Rule-of-Law Conditionality and Resource Mobilization – the Foundations of a Genuinely 'Constitutional' EU?

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The primary function of a constitution, whether written or unwritten, is not to constrain power but, in fact, to 'constitute' it. What does it mean for power to be 'constituted'? What are the normative or practical implications of this 'constitutional' phenomenon?

The emergent dimensions of the coronavirus response in the EU — most importantly, the extensive common borrowing contemplated by Next Generation EU (NGEU), along with the effort to institute 'rule-of-law conditionality' to govern distribution of its proceeds — should remind us all why these questions are increasingly insistent in European integration.

The compromise negotiated by the German Presidency and agreed at the European Council's meeting of 10-11 December has been roundly criticized (e.g., here) for subordinating the hopes for a robust rule-of-law conditionality to the imperatives of NGEU. From our perspective, the result may put the EU on the path toward a genuinely 'constitutional' transformation, one truly worthy of the name, rather than persisting as a system that is unable to mobilize resources in amounts commensurate with the challenges facing it. It is also vital, however, that the proceeds be distributed in ways that uphold the Union's core values of pluralist democracy and the rule of law. This, in effect, was the question before the European Council summit, and the German compromise — which is certainly not beyond criticism — nonetheless moves the integration project in the right direction. The veto threat by Hungary and Poland in the lead-up to the summit, as well as their joint effort to water down the proposed rule-of-law conditionality (or at least defer its application until the CJEU could rule), demonstrates quite clearly that they have understood the genuinely 'constitutional' stakes.

The 'constitution' of power, in the most robust sense, entails mechanisms to extract and redirect ('mobilize') human and fiscal resources in a legitimate and compulsory fashion. Legitimate compulsory mobilization is the crucial element in the political metabolism of a community, one that enables it to convert social and economic resources into work for public ends. EU judges, lawyers, and legal scholars have long been accustomed to using a conceptual vocabulary that casts the integration project as if it were *already* constitutional. But the fragility of that project over the last fifteen years — from the failure of the doomed (and mislabeled) Constitutional Treaty, through the 'polycrisis' of the last decade (in the Eurozone, or as to refugees, Brexit, and democratic backsliding in certain member states), and

up to and including the insistent, more recent demands of climate change and the coronavirus pandemic — have all raised considerable doubts about the aptness of that 'as if'-constitutional understanding of the EU.

The main problem with this dominant legal discourse is its dependence on a category mistake. It confuses what we can call the 'constraint function' of constitutionalism with the actual 'constitution' of power in the most robust sense. All law constrains, and the mere fact that EU law has constrained the prerogatives of its member states does not mean that EU law is itself constitutional, even as it aims to ensure fundamental rights and the separation of powers. Rather, it is the member states, in the exercise of their own constitutional authority, that have decided to self-limit their powers for the sake of integration, and they have created a set of technocratic and juristocratic 'pre-commitment' institutions at the EU level (notably the Commission and CJEU, but also the ECB) to assist them in that task.

The category mistake of legal elites — this 'as if'-constitutional outlook — has arguably blinded many Europeans to perhaps the central contradiction of the integration project, one that has particular salience in the context of crisis. On the one hand, the member states have found themselves increasingly constrained in the exercise of their own constitutional authority; but on the other, the EU has been unable to fill the void — despite repeated crises — because it lacks genuine 'metabolic' constitutional authority in its own right.

As the two of us have recently written, despite the many challenges of the last decade of crisis, the EU's 'metabolic' constitution has remained almost entirely national, and thus fundamentally fragmented among its member states. This is best demonstrated by the traditionally small size of the EU budget (roughly only 1% of aggregated member-state GNI) as well as by the composition of the EU's purportedly 'own resources', 80% of which have been derived from member-state contributions, with the remainder coming from custom duties and designated taxes that are in fact collected nationally. In other words, there has never been a significant autonomous resource-mobilization capacity at the EU level. Perhaps more importantly, there has never been an EU tax collection service that 'wears the EU badge', so to speak, operating on the basis of the EU's own autonomous legitimacy rather than that of the member states.

The EU's ultimate dependence on the member states for fiscal mobilization is understandable, given that the national level has long been the exclusive locus of the sort of robust legitimacy needed to support this sort of 'metabolic' power. But the question today is whether the coronavirus pandemic is prompting changes that may lead to a more fundamental shift in the nature of EU governance.

The extensive common borrowing in NGEU, a sort of proto-fiscal mobilization capacity — short of taxing power, to be sure, but still considerable — would seem to point in that direction. Moreover, the combination of this borrowing capacity with the imposition of a rule-of-law conditionality of some kind leads us to reconsider our prior conclusion that the current situation falls short of the sort of 'critical juncture' needed to force a fundamental transformation of the EU. Even as the actual 'constitution' of power at the supranational level in the EU will remain an uphill struggle, there is an

argument to be made that the foundations of a potentially constitutionalizing dynamic are genuinely being laid.

The massive borrowing operation needed to finance NGEU (up to 750 billion euro) — by far the most significant such operation in the history of the EU — will make the Union one of the very largest bond issuers in the financial markets. The EU 'will see its balance sheet transformed from occasional issuer to market stalwart', according to one commentator. This extensive borrowing, even if temporary, will give the EU a capacity to mobilize fiscal resources on a scale that it has never previously enjoyed. This program may well give rise, in effect, to the long sought European 'safe asset' — a 'Eurobond' in all but name. These new bonds 'could boost integration between national financial systems, reduce the risk of runs on national bond markets, and help detangle the "doom loop" of interdependence among banks and local sovereigns'. Given the functional benefits this borrowing offers, it will not be surprising to see significant pressure — despite resistance from the usual quarters — to make similar operations a permanent feature of the EU fiscal landscape. Indeed, authoritative voices in Europe — namely the ECB's President Christine Lagarde and the ESM Managing Director Klaus Regling — have already advocated turning NGEU-type borrowing into a permanent instrument.

This capacity will, of course, still depend on the backing of taxes imposed and collected at the national level, drawing on the member states' more robust democratic and constitutional legitimacy. In this regard NGEU certainly does not involve any formal Europeanization of autonomous taxing authority. Nonetheless, NGEU will create tangible incentives to ensure debt sustainability through greater coordination of national tax legislation. And while this coordination will remain under the rubric of the 'own resources' decision adopted under Article 311 TFEU (requiring unanimity in the Council, mere consultation of the EP, and entry into force only upon the approval of the member states according to domestic constitutional requirements), the obvious functional advantages of common borrowing will be conducive to facilitate, over time, a *de facto* fiscal mobilization capacity in the EU that is much less fragmented among the member states than it is today.

With that capacity, moreover, could come a kind of polity-building power that reaches well beyond the sort of technocratic and juristocratic 'pre-commitment' authority that has underpinned European integration up to this point. That, at least, is the potential effect of the draft regulation on rule-of-law conditionality, as well as the draft Regulation on the Recovery and Resilience Facility and of their linkages to the future MFF 2021-2027 and Own Resources Decision, the latter two requiring unanimity for their adoption. The evident 'constitutional' resonance of these proposals — in the 'metabolic' sense we are using the term here — explains why the Polish and Hungarian governments have found this effort toward rule-of-law conditionality so problematic. No doubt rule-of-law conditionality is not new — it was widely used in the EU enlargement process and remains a tool in the distribution of structural funds. What is new, however, is the genuinely 'constitutional' scale of the supranational resource-mobilization that this new conditionality mechanism will support, vastly increasing the EU's collective leverage over the conduct of national governments. In so doing, the combination of NGEU and the rule-of-law conditionality may help to

create a new constitutional dynamic toward a new kind of post-pandemic EU, one that will have the effect of defining the boundaries of full membership in a much more robust sense than Article 2 TEU could ever achieve on its own.

There are considerable potential obstacles that could still inhibit or derail this dynamic, to be sure. In the first instance, there are the obvious legal hurdles. Hungary and Poland have pointed to a previously undisclosed opinion of the Council Legal Service (CLS) in 2018 to argue that any effort to enforce rule-of-law conditionality by way of a regulation adopted under Article 322(1)(a) TFEU would violate Article 7 TEU as the sole means of such enforcement under the treaties. Consequently, the two outlier member states argue that any such effort would in fact require a treaty change. Commentators have harshly criticized the 2018 CLS opinion, but the dispute recalls, as a legal matter, the very earliest of the so-called 'constitutionalizing' decisions of EU law in the 1960s. In *Van Gend en Loos*, the Court of Justice was confronted by a seemingly exclusive enforcement mechanism (the old Articles 169-170) but also had at its disposal a provision (the old Article 177) whose language was sufficiently capacious, even if somewhat vague, to ground an alternative enforcement mechanism. The Court opted for the latter precisely because of the functional advantages that this alternative enforcement mechanism provided to the cause of European integration. Will the Court opt for the same approach here? It remains to be seen. But the CJEU will be under enormous pressure from the EU25 as well as the EP to do so.

In the end, however, this dispute will be less about law than about politics, even if dressed up in the language of the law. Genuine constitutional change, as with any fundamental process of institutional change, always entails the replacement of an old 'rule of recognition' with a new one, a process that can never be fully justified solely by reference to the old 'rule of recognition'. Politics — values — will always overtake the law in the final moment of decision, even if dressed up in the language of the old law. Nonetheless, the effort to retain the language of old law and to operate within its forms is a key factor that typically differentiates legitimate and ultimately successful and durable processes of constitutional change from ultimately transient and ephemeral efforts. Hence the ingenuity of the current compromise on rule-of-law conditionality in the adoption of NGEU, relying as it does on the adoption of interpretative guidelines by the Commission (of admittedly questionable legal effect) as well as the prospective of an eventual Court ruling.

If this gambit succeeds, the EU will have successfully tied the mobilization of fiscal resources at a genuinely 'constitutional' scale to the enforcement of core values on behalf of the polity as a whole. In doing so, it will take significant steps to transcend the fragility of the 'as if' constitutionalism that has characterized the integration project to date.