The Charisma of the European Central Bank: From Political Sacrifice to Monetary Rituals

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Abstract: The article expands Paul Kahn's cultural analysis of the US Supreme Court's charisma to EU institutions and, in particular, to the European Central Bank. The aim is twofold: on the one hand, the intention is to show the rich potential of the cultural study of law for understanding different constitutional experiences; on the other hand, the aim is to show that political sacrifice may not be the only material for building constitutional imagination. As the analysis of the ECB's unconventional intervention into the Euro-crisis tries to establish, other forms of sacrifice might be conjured up, in a context where the constitutional order is held together more by rituals rather than violent commitments. Although the ECB does not enjoy sovereign authority, it has been able to maintain stable (though at a high price, not only metaphorically) the eurozone legal order.

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In this article, the approach of the cultural study of law is applied to the context of the European Union and one of its main institutions by exploring two arguments made in "Making the Case" (and also in previous works by Kahn). In particular, I intend to discuss two points. First, I want to test the argument made by Paul Kahn about the courts' charismatic authoritative function. This is not the first time that Kahn is putting forward this type of argument,[1] but I want to take the opportunity to discuss the interpretation of the highest judicial function from a cultural point of view with the aim of proposing a partially different reading of the charismatic function in contemporary constitutional orders, in practice using Kahn to go beyond Kahn. Second, I want to extend this point to the constitutional context of the European Union, where persuasion and charisma play out in different ways, in different institutions and, crucially, *to different addressees*. I will briefly try to sketch out why and how the equivalent role played by the Supreme Court in the US seems today to be, in the EU, in the hands of the European Central Bank. Yet, the grounds on which the charismatic authority of the ECB stand are of a different kind. Persuasion is played out according to a different rationality, which speaks first to markets and only secondarily to citizens. Under this aspect, the ECB does not need to persuade markets and citizens that its decisions are 'theirs', but – according to an output-based logic – that they are effective in preserving the form of life associated with the common currency. In the conclusions, it will be high-

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1 *Paul W. Kahn*, Putting Liberalism in Its Place, Princeton 2004, p. 232.

lighted that austerity has introduced a certain type of sacrificial logic – not understood as the potential exposition to the possibility of killing and being killed[2] – based on the ritualization of economic restrictions as normality. The latter can be understood only if an idea of sovereignty as exceptional decision is marginalised. Exceptionalism can be defined as the tendency to portray the grounds of a constitutional order upon extraordinary acts which cannot be contained nor validated by already constituted norms.[3] The latter is a frequent position adopted not only by Schmittians, but a whole array of other authors (e.g., Hannah Arendt often seems to imply that a new beginning operates as an exceptional moment). For this reason, in fact, the example of the authority of the central bank shows that the problem lies in the undergirding exceptionalist conception of sovereignty and its alleged (by the standard narrative of modern European constitutionalism) categorical difference with the institution of government.[4]

A. Beyond Conventionalism: A Cultural Take on Social Practices

Before proceeding to the analysis of the role of the courts and then of the European Central Bank, a brief summary of the main tenets of a cultural study of law is necessary. In the version elaborated and developed by Kahn,[5] the cultural study of law offers a refreshing angle through which one can observe the life of the law. The legal order is understood and observed as a social practice, but unlike legal positivist conceptions of social practices, Kahn's cultural approach presents them as worlds which can be reconstructed by observation through thick descriptions.[6] While for the legal positivist these practices are often a question of rule-following, for the cultural study of law legal practices come across as constitutive and supportive of webs of meaning, whose depth and width cannot be exhausted nor explained by these rules alone: 'these social practices are somewhat like games, in that they have rules and expected customs of behaviour that are the product of community's history'.[7] The problem with the positivist reconstruction of these practices is that they are often reduced to common agreement, that is, to a (social or legal) convention. This is probably the dominant approach among legal positivists[8] but, as a theoretical solution, this remains subject to issues of infinite regression.[9] In fact, social practices make sense as long as

2 *Kahn*, note 1, p. 244.

3 For an intellectual history see *Andreas Kalyvas*, The Politics of the Extraordinary, Cambridge 2009.

4 *Richard Tuck*, The Sleeping Sovereign, Cambridge 2016.

5 See mainly, *Paul W. Kahn*, The Cultural Study of Law, Chicago 1999.

6 A key point of reference is *Clifford Geertz*, The interpretation of Cultures, New York 1973.

7 *Kahn*, note 5, p. 35.

8 An essential text is *Andrei Marmor*, Social Conventions, Princeton 2008.

9 Marmor's work is illustrative of this issue: in *Social Conventions* he feels compelled to introduce the distinction between deep and surface conventions, but this move does not avoid the problem of the infinite regress. In fact, what lies behind deep conventions? Another deeper and more fundamental convention?

they are nested in a world of meaning. Therefore, the cultural study of law elaborates the structure of the imaginative possibilities of worlds of social and legal meanings. Here lies a key difference between a conventionalist and a cultural view of social practices. Both adopt an internal point of view in order to explain the emergence of the legal order, but their horizon of reference differs in a very significant way.

In brief, a cultural study of law (which is a social practice in itself, as Kahn often reminds us) goes beyond the idea that a social practice is a set of prescribed actions: 'it is the way of understanding self and others that makes actions meaningful'.[10] According to Kahn, it is impossible to separate action and belief when describing a social practice as 'every action rests on some set of beliefs; every belief makes possible a range of actions'. By looking at these reasons, one can understand why Kahn places so much emphasis on sacrifice: it is only through the exposition of the body to the marks (or, better, scars) of faith and belief that the symbolic forms of the constitutional order are substantiated and made explicit.[11] The constitution requires this commitment in order to be made a meaningful legal order.

The conventionalist inquiry reconstructs authority as a matter of agreed convergence of officials or people upon a shared activity. Ultimately (and this is why it is a conception of the legal order with an enormous appeal), the dispute is about what a convention is. The possibility of grounding the legal order on a convention allows the theorist to avoid questions of meaning and substance. Often, the outcome is that a social practice counts as a convention (as a constitutive one, to be more accurate) if there is an undergirding social consensus.[12] Opposed to that, the cultural study of law reconstructs authority as a matter of self-knowledge and self-understanding. For this reason, studying the law from a cultural perspective entails the reconstruction of the conceptual conditions that make the emergence of a social practice possible. Kahn, following Foucault, speaks of the 'historical *a-priori*': what are the conditions that make the emergence of a certain practice possible? Those conditions cannot be known in abstract but only by bounding the inquiry to particular examples of the social practice.[13] This is a powerful tool in the hands of the legal analysist because it immunises from undue generalisations such as the one René Girard's theory of the scapegoat seems to be exposed to.[14]

Yet, like the conventionalist picture of social practices, even this presentation of the cultural approach might concede too much to (1) a pacified convergence upon structures and (2) an intimate link between social practices grounding constitutional orders and the logic

10 *Kahn*, note 5, p. 37.

11 It is not completely clear whether Kahn admits a symbolic form achieved by a sacrificial action that does not require to put the body on the line, but only the giving up to something without a contractual obligation (e.g., sacrifice in an economic sense as in the jargon of austerity).

12 The classic view is offered by *John Searle*, The Construction of Social Reality, Oxford 1995.

13 Of course the general level of inquiring is unavoidable: Kahn notes, for example, that 'we need to investigate the shape of legal space and time generally before we inquire into particular kinds of space and time' (*Kahn*, note 5, p. 37).

14 *René Girard*, The Scapegoat, Baltimore 1989.

of sacrifice. It is important to remind that the historical *a-priori* is not a given semantic, but that its historical pedigree resonates with the idea of unlimited contingencies. A social practice, by definition, could have always been something else. In brief: the social practice could have taken up a different form. I do not dispute that this nuance cannot be addressed by the cultural approach to legal studies. To the contrary: within a cultural perspective there is a remarkable quantity of intellectual resources available for tackling this issue. There is also a shared assumption with a phenomenological approach: the reduction of complexity is a precondition for the creation of meaning. However, this position is exposed to two risks. The first one consists in universalising the politico-theological underpinnings of the cultural reading of constitutional orders, which would mean to make sacrifice and to make its logic necessary elements of every order - and not just contextual outcomes of a particular and concrete set of circumstances. The other risk, closely linked to the former, is to conceive acts of world-building as exclusively exceptional. To the contrary, the idea proposed here, is to enquire into the systems of meaning of every constitutional order without taking for granted that there is a common anthropological structure underpinning them (i.e., sacrifice might be the way to understand how constitutional orders are created and maintained, but there is nothing necessary about it). Moreover, the proposal here is to think the exception as functional to the construction and preservation of normality, rather than a moment of revelation. Following Schmitt, the exception is often assumed to give meaning to the rule.[15] However, one can conceive a cultural study of law focussed rather on the ordering qualities of normality. The exceptionality of certain practices or actions should be read as entirely functional to the consolidation of a social semantic of normality. This is what I intend to discuss the next section with reference to the charismatic function allegedly played by judges. In the following section, then, I will try to extend these insights to the analysis of the charismatic function of the European Central Bank in the eurozone.

B. Charisma and Rituals

One of the great insights of a cultural study of law lies in its capacity of understanding the boundaries of the legal imagination.[16] In societies based on the recognition that the law is sovereign, the legal imagination extends its grip into a series of cultural artefacts that are not immediately associated to the administration of law. For example, Kahn has shown in a powerful way how much the legal imagination can pervade the production and realisation of contemporary movies.[17]

However, not all the observed practices and institutions do have the same function within the legal imagination. The ability to draw a distinction between the roles of different

15 For Kahn's take see *Paul W. Kahn,* Political Theology: Four New Chapters on the Concept of Sovereignty, New York 2012.

16 For another investigation on the role of imagination cf *Martin Loughlin*, Constitutional Imagination, Modern Law Review 78 (2015), p. 1.

17 *Paul W. Kahn*, Finding Ourselves at the Movies, Princeton 2013.

institutions or objects is actually a dividend of a cultural understanding of the constitutional order. We might look at movies, novels, arts as *representations* of our identities and our way of seeing the world through law. These creations, as temporally and spatially defined processes of production, do work as narrative devices for telling over and over who we are. They also work as myth-making machines: their symbolism sustains a whole web of meanings without which the context of one's life would remain unintelligible. They also enhance and celebrate the point of the practice and therefore they operate as learning devices. By observing the representation of how the political and constitutional order comes into existence, we learn about it. Yet, the fruition of these objects, as helpful as it might be in strengthening the ordering properties of a certain imagination, does not require us to identify fully with them. To resort to Kahn's language, a movie is not supposed to *persuade* us that we are the authors of our legal order. If it works, it might simply remind us what the main tenets of our constitutional imagination are. By inquiring into the structures of meaning of the movie one can retrieve the boundaries of the constitutional imagination which make the actions represented in the movie intelligible.

This is the specific difference marking out certain institutions and certainly the Supreme Court (at least in the US):[18] to persuade citizens that they are the authors of a constitutional order ruled by law. It is important to note that persuasion is driven by the function of upholding popular sovereignty because the founding belief in the US constitutional order is based on the idea that the 'law is king' and the people are sovereign.[19] Kahn introduces the theme after a discussion of *Marbury v Madison*. His point is that this seminal case does not contain enough textual resources to explain why it has become the foundational case in US constitutional history. In other words: Why has a decision expressed in rather dry legal reasoning been able to bootstrap judicial review in the US legal order?[20]

Kahn rehearses here a relatively well-known argument about constitutional review. The connection lies between the constitutional identity of the people and its mirroring into the adjudicative process of reviewing the constitutionality of ordinary law. The connection between identity and institutions was already known to the Enlightenment generation. Both in the US and in France, at the time of their revolutions, the theme of the renewal of the institution as the consolidation of identity is quite common. For example, Sieyes' project for a constitutional jury (which was rejected during Thermidor) contains a reference to the undergirding constitutional identity through the periodical renewal of a fraction of its members. In the case of the Supreme Court, this is even more evident as the appointment process requires a solid majority in the Senate and it entails, once confirmed, a life-long tenure.

18 It is not entirely clear to me whether Kahn's argument concerns only the Supreme Court, or if it can be extended to the whole judiciary. In light of the structure of the US judiciary and given his constant references to courts and judges, I tend to think that the charismatic function is played out by all courts within the judicial system. Yet, the book discusses only Supreme Court case law.

19 *Paul W. Kahn*, The Reign of Law, New Haven 1997, p. 47-50.

20 Though the standard narrative of the creation of judicial review has been subject to revision: see *Bruce Ackerman*, The Failure of the Founding Fathers, Cambridge, Mass. 2005.

The temporality of the judicial office transcends the electoral process and invites to connect the composition of the Supreme Court to the identity of the American people conceived as an intergenerational process. Kahn reads into this peculiar feature of the American Supreme Court the symbolic mark of sacrifice: Justices give themselves up to the Constitution when their appointment is confirmed. Along the same lines, Bruce Ackerman has also attributed to the Supreme Court the task of the intergenerational synthesis between different constitutional moments, that is, between fundamental changes in the constitutional identity of the people.[21] The function of the Supreme Court is to tie different constitutional moments in one coherent narrative and offer, in this way, a mirror to the sovereign people.

According to Kahn, Marbury was able to introduce a crucial novelty (a new beginning for legal doctrine, as in the language of the book) such as the judicial review of ordinary law because it persuaded the people that the opinion had been written by the authors of the law: the people themselves. But how is the persuasion supposed to work? This is an unavoidable question as a lot is based on the persuasive rhetoric deployed by the Court, given the recognition that even transformative judgments are usually contested by dissenting opinions.

Kahn spends at least two long chapters reconstructing how and what makes an opinion persuasive. But in line with the cultural study of law, he examines also the conditions which make possible the 'performative success' of an authorial judgment by the court. The answer is that the narrative offered by the Court has to speak with 'the fullness of charismatic presence'.[22] Charisma is here employed in a politico-theological sense as that which 'stands between the sacred and the profane'.[23] Charismatic presence performs an intermediation function: it renews the belief that the source of law bears the mark of the sacred. As known, Kahn believes that (at least for the US experience), the mark of the sacred is a way to remember the sacrifice behind the enactment of the Constitution and of the other sacrifices (like those of the Civil War) which drove major constitutional changes in the history of the US. In this way, the puzzle of the composition of the rule of law and popular sovereignty is apparently solved: to live according to the principle of sovereignty is to live under the law (under the condition that the law is self-authored in the peculiar meaning given by Kahn to this expression). The authorship of popular sovereignty carries the weight of the legitimacy of an opinion as long as the latter can support that particular belief. Otherwise, in the absence of an appropriate faith, 'following the law can become a hollow ritual'.[24] The latter statement means that a constitutional order without the support of an appropriate faith is built on quicksand.

In light of the previous remarks, it is clear that there is no rulebook of charismatic behaviour. The charismatic function, it is noted, is *enacted* rather than represented. Apparent-

21 *Bruce Ackerman*, We the People: Foundations, Cambridge, Mass. 1991, ch. 6.

22 *Paul W. Kahn*, Making the Case, New Haven 2016, p. 84.

23 *Kahn*, note 22, p. 84.

24 *Kahn*, note 22, p. 85.

ly, its success cannot be measured according to criteria of justice or correctness (i.e., whether a ruling is correct or wrong). The success of an opinion is performative: if it persuades the people that they are its ultimate author, then it can be deemed to be a charismatic achievement obtained by making the sovereign present.

But how can we judge the success of a performative? The ritualistic and belief-making elements of the practice are highlighted several times by Kahn. Reason – we are told – cannot fully determine the content of practices and beliefs. At the end of the day, this is a reconstruction heavily indebted to negative theology: 'If this all seems mysterious, it is because it is. It is a matter of faith and belief, of rituals that maintain that faith, and of rhetoric that gives it expression'.[25] It seems we are back to the difficulties that affected Austin's conventionalist reconstruction of performatives. While insisting on the conventional nature of performative acts, he was forced to recognise that 'it is difficult to say where conventions begin and end'.[26] In fact, not even institutional events can be made real by a performative act, as it remains impossible to separate them from facts, or to use Austin's terminology, the *illocutionary* and *perlocutionary* moments of the speech act.[27] At times, Kahn seems to concede the same point for the validity of rituals as if their performativity were to be a matter of magic rather than practices involved in the production of normality.[28]

However, despite this almost mystical closure of discourse about the grounds of ritual practices, Kahn does not stop there: in fact, chapters 4 and 5 of *Making the Case* explain how persuasion can work in the US constitutional culture. In other words, within the possibilities of a historical *a priori*, a series of narrative devices are analysed in order to offer a classification of the possible narrative moves available to the Court. Moreover, a couple of cases in chapter 2 are discussed as instances of Supreme Court's failures in persuading the American people that its decisions were their (of the people) law. *Bush v Gore* is flagged up as the paradigmatic instantiation of a failed attempt at persuasion. Note that Kahn's remarks on the case are not limited to a sociological recognition of the failure of the decision and, more specifically, the opinion. *Bush v Gore* might not have been recognised as belonging to the constitutional canon by US constitutional lawyers, but the reaction of the institutions was not comparable to the one of Lincoln before *Dred Scott*. Moreover, Kahn notes that the Court could have adopted at least three different narratives and its failure is due to its inability to speak with the voice of the sovereign.

25 *Kahn*, note 22, p. 87.

26 *John Austin*, Doing Things with Words, Oxford 1962, p. 118.

27 The cultural study of law is less opened to this type of criticism as, unlike conventionalism, it would still require a shared understanding which is not reducible to the conventionalist agreement. For the cultural study of law, performatives are effective only as long as they are supported by a shared understanding concerning concrete forms of life.

28 For example, discussing Marbury, he notes that it 'can be likened to a great magic act. The trick of the opinion is to make its drafter disappear, leaving us staring at the Constitution- or more accurately, persuading us that we are staring at the Constitution' (*Kahn*, note 22, p. 70).

Yet, at the end of this dense chapter, we are reminded that to understand the reverence for law in the American imagination sheds a revealing light upon 'the exceptional nature of the judicial opinion'.[29] Reverence for law is what supports the connection between the sacred and the profane and that makes the Justice a bearer of sovereignty rather than a mere lawyer. The gift of experiencing the opinion of the Justice can be received only by those who are still in the grip of the sovereign presence.

Kahn's text, however, invites also a potentially alternative reading which might not need to establish a close connection with the sacred and the exceptional: 'Courts persuade us of their access to […] truth not by logic but by the rituals and beliefs that go into the production of the opinion… We need to read the opinion as it shows itself in our social practices, which begin with the judicial rite of passage that is the confirmation process, continue in the symbolism of the courtroom, and then bring forth the opinion that takes us from the position of reader […] to that of author'.[30] Beliefs and faith are taken to be the supporting elements of this specific social practice. But its ritualistic tenets might suggest a reading that does not rest on the grounds of sovereignty and its exceptionalist understanding.

Schmitt's development of the concept of sovereignty, while clearly located on the exceptionalist side, betrays also an anxiety for the creation of normality.[31] Legality cannot rest on a norm because every general norm demands a normal, everyday frame of life - given that there is no norm applicable to chaos. In fact, sovereignty has to guarantee the 'totality of the situation'. The exception has to be managed and made productive for the ordering properties of the institutions.[32] The ritual of the Justice's confirmation, for example, can be seen as the 'signal of an order of law, not politics, for those who are present'.[33] If it works (meaning: if it is not received by sheer indifference), it symbolically establishes the constitutional function of the Justice. Exceptional attributes are given to the Justice and its functional role is buried (and made invisible – Kahn rightly notes that the narratives adopted by the Supreme Court are often referring to the dynamics of seeing/not seeing). Catherine Bell, in her study on ritual practices, has called this work of separation and distinction 'ritualization', suggesting in a rather convincing way that the basic moment in rituals should be sought, more than in their content, in the need to fix a boundary and to mark a difference: 'I will use the term "ritualization" to draw attention to the way in which certain social actions strategically distinguish themselves in relation to other actions […] As such, ritualization is a matter of various culturally specific activities, for [..] creating and privileging a qualita-

29 *Kahn*, note 22, p. 87.

30 *Kahn*, note 22, p. 85.

31 For this reading, see *Mariano Croce* & *Andrea Salvatore*, The Legal Theory of Carl Schmitt, Abingdon 2013.

32 This discourse is translated, in the late Schmitt, into a geopolitical meditation on the role of the line and the importance of qualifying the extra-European space as the one 'beyond the line': *Carl Schmitt*, The Nomos of the Earth, New York 2006.

33 *Kahn*, note 22, p. 64.

tive distinction between the sacred and the profane'.[34] All of this resonates clearly with Kahn's interpretation of the judicial role. But in order to avoid any misunderstanding, it should be immediately added that a ritual must be able to constitute a model, or more exactly, a paradigm for ordinary practices. Separation does not entail absence of connection. After all, a total separation between the sacred and the profane would make the ritual, whose task is to stabilize the social order, totally ineffective. If the bridge between the sacred and the profane is stretched too far, the ritual will lose traction precisely because it won't be able to function as an ordering paradigm.[35] This is quite a common risk for those writing in the tradition of political theology because they are usually prone to take at face value the distinction between sovereignty and government.[36]

Is the ritual then something close to an anthropological universal? Or are functional equivalents available? This is a difficult question to answer, although many studies highlight the presence of some form of ritual in every observed society;[37] yet, the question has not been settled and cannot be addressed here.[38] The point to bring home is that the ritual of judging is certainly understandable only within 'our social practices' since it is partially constitutive of their normality. The production of normality is the point of the ritual: limiting the disruptive effects of the openness to absolute contingency. In fact, the ritual of judging contains the risk that communicating the order might display its conventionality, 'revealing the incontrovertible truth that everything that can be *said* can equally be *negated*'.[39] In this way, the opinion of the Court (*this* opinion, *these* judges) is translated into *the* voice of the sovereign people. Kahn is right to note that only the exceptional gift of *delivering* the opinion is a sign of contact with the sacred. However, it should be added that this cannot be obtained at the cost of losing contact with the ordinary. Maintaining the connection between the sacred and the ordinary is not a work of magic or miraculous action, but the construction of a normality that cannot be separated from ordinary practices. Therefore, charisma does not belong fully to the exceptional dimension, but works as a bridge between the ordinary and the sacred.[40]

34 *Catherine Belle*, Ritual Theory, Ritual Practice, Oxford 1992, p. 74.

35 *Massimo de Carolis*, The Anthropological Paradox, Abingdon 2018, p. 67.

36 See section 4.

37 Cf. *Roy Rappaport*, Ritual and Religion in the Making of Humanity, Cambridge 1999.

38 See for a nuanced treatment *Walter Burkert*, The Creation of the Sacred, Oxford 1998.

39 *De Carolis*, note 35, p. 65.

40 For the sake of clarity, it should be added that Kahn does not disagree with this statement, but only with the implication that the bridge does not need to be built with sacrificial materials: *Kahn*, note 1, p. 252-254.

C. The Austere Charisma of the European Central Bank

What is the potential of the idea of charismatic authority when studied from the cultural perspective? It is certainly remarkable, in particular for constitutional studies.[41] One wonders, for example, whether the authority of the President of the United States is a matter of charisma or, to put it in different terms, whether it is the office or the person who makes it charismatic. In the case of courts, it seems to be the office rather than the person. Perhaps for political institutions the question remains more controversial. Kahn has often discussed in his works the speeches and the actions of key figures of American constitutional history. For example, Lincoln is often presented as the epitome of a figure who does not just represent but who embodies the voice of the people. It would be interesting here to compare the charismatic role of the judiciary with the politically charged charismatic role of the President. Should the difference be seen in the different modalities of potential self-sacrifice? The President literally embodies sovereignty by exposing himself to the risk of being murdered while the Justices simply take up a new persona by an oath for life.

Or is the difference given by the modalities of delivering the voice? Prophecy is at times the transmission belt of the sovereign voice which challenges the *status quo* and it seems to be a common modality of transformative presidencies[42], while the Supreme Court seems to be more concerned in relating the sovereign voice to temporal continuity, that is: past, present and future (in which case transformation is then portrayed as renewal).[43]

Be that as it may, the idea of charismatic institutions has a wider comparative potential.[44] It can teach us many things about the nature and roles of other institutions in different constitutional orders. This is indeed one of the greatest dividends of the cultural study of law. Kahn is adamant in stating that there is no equivalent to the American experience among European Union courts as there is no equivalent in the EU to the sacrificial ethos of American constitutionalism.[45] This is probably an accurate judgment but it underestimates the capacity of effective mobilisation of EU institutions.[46] I believe that a cultural study of

41 A recent study on the constitutionalisation of charisma is *Bruce Ackerman*, Revolutionary Constitutions, Cambridge, Mass. 2019.

42 *Stephen Skowronek*, The Politics Presidents Make, Cambridge, Mass. 1993.

43 Though, again, Kahn is very keen in stressing the role of Lincoln in crafting a political rhetoric which 'links each generation to its predecessors and ultimately to the revolutionary origins of the nation in a collective threat of political martyrdom': *Kahn*, note 1, p. 244.

44 *Benjamin Berger*, Narratives of Self-Government in *Making the Case*, The Journal of Appellate Practice and Process 18 (2017), p. 89.

45 For a cultural study of EU integration through law see *Ulrich Haltern*, Integration Through Law, in: Antje Wiener/Thomas Diez (eds), European Integration Theory, Oxford, 2004, p. 177.

46 This is the reason why the critique of the attempts made by the EU to appear like a sovereign entity made by *Ulrich Haltern*, Pathos and Pathina, European Law Journal 9 (2003), p. 14, shall now be tempered. This is not because the EU has become a sovereign legal order, but it has certainly showed that it is more than an international organisation. On the constitutional nature of the EU as a *Bund* (federation) see the brilliant analysis by *Olivier Beaud*, Théorie de la Fédération, Paris 2007; and see the original analysis by *Signe Larsen*, The European Union as a Federation: A Con-

the European Union legal order would locate the charismatic institution (if there is any) in the European Central Bank (ECB) rather than in courts. This is not only because the ECB is more insulated from member states' pressure and it is more federal in design. Indeed, within the wider constellation of the new economic governance of the eurozone, the reaction to the crisis has shown the power of the ECB to mobilise resources and actors.[47]

The managing of the eurozone crisis has proved that the European Central Bank had both the institutional capacity for action and, at the same time, a reserve of credibility amongst politicians and (some sections of) the European peoples. Clearly, the European Central Bank does not work as a connector between the sacred and the profane by resorting to the language of political sacrifice (understood, as noted before, as the potential for killing or being killed), but it still operates as the symbolic mediator of an attempt of building European identity around the common currency. An analysis of the ECB and its constitutional relations within the wider EU legal order highlights that the institution has represented itself as the guardian of the core monetary constitution upon which political unity is supposed to be expanded. The officials of the ECB have become so confident with the role of the institution that they have recently started presenting the institution as the bank of the people of Europe.[48]

As known, the story of the euro as an instrument of integration dates back to a quite distant time by now. Attempts to root the euro into European history have made sure to embed it within the epic narrative of European integration.[49] But most importantly, the common currency has become the symbolic centre of Europe, consisting of a moral fabric whose centre of gravity is a culture of economic and political stability. The latter is functional to establishing a new constituency within the European constitutional order: the *Marktvolk*.[50] In other words, the constitutional order of the EU is not only addressed to the member states' citizens, but to certain markets (financial and non-financial as well) whose dictates strongly influence many EU initiatives. Hence, as Streeck has noted, the EU addresses the concerns of its citizens by pleasing markets and transforming social integration into market integration. As we shall see, this implies that the ECB has to persuade markets in the first place and, if successful in doing this, it will be able to persuade citizens as well.

stitutional Analysis, PhD Thesis LSE 2018, etheses.lse.ac.uk/3787/ (last accessed on 19 September 2019).

47 An in-depth analysis of the constitutional effects of the Euro-crisis is offered by *Thomas Beukers/ Bruno de Witte/ Klare Kilpatrick* (eds), Constitutional Change Through Euro-Crisis Law, Cambridge 2017.

48 *Hjalte Lokdam*, Is the European Central Bank Becoming a Central Bank for the People of Europe?, Verfassungsblog (2016), available at https://verfassungsblog.de/is-the-european-central-bank-becoming-a-central-bank-for-the-people-of-europe/_(last access: July 1, 2019). Lokdam rightly notes the emphasis on people rather than peoples.

49 For the story of the pre-common currency era see *Emmanuel Mourlon-Droul*, A Europe Made of Money, Ithaca 2012.

50 *Wolfgang Streeck*, Buying Time, London 2014, p. 79-81.

All of this is supposed to be performed for one of the highest European goods, i.e., economic and financial stability.

This novelty is coupled with the transformation of the European state from a fiscal to a debt state. As known, in the former case political representation is rooted in the State's capacity to collect taxes, while in the latter, the state becomes responsible before markets for its capacity to persuade them of the financial solidity of its public debt. These constitutional and political transformations have paved the way to introduce the currency as the framing device for governing, at least within the eurozone.[51] In fact, the preservation of the currency (which, according to mainstream narrative, allows member states to fund themselves on financial markets) requires certain sacrifices from citizens in order to rationalise public expenses. Solidarity is therefore substituted by an ethic of austerity whose core is a demand for European citizens to live with less resources because the majority has lived 'beyond their means'.[52] As put by a commentator before the inception of the currency, 'the euro is ... not just a currency but a meaning. However, this meaning will not be built solely by means of financial messages but will also take shape through narrative […] it is therefore a mistake to tell people that what they will be sharing is only a currency; they have to be *persuaded* that the European integration process means sharing something more'.[53] This is very close to attributing a sacred symbolic status to the currency. The constitutional translation of this status can be seen in the remarkable forms of autonomy and independence conceded to the ECB, an institution with the complete monopoly of control over the common currency.[54] The constitutional doctrine of central bank independence lies at the core of the euro as a form of government, because it detaches fiscal policies from monetary policies and in this way affects the basis of political representation. The separation of monetary from fiscal policies allows the ECB to become the guardian (if not the priest) of the culture of stability within the euro zone because it allegedly insulates the managing of prices from short-term driven political interests. The institution itself, through its own legal office, has even capitalized its outstanding independence status by claiming that the ECB is an autonomous 'constitutional order' within the EU (see, paradigmatically, the *OLAF* case) and, accordingly, not subject to ordinary forms of political or legal accountability.[55]

51 *Omar Chessa*, La costituzione della moneta, Napoli 2016, p. 262-293.

52 *Mark Blyth*, Austerity. The History of a Dangerous Idea, Oxford 2013.

53 *Vicente Perez*, The Euro as a Political Communication Process: Quality Requirements, 22 Journal of Consumer Policy 22 (1999), p. 140.

54 For an analysis of the ECB's outstanding constitutional autonomy see *Chiara Zilioli*, The Law of the European Central Bank, Oxford 2001. For a sobering account of the rise of central banks' power see *Paul Tucker*, Unelected Power, Princeton 2018.

55 See the *Olaf case* (European Anti-Fraud Office), Judgment of 10 July 2003, *OLAF,* C-11/00, EU:C:2003:395, where the ECB stated that its independence allowed it to set up its own antifraud investigation and the recent appeal to immunities and privileges for its archives (on the archives of national central banks). For an insightful analysis see *Matej Avbelj*, The European Central Bank in National Criminal Proceedings, European Law Review 42 (2017), p. 474.

Nonetheless, the euro crisis, which soon affected both states' public debts and national banking systems, exposed the contradictions of the design of the common currency. The euro is built on shaky ground, as it is not tied to any form of common taxation,[56] and it is not deemed to be an optimum currency area. Moreover, according to the TFEU (art. 123), the ECB cannot act as a lender of last resort and, according to art. 125, the Union is not allowed to bail out a Member State on the brink of default. Nonetheless, it is the second strongest currency at the global level and even in the darkest moments of the crisis, where the consensus for the common currency would shrink visibly, it would never go below the level of simple majority (and this was the case even for Greece). Given the devastation brought about by the governing mechanisms associated to the common currency (e.g., the pact of growth and stability, the European Stability Mechanism, the Fiscal compact),[57] support for the euro has never been seriously weak. It was also quite revealing to see how many key figures of EU politics (Merkel, but also Sarkozy as well)[58] stated openly that the collapse of the euro would be equivalent to the end not just of the eurozone, but of the EU itself. In other words, important components of the political imagination in the EU could not conceive a Union without the common currency. This is reflected even in the Treaties. As known, there is a dedicated article for Member States with the intention of exiting the Union (art. 50 TEU, used for Brexit), but there is no procedure to exit the euro. This is because the 'myth' of the irreversibility of the euro is a constitutive factor of the current EU constitutional imagination.[59]

The ECB has become the mediating institution in the ritual of monetary policy and, in exercising this role, it has risen to the status of the guardian of EU stability. Such a task has long gone beyond the control and review of the inflation rate and it has now expanded to a point that includes the publication of its reports and its executive boards' meetings as instruments of persuasion that are clearly directed to markets first and only secondarily to citizens. It would have been impossible to imagine, 20 years ago, something similar to Mario Draghi (the current President of the ECB) actions in the midst of the eurozone crisis in September 2012. In a rather Schmittian vein, during a press conference following a gov-

56 On the constitutive link between centralised fiscal power and the rise of State money see *Christine Desan*, The Constitutional Approach to Money: Monetary Design and the Production of the Modern World, in: Nina Bandelj/ Frederick Wherry/Viviana Zelizer (eds.), Money Talks, Princeton 2017, p. 109.

57 For a reflection on how the measures adopted to manage the crisis changed the constitutional balance of the EU see *Mark Dawson*/*Floris de Witte*, The Constitutional Balance of the EU after the Euro Crisis, Modern Law Review 76 (2013), p. 804.

58 Sarkozy was very vocal during the euro crisis and established a clear connection between the common currency and peace. He tapped into a well-established narrative about the historical meaning of European integration, warning that the implications of a failure of the euro would be unimaginable and earth-shaking. Those referring to the end of the euro are oblivious of Europe's past of "barbaric" wars.

59 For a perceptive analysis see *Michael Wilkinson*, The Euro Is Irreversible!.. or Is It?, German Law Journal 16 (2015), p. 1049.

erning board meeting, he stated that 'we (the ECB) will do whatever it takes to save the euro', and then added immediately: 'and, believe me, it will be enough'. Through this statement, the ECB declared that it was ready to purchase government bonds issued by States of the euro area on secondary markets, subject to certain conditions which included, first, that the concerned states had to be subject to financial assistance, by either the EFSF (European Financial Stability Facility) or the European Stability Mechanism (ESM). Second, no quantitative limits for the amount of purchases of these bonds were announced. Third, the ECB would act in the same way as any private creditors and therefore would not benefit from a special status as public actor. Following the announcement, the volatility of the interest rates paced down, and until today, the OMT programme has never been activated, and the programme itself has now been overcome by different versions of 'quantitative easing', a staggering programme for buying banks' and governments' bonds on secondary markets. Part of the novelty of these claims has to be seen not only in the unconventional measures (Outright Monetary Transactions Programme, Quantitative Easing) adopted by the Governing Council of the ECB, but also in the fact that acts of communication (performative acts) such as the press conference just mentioned would become the subject of judicial review by the Court of Justice of the European Union (CJEU). But in this case, the act under scrutiny was an informal act of the ECB which announced an unconventional (i.e.: not foreseen explicitly by the Treaties) programme for supporting the Member States' public debts which would come under speculative attack. In *Gauweiler*,[60] the CJEU took up another confrontation with the German Constitutional Court and addressed the latter's doubt about the legality of the ECB's intervention (in particular in violation of article 123 and 126 TFEU). Interestingly, the Court used proportionality analysis as the main methodology to address the question of the illegality of the OMT programme. In accordance with the Advocate General's advice, the CJEU acknowledged that since the ECB is supposed 'to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion'. The question, at this stage, obviously concerns how to harness such discretion in a way which remains compatible with the rule of law. The CJEU suggests a procedural test of proportionality in order to check the legality of the ECB's discretion. As for what concerns the suitability step of proportionality review, the Court held that 'it does not appear that that analysis of the economic situation of the euro area is vitiated by a manifest error of assessment'.[61] The point of technical expertise is again conjured up at this point: 'given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it uses its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy'.[62] As for the second step of proportionality review, the necessity of the OMT programme, the CJEU ruled the action of the

60 Judgment of 16 June 2015, *Gauweiler,* C-62/14, EU:C:2015:400.

61 Judgment of 16 June 2015, *Gauweiler,* C-62/14, EU:C:2015:400, paragraph 74.

62 Judgment of 16 June 2015, *Gauweiler,* C-62/14, EU:C:2015:400, paragraph 75.

ECB did 'not go manifestly beyond what is necessary to achieve its objectives'. The ECB had the expertise to decide if and when a bond-buying programme may prove necessary in order to avoid the disruption of the monetary policy transmission. However, given that it is impossible to establish in advance how long it will take to support a Member State's bonds on the markets, it seems that the necessity of the programme and the absence of possible alternatives have not been fully appreciated by the CJEU. Clearly, the Court has recognised an enormous margin of discretion to the ECB as the ultimate guardian of the stability of the eurozone and, as such, of the stability of the European Union. The complexity of monetary policies can be addressed only by an institution acting according to a logic that, upon closer scrutiny, is everything, but inspired by proportionality. Rather, in the language used by Draghi ('whatever it takes') one can hear echoes of sovereign power. The controversial actions undertaken by Draghi and the ECB seem to have achieved what they intended to obtain: preserving the stability of the eurozone and, hence, ensuring the preservation of the EU constitutional order. This has had consequences (of legal and political nature) that go well beyond the concerns of financial markets and the banking system. Of course, the actions of the ECB did not go uncontested: the challenges came mostly through the judicial channel, in particular because of the German Constitutional Court, and for this reason the ECJ was brought into the picture in order to bestow a pretence of legality on the Bank's unconventional policies. Remarkably, the legal reasoning of the Luxembourg Court was very thin (given its importance, the judgment is really short and the proportionality test left underdeveloped in its third prong) and prone to concede to the ECB an enormous amount of discretion. The latter point cannot be underestimated: the independence of the ECB was initially justified by its expertise and the idea that the governance of the euro was rule-based (hence, inviting no discretion); in this judgment, the Court has simply rubber-stamped the Bank's self-redefinition and has taken the fact that markets were persuaded and speculation calmed down as one of the measures of the validity of the ECB's move. At this point, it is possible to identify the relevant difference with Kahn's reconstruction of the US Supreme Court's charisma: in the case of the EU, the persuasion is a matter of output realisation and the performative success of a charismatic action is not given by a sense of shared 'authorship' among citizens, but by the reactions of markets which is compatible with the dominant culture of stability. At one level, there is still a non-contractualist logic behind the euro legal order, as the new economic governance of the EU and the unconventional policies of the ECB come with certain economic sacrifices imposed upon EU citizens. Constitutionally, the problem is not that the sacrifice required is not investing citizens' bodies. As noticed in the first part, there is a culture of stability built around the common currency and the sacrifices required are necessary in order to maintain that stability. The problem is rather that there is no European political recognition of the sacrifices (for example in terms of solidarity or compensation mechanisms) which then tend to be perceived more as an undeserved form of punishment than an achievement.

Although discourses on the link between the currency and European identity have often been shifting across three different types of identity (ethnic, civic and cultural), the ECB

has increasingly presented itself as the guardian of that link.[63] Such an effort has been conducted with many available means, legal and extra-legal. The capacity of the ECB of mobilising those different instruments and get away with it (although, of course, facing severe criticism at the same time) seems to confirm that, in times of crisis and emergency, it has been the most authoritative and charismatic institution within the EU. The ECB has made sure that the governance of the common currency would be turned into a morality play inspired by austerity and stability. To resort to the terms used in the previous sections, this move has made sure that even exceptions would be integrated into normality.[64] In fact, Draghi's famous statement has not amounted to a deep constitutional change of the eurozone order, or at least not of its main objectives. More accurately, the ECB's unconventional measures are a borderline legal intervention in support of the existing eurozone material constitution. Its purpose was to save and preserve a culture of stability and austerity. As such, the constitutional meaning of Draghi's intervention was completely within the already constituted horizon of financial stability.

However, the linkage between currency and collective identity remains an extremely contingent cultural achievement. As such, it needs to happen on a systematic basis in order to produce sustained institutional and social effects. Since this has not been the case in European monetary affairs, 'the transubstantiation of the euro into a matter of European identity has been cursory at best'.[65] It is clear, at this point, that the ECB cannot afford to adopt unconventional decisions which would be ineffective and unpersuasive as *Bush v Gore* was. In the eurozone, persuasion also works according to how it is performed, not only by whom. This might include more informal interventions, such as press conferences, press releases, interviews and more formal interaction with other institutions, such as appearances before the European Parliament or some national parliaments in order to build political consensus for the Bank's approach to financial stability. Yet, the current wave of anti-European political movements and parties that is threatening EU stability is the proof that the ECB's achievement is not as solid as it might appear in the first place.

D. Central Banking between Sovereignty and Government

The cultural study of law can give us important insights into the features of essential institutions of a constitutional order. But it is important to be aware of the type of logic that lies behind the formation and development of a constitutional culture. Kahn has aptly reconstructed the conditions which make the emergence of a certain constitutional imagination possible. Perhaps, he is right in identifying the ground of American constitutionalism in a sacrificial logic. It might explain better than conventionalism or social contract how consti-

63 *Carlo Tognato*, Central Bank Independence, Basingstoke 2012.

64 For a different account which puts emphasis on the use of emergency powers to transform the constitutional essentials of the EU see *Jonathan White*, Emergency Europe, Political Studies 63 (2015), p. 300.

65 *Tognato*, note 62, p. 101.

tutional orders hold together. The logic of conventionalism and contractualism is one of sheer reciprocity. Kahn notes that this type of logic cannot glue together two fundamental institutions: family and political community.[66] Only the willingness to self-transcend oneself (to self-sacrifice) can give material form to the constitution.[67] However, it is not clear whether the importation of such logic into the constitutional order can be read in fully exceptionalist terms. It seems possible to reverse the order of that reading and to harness the cultural study to an understanding whose main concerns are normality and its ordering properties. Within this view, it would still be possible to ask citizens some form of sacrifice, but this should not be tied to an exceptional moment of commitment. The construction of austerity as the morality play which breathes life into the EU constitutional order illustrates this possibility rather eloquently. If this is the case, then the radical split between sovereignty and government that is usually postulated (very palpable, for example, in Schmitt's work) must be rejected. As noted by De Carolis: 'The split, which is a result of the modern order and its way of representing itself, was taken as an actual premise, almost as if the actual social systems, the forms of life, and the concrete modalities of administering power contributed only marginally to the stability of the legal order'.[68] In other words, it is not imaginable that sovereignty as a principle can fully be abstracted from government and the governing function. The two are distinct figures, but they remain strictly connected[69] and the contemporary embedding of financial interests in the actions of the EU and its member states highlights how difficult it is to draw a categorical line between sovereignty and government.[70]

The case of the ECB shows how enriching this different viewpoint can be. Although it acted apparently without a clear sense of constitutional limit, the ECB's intervention cannot really be described as an act of a decisionist sovereign, but rather as an authoritative constitutional actor which uses extraordinary (or, better, unconventional) means within an already constituted imaginary. Its claim to disproportionate intervention and its request of sacrificing citizens' well-being (through austerity) might resonate with sovereign echoes, though the sacrifice, as already noted, is presented more of a punishment than a recognised achievement. Yet, one would miss the point if the ECB intervention was seen as purely transformative, that is, as an extraordinary action that grounds the EU constitutional order. Its charisma plays out in the ritualistic uses of its alleged epistemic advantage and its capacity to maintain order and stability. A form of life is then shaped by this set up in virtue of the assumption that the social order would be shattered by the fall of the common currency. Faced with potentially unsettling contradictions to deal with, the President of the ECB de-

66 *Paul W. Kahn*, Sacred Violence, Ann Arbor 2008, p. 98 f.

67 A similar argument has been recently defended by *Terry Eagleton*, Radical Sacrifice, London 2018.

68 *De Carolis*, note 35, p. 72.

69 See the analysis by *Giorgio Agamben*, The Kingdom and the Glory, Stanford 2011.

70 On the dependence of finance over the principle of sovereignty (called by the author: the sovereign effect) see *Joseph Vogl*, The Ascendancy of Finance, London 2017.

cided to mobilise unconventional and possibly unlawful resources to *preserve* (and not to create) a culture of stability and austerity.

By looking at the role of the ECB in the EU it is also possible to appreciate the richness of the cultural study of law. Other approaches would not be able to take into account the question, which, legally speaking, irrelevant forms of intervention exist. To the contrary, crucial for the understanding of the role of the ECB is to study how it operates in interaction with markets and other EU institutions in order to persuade both of the efficacy of its decisions. Clearly, in order to appreciate its power, one has to recognise that other jurisgenerative forces beyond the citizens' willingness to sacrifice itself for the constitution can be mobilised. Under certain material conditions (some legal instruments, a specific organisation of the political economy) and beliefs (the importance of financial stability for the constitutional order and the integrative force of the common currency), other forms of charismatic authority can be generated and employed in order to support a constitutional order. There is nothing, in the cultural study of law, that would prevent the constitutional scholar from recognising this state of affairs.