 'internal market without borders'?
3. What are 'home country control' and 'host country control'? What are the drawbacks and advantages of either?
4. Why does the principle of 'home country control' or 'mutual recognition' lead to a market with relatively low levels of regulation?
5. 'Cassis de Dijon is the most deregulatory judgment ever produced'. Discuss.
6. Does Keck make economic sense? Or is it primarily about clearly deciding the scope of Article 34 TFEU?
7. Should Article 34 TFEU apply in the following cases (fictitious)?

Problem questions for discussion:

- A. After the 2015 new year's eve celebrations, in which 107 citizens were seriously injured while attempting to set off fireworks, the Netherlands decides to ban fireworks. Anyone caught setting off fireworks risks a severe penalty. Should this be caught by Article 34 TFEU?
- B. In light of the increasing childhood obesity, the UK decides that food products can only include the words 'breakfast' 'lunch' or 'dinner' if it meets very high nutritional standards, and contains very little fat. Should this be caught by Article 34 TFEU?
- C. In Spain, condoms can only be bought in pharmacies – not online, in supermarkets or in automatic dispensers. The reason is that pharmacies have staff at hand that can professionally explain how to use condoms and what the health risks are. Should this be caught by Article 34 TFEU?

LECTURE 5 – FREE MOVEMENT OF PERSONS & EU CITIZENSHIP

In this lecture we will consider the free movement of persons, with a specific emphasis on Union citizenship. The free movement of persons has rapidly become the most contested topic in EU law, primarily because of the 'threat' of 'welfare tourists'. It is also at the centre of the debate on Brexit.

We will approach free movement of persons and citizenship from two sides. On the one side we will look at how it has affected the national welfare state. The right to equal treatment in the host state attached to Union citizenship creates a tension on the national level, in so far as it puts pressure on the national welfare state. If every Union citizen can freely travel throughout the EU and can freely access welfare entitlements in their host state, how can we protect the social welfare rights of *nationals*? Or is this potential loss a necessary result of the creation of a *European* citizenship? How can EU law respond to this fear and protect domestic structures of solidarity and reciprocity? This element of EU citizenship (and the free movement of workers) is currently being discussed within the context of the Brexit debate. Have a look at the current compromise (the 'Tusk proposal'). Does this solve the issues? Does it do so in an appropriate manner?

On the other hand we will look at the constructive potential of citizenship and free movement. In elaborating these rights, the European Court of Justice tries to move beyond the economic paradigm that underlies the free movement of workers, and create a 'fundamental status of all nationals of the Member States', that does not replace but supplement national citizenship. What does it mean to be a citizen of the EU? Which rights are attached to such a status, and why? Ruiz Zambrano suggests that a core right exists that citizens can exercise independently of the exercise of their right to free movement throughout the Union.

Background Reading

- Chalmers, Davies and Monti, Chapter 11

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Class Reading

- Floris de Witte, ['The End of EU Citizenship and the Means of Non-Discrimination'](#), (2011) 18 *MJ*, 86 – 108.
E-journal article:
<http://heinonline.org.gate2.library.lse.ac.uk/HOL/Page?handle=hein.journals/maastje18&collection=journals&page=86#88>
- [Tusk proposal on a 'New Settlement' for the EU - please read pages 12-16](#)

Class Questions

1. In which ways is the construction of Union citizenship similar to national citizenship, and in which ways does it differ?
2. Which rights does every Union citizen have on the basis of Union citizenship, independently from his or her exercise of free movement?
3. Should the rights that migrants accrue in the EU depend on the length of their residence in the host state, the type of welfare good to which they seek access, or their economic engagement with the host state?
4. Does Union Citizenship help or deter the attainment of a 'social Europe'?
5. What do you make of the 'emergency break' that is introduced within the Brexit debate?

LECTURE 6: AUTHORITY OF EU LAW

According to the Court of Justice, EU law is an autonomous legal order that limits national sovereignty and creates rights which individuals can directly invoke in national courts. There are a number of formal implications to this and a number of wider obligations. Formally, the authority of EU has four elements: the right for EU law to determine its own right; the precedence of EU law over all national law; the right for EU law to determine when there is a conflict with national law; and the fidelity principle, the duty of all national institutions to secure the application and effectiveness of EU law.

The question raised by all this is whether EU law should have this level of authority and whether in practice this level of authority is universally accepted. In this respect a number of constraints have emerged in national court's responses to the doctrines outlined by the ECJ, in particular in the German Constitutional Court.

We will examine the doctrinal responses to the relationship between EU law and national law as well as the broader normative and political questions that an understanding of this relationship in context requires.

Background Reading:

- Chalmers, Davies and Monti, Chapter 5

Class Reading:

F. Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2016) *German Law Journal* 1003 – 1024 (we will look at the substance of this case later when we study the Eurozone crisis)

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Class Questions:

1. On what basis did the ECJ announce the principles of supremacy and direct effect of EU law? Are those principles enough to make EU law 'constitutional' in nature? If not, what is the nature of the EU legal order?
2. Why do you think the *Bundesverfassungsgericht* has taken the lead in contesting the authority of the EU and the Court of Justice? Is the German Court's 'bark worse than its bite'?
3. From the perspective of EU law, what is the significance of Article 4(2) TEU? Is there a difference between national identity and constitutional identity? What in practice do you think will be the effect of this Article?
4. When there is a conflict between EU law and national law should one always prevail? Should there be recourse to wider legal principles as the literature in the textbook suggests? Or is ultimately just a political question?

LECTURE 7: FUNDAMENTAL RIGHTS

The EU claims to be founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. But what is the reality? Does the EU have an autonomous notion of these values, and what role should fundamental rights play within the EU?

In this session we are going to discuss three issues: (a) the role of fundamental rights in the post-war European political and constitutional context, (b) the evolution of the *legal* system of fundamental rights protection in the EU, through the Charter of Fundamental Rights, the general principles of EU law and the European Convention on Human Rights; and (c) the question of how the EU can secure its fundamental values, which include fundamental rights, when its own Member States violate such rights.

Background Reading:

- Chalmers, Davies and Monti, Chapter 6

Class Reading:

- Joseph HH Weiler, 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space' in Ibid, *The Constitution of Europe* (Cambridge: CUP 1999), 102-129

Class Questions:

1. What are the sources of fundamental rights law in the EU?
2. How has the Court of Justice incorporated fundamental rights into EU law? Was it right to do so?
3. Do the EU Courts apply fundamental rights standards in a rigorous manner in your view? What are the obstacles to rigorous protection?
4. Does EU law manage well the tensions between local concerns and universal values? What forms of national resistance are there?
5. 'The ECJ's decision in *Kadi* is not self-serving but is the sole justifiable reaction to be expected from a responsible constitutional court.' Discuss.

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LECTURE 8: DEMOCRACY AND SUBSIDIARITY IN THE EU

We have already looked at the institutions and at the law-making process. This session will consider the democratic legitimacy of the project and process more broadly. The principle of democracy has been central to understanding the evolution of the European Union as well as the challenges to its authority and the limits on integration. We will explore the so-called 'democratic deficit' of the EU in terms of its specific institutional dimensions both from the perspective of European integration and from the perspective of national resistance to EU authority.

We will look at the principle of subsidiarity, the role of national parliaments and the Citizens Initiative as ways to increase the democratic quality of the EU, and more generally at the role that democracy might play in reinforcing or resisting the power and authority of the EU. In particular, we will discuss where we should locate the need for democracy: at the national and/or at the European level?

Background Reading:

- Chalmers, Davies and Monti, Chapter 9

Class Reading:

- Follesdal & Hix, 'Why is there a Democratic Deficit in the EU: A Reply to Moravcsik' (2006) 44 *JCMS* 533
onlinelibrary.wiley.com/doi/10.1111/j.1468-5965.2006.00650.x/abstract

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Class Questions

1. Is democracy about securing self-government or about limiting the power of government to intervene in people's lives? Explain the difference between input legitimacy and output legitimacy, and the difference between accountability and representation.
2. Should the EU be democratic, or is the de-politicised nature of the EU necessary for it to be successful?
3. Is the EU democratic? If not – do the problems lie in its representative nature, its deliberative nature, or its participative nature?
4. Is the fact that Malta can veto certain legislative processes (or Treaty reforms) a protection of, or an affront to, democracy (considering that Malta comprises 0,1% of the EU population)?
5. Which options can you think of to increase the democratic quality of the EU? What are the advantages and drawbacks of the following options:
 - Citizens' Initiative
 - Early Warning System
 - Transforming the EP in the sole legislator
 - Granting NPs veto-powers in law-making

LECTURE 9: AREA OF FREEDOM SECURITY AND JUSTICE

We will focus in this session on European criminal law, which has developed into one of the most dynamic fields of EU law. It has made it more and more difficult to claim that European integration is “only” about the Internal Market and economic freedoms. It also, however, harder to justify this type of exercise of public authority in the name of the European Union and the imposition of limitations on European citizens’ freedoms. The resistance by national constitutional courts in this field is real, as you will see from reading material selected for this session. We will consider first the context of criminal law cooperation: why have Member States agreed to give more powers to the EU and why have national parliaments and courts largely acquiesced? How have the Member States protected their prerogatives?

The European Arrest Warrant is a “post-9/11” measure, which implements what the European Council considered the “cornerstone of judicial cooperation in criminal matters” – the principle of mutual recognition. Transferring this principle from the context of internal market freedoms to the field of criminal law has been strongly critiqued. Understanding this tension is the second “big question” of this week’s topic. Finally, Melloni is one of the recent ECJ’s decisions where a national constitutional court questions the EAW’s principles in the light of fundamental rights. The extent to which the EAW possibly violates fundamental rights guaranteed by EU law and also national legal systems is the third issue for consideration.

Background Reading:

- Chalmers, Davies and Monti, Chapter 14

Class Reading:

- Sandra Lavenex, ‘Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy’ (2007) 14 Journal of European Public Policy 762-779

Class Questions:

1. How can we explain the emergence of EU criminal law? Is it just the desire of “Brussels bureaucrats” to have more control over European people’s lives?
2. Do you agree with Lavenex that it is problematic to transfer the principle of mutual recognition, developed in the context of market integration, into the field of criminal law? Is the “free movement of judicial decisions” so different from the free movement of goods?
3. Can a Member State authority refuse to execute European Arrest Warrant on grounds of a possible violation of fundamental rights in the issuing country?
4. Should own nationals be more protected against surrendering to another Member State? Does the EAW Framework Decision provide for such possibility?

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LECTURE 10: LAW AND GOVERNMENT OF THE EUROZONE

There are in reality many different systems of laws and governments within the European Union. What we have studied thus far is a very generalized presentation of how law and politics work and interact in the EU. In this session we want to take one prominent area where both differ significantly from the template: Economic and Monetary Union. We will consider how this was established, but also how it has altered since the Euro-crisis. Specifically we will consider some of the legal questions and challenges which the post-crisis measures have thrown up.

Background Reading:

- Chalmers, Davies and Monti, Chapter 16

Class Reading:

Wilkinson, 'Austerity, Grexit and the Battle for the Euro', download here:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2689045

Class Questions

1. What were the central features of EMU prior to the crisis? Who was responsible for the borrowing by States? What was the no bail-out provision? What were the central features of the ECB? What was the political economic perspective behind this structure?
2. What are the central institutional changes to this structure to have emerged since the crisis?
3. Consider the Outright Market Transactions Programme (OMT). What concerns does the German Constitutional Court have about OMT? What do you think of the ECJ's decision?
4. Explain the central features of the ESM Treaty. What imbalances flow from the post-crisis reforms?
5. What criticisms of the ESM were raised in Pringle? Are you convinced by the Court's handling of them?
6. What do you think the future holds for the Euro- area?

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Lecture 11: Authority after the Crises of Europe

In this session we will consider the more general implications of increasing conflicts both within and between nations for the EU's constitutional authority and political order.

Some think that the OMT reference should be celebrated for finally resolving the question of authority in favour of the ECJ and EU law. As a result of its trenchant assertion of EU supremacy and of its own authority to determine the legality of acts of the institutions, constitutional pluralism (which had celebrated indeterminacy on the question of the final arbiter) can be presumed dead (Kelemen). This is normatively desirable, any other solution jeopardising a basic principle of member state equality (remember Fabbrini from lecture 6). In any case, in the final analysis, Member States retain the right to withdraw, retaining ultimate *political* authority.

Wilkinson is skeptical of any such celebrations, as not only premature, but missing the bigger picture of the transformations in political authority that have accompanied the Euro crisis response and has been rubber stamped by the European court.

Kilpatrick's paper broadens out the discussion. First she considers the national challenges to the Eurocrisis measures from the other side than those raised in the German Court - their violation of cherished social rights in debtor states (loans were subject to strict conditionality or 'austerity'). Second, she considers the links between Euro crisis measures and constitutional crisis in Hungary. This raises a distinct but related question of the extent to which the EU *should* get involved in the domestic constitutional life of its Member States, where democracy and the rule of law might be threatened (Müller).

Reading:

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R. Daniel Kelemen, 'On the Unsustainability of Constitutional Pluralism' Forthcoming in *Maastricht Journal of European and Comparative Law*

M. Wilkinson, 'Constitutional Pluralism?' (to be distributed)

C. Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' EUI working papers, Law 2015/34

J. W. Müller, 'Should the EU Protect Democracy and the Rule of Law Within its Own Member States?' (2015) *European Law Journal*

Questions:

1. What is constitutional pluralism?
2. Does the OMT decision signal its end?
3. Can juridical supremacy be divorced from political authority?
4. How can constitutional rights across Europe best be respected?
5. To what extent is it legitimate for the EU to intervene in the domestic affairs of a Member State? What is the best means for enforcing the rule of law and democracy within Member States?

Lecture 12: Europe's Future: Five Un-Easy Pieces

In this last lecture we will bring together all the lessons from the different weeks in the course, and discuss possible ways of thinking about the EU's future. Each proposal takes a relatively similar view on the problems of the EU, but have different suggestions for the possible solution. Many of the arguments, as we will see, have been discussed throughout this term. You are also invited to make your own contributions as to the problems of the EU or its solutions.

Dawson and De Witte call for a far-reaching reform of the EU's institutional, normative and legal set-up, which should centre on the creation and institutionalisation of social and political conflict. Habermas offers a more conceptual analysis of how the European citizen can be understood as the pivot for the development of a genuine European democracy. Scharpf offers an interesting and nuanced counterpoint. In his view, the crisis has highlighted the need to overcome the joint decision traps in the EU, and requires a central role for executive actors (Member State governments). Streeck, on the other hand, attacks Habermas for the latter's misunderstanding of the nature of the crisis: this is, Streeck suggests, due to the nature of capitalism – which even a transnational democracy cannot solve. Varoufakis, in line with Streeck's diagnosis, thinks that only a transnational democracy can tame capitalism in the 21st century.

Required Reading:

Mark Dawson and Floris de Witte, 'From Balance to Conflict: A New Constitution for Europe' (2016) *ELJ* forthcoming.

Jürgen Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible' (2015) *21 European Law Journal* 546–557

Fritz W. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) *21 European Law Journal* 384–405

Wolfgang Streeck, 'Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas' (2014) *21 Constellations* 213–221

Yanis Varoufakis (tbc)

This last session will involve a general discussion on these pieces, come prepared to defend (at least) one of them, or to propose your own idea!

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Credit Transfer: If you are hoping to earn credit by taking this course, please ensure that you confirm it is eligible for credit transfer well in advance of the start date. Please discuss this directly with your home institution or Study Abroad Advisor.

As a guide, our LSE Summer School courses are typically eligible for three credits within the US system and 7.5 ECTS in Europe. Different institutions and countries can, and will, vary. You will receive a digital transcript and a printed certificate following your successful completion of the course in order to make arrangements for transfer of credit.

If you have any queries, please direct them to summer.school@lse.ac.uk