

## Introduction: Integration Through Law and the European Legal Community



# Integration Through Law and the European Union

*Domenica Dreyer-Plum, Wolfram Hilz\*†*

The European Union (EU) represents an international legal order which, with the participation of its Member States, influences and shapes national legal systems to a considerable extent and sets limits to national scope for action. This has recently led to serious questions of democracy, legitimacy and sovereignty in political discourse, which have not least encouraged right-wing and left-wing populist parties and a Eurosceptic attitude. This affects the normative foundations of the individual states as well as the overarching legal system of the EU. There is no doubt that the European integration project is a legal achievement. However, the current political dispute over the further shaping of the European legal community is being fought out in many individual processes, institutional arrangements and in each specific policy area.

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\* Dr. Domenica Dreyer-Plum, Senior Researcher, Institute of Political Science, Political Systems, RWTH Aachen University and Senior Fellow, Center for Advanced Security, Strategic and Integration Studies, University of Bonn; Professor Dr. Wolfram Hilz, Professor of Politics, Institute of Political Science, University of Bonn; Co-Director Center for Advanced Security, Strategic and Integration Studies, University of Bonn.

† We would like to thank the excellent speakers who accepted our invitation and enriched our panels at the Conference on “Integration Through Law and the European Union: Political and Legal Developments vs. Polycrisis” on 24/25 October 2024. Our special thanks go to our teams at the University of Bonn and RWTH Aachen University: Jakob Bartolomey, Fabian Funke and Marit Geißinger for their research assistance during the conference and in preparation of this edited volume, and Heike Frank for organisational and administrative support. The Conference and this volume would not have been possible without the generous funding by the Arbeitskreis Europäische Integration e.V./European Community Studies Association Germany and the Foundation for International Dialogue of the Savings Bank in Bonn. Last but not least, we would like to express our gratitude to the Institut Français in Bonn for hosting the conference at the Robert-Schuman-Saal.

## 1. European Union: The Legal Community

The EU is a well-established legal community. In addition to 70 years of treaty history, the body of law includes a wide range of secondary legislation and extensive case law. European law constitutes a strong core. In view of the manifold crises of recent years,<sup>1</sup> both the power of integration and the authority of law are astonishing. Turning to the early years of integration and remembering that the EU started out as an international organisation similar to the Council of Europe or the Organisation for Economic Co-operation and Development, the transformation of the past decades into a political system is all the more remarkable.

Since the financial crisis starting in 2008, both politicisation and crises experiences have become an increasing challenge to the EU. This exposure has led to the realisation (1) that global governance processes require cooperation between Member States, especially since (2) a number of political challenges can no longer be addressed by individual Member States. But those can only be addressed sensibly and effectively by a community of states (migration policy, digitalisation, dealing with large corporations, taxation). In addition (3), it is precisely in crisis situations that the community's potential for solidarity is demonstrated.

The EU's polycrisis has recently been addressed by a number of renowned European law scholars in order to investigate the question: What is the state of the EU?<sup>2</sup> What characterises the EU's crisis management and how is it institutionally and policy-wise positioned? All contributions fall into one of three categories: *Breaking down, muddling through or heading up* – which applies to the area under investigation? Unsurprisingly, the answers are just as complex as the EU itself. Very often, the authors arrive at fuzzy results, according to which at least two out of three categories apply.<sup>3</sup>

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1 M. Riddervold, J. Trondal and A. Newsome (eds), *The Palgrave Handbook of EU Crises*, Palgrave Studies in European Union Politics (Palgrave Macmillan, 2021).

2 M. Riddervold, J. Trondal and A. Newsome, see n. 1.

3 A. E. Stie, 'Crises and the EU's Response: Increasing the Democratic Deficit?', in M. Riddervold, J. Trondal and A. Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021), 725, 727–729; C. Holst and A. Molander, 'Responding to Crises—Worries About Expertization', in M. Riddervold, J. Trondal, and A. Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021), 647; S. L. Greer, A. de Ruijter, and E. Brooks, 'The Covid-19 Pandemic: Failing Forward in Public Health', in M. Riddervold, J. Trondal, and A. Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021), 747.

This leaves us with the realisation that “the path to political unification remains contested and uncertain to this day.”<sup>4</sup> The legal history and success of the EU is not certain: “Above all, history teaches us how improbable the EU’s current status is.”<sup>5</sup>

What does this imply for examining political and legal developments in the EU against the backdrop of the polycrisis experience? Developments within the EU – in terms of the balance of institutions, separation of powers, democratic demands, but also within policy areas – are diverse and sometimes contradictory. This is where this book seeks to make a significant contribution in four areas of research related to *integration through law*.

This edited book combines conceptual and empirical contributions in relation not only to *integration through law* but also further *integration through...-formats* such as *integration through funding*, *integration through crisis-response* and most basically *integration of law*.

Thus, it stimulates a debate about the significance of *law and legal instruments* in the European integration process in general and in particular within the polycrisis setting. The complex situating of “Integration through Law and the European Union” is approached with an emphasis on the dimensions of *law*, *legitimacy*, *rule of law* and *(self-)perceptions* and address highly relevant concepts such as sovereignty, jurisdiction, policy agenda development and not least the financial architecture of the EU.

## 2. Conceptual Questions and Focus of the Book

The EU is powerful with its exclusive competence for the functioning of internal market competition rules combined with the effective design of the internal market by way of secondary law. The power of the EU is reinforced by directly applicable law that cannot be discarded by Member States, while the institutional position of the Court of Justice of the EU is continuously reinforced.<sup>6</sup>

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4 E. R. Lautsch, *Integration durch Recht* (Mohr Siebeck, 2023), 4.

5 K. K. Patel, *Europäische Integration: Geschichte und Gegenwart* (C.H. Beck, 2022), 119.

6 T. Eijsbouts, ‘Constitutional Sedimentation’ (1996) *Legal Issues of Economic Integration*, 51.

Both disruptive and reinforcing to that continuous process of “constitutional sedimentation”<sup>7</sup> are exogenous crises which hit the EU hard since 2008. Given the magnitude of the crises, it is surprising to see the resilient integration power of EU law. Simultaneous expectations are paradoxical: The EU should do more – especially in crisis situations, when national resources are exhausted – at the same time, Member States want to decide more independently.

The complex situation of the EU therefore includes several dimensions that need our attention, when we address the political and legal developments of the EU against the polycrisis experiences. This edited book strives to combine theoretical, conceptual and empirical contributions in relation to *integration through law* which is not limited to the classic understanding of integration through jurisprudence, but considers various formats such as *integration through legislation*, *integration through funding* and *integration induced by crisis*. What unites these approaches is their focus on the law not only as tool and necessary medium, but powerful variable to strengthen integration in the sense of *constitutionalisation* of the European integration process.

In this volume, we address the significance of law for the European integration process by asking: What can we take from the link between law and European integration in times of multi-layered forms of *integration through law*? We do not stop there, but give an outlook for an integrated research agenda to consider the strategic significance of law in developing and legitimising crisis-intensive policy fields.

The anthology starts with a brief summary of major arguments that were exchanged at the conference “Integration through Law and the European Union: Political and Legal Developments vs. Polycrisis”, held at the University of Bonn in October 2024 (Pages 17 to 29). All contributing authors of this edited volume participated in the conference and debated on different panels the four main issues elaborated in more detail in this book.

## 2.1 Understanding the Link between Law and European Integration

The first section of this book focuses on the significance of *law* in both the integration and policy process at EU level. It reconnects to the theory

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<sup>7</sup> T. Eijsbouts, see n. 6, 51.

approach of *integration through law* while extending the scope significantly toward legal culture and the narrative dimension of law.

*Domenica Dreyer-Plum* returns in her contribution (Pages 33 to 53) to fundamentals of *integration through law* and connects the general assumption about the significance of (case) law with an operationalisation of legal culture to investigate the characteristics of European law and provide access strategies to the multifaceted *integration through...-formats* against the background of a permanent state of crisis in the EU.

In the following Chapter (Pages 55 to 75), *Domenica Dreyer-Plum, Anna Wenz-Temming* and *Jared Sonnicksen* turn to law as medium in European integration and policy processes and design a framework to theoretically and methodologically access the strategic potential of law as persuasive idea and powerful fundamental in European policy-making. Their thoughts are guided by broader normative concepts such as legitimacy and democratic repair and at the same time connected to policy design for challenging issues such as climate change.

## 2.2 Sovereignty Claims vs. Legitimacy Deficits

Different contributions in this book point to the legitimacy issues related to sovereignty claims of both Member States and EU institutions. Having in mind the concept of *integration through law*, contributions take different angles to address how Member States demands and legitimacy are reconciled. This is discussed particularly with reference to the European Commission and the Court of Justice. The main theme in the second section is therefore *legitimacy*.

*Susanne K. Schmidt* investigates legitimacy deficits and risks that are connected to the jurisprudence of the European Court of Justice (Pages 79 to 104). *Schmidt* argues that the imperative of free movement and market liberalisation mediated by case law intrudes deeply in Member States' social and organisational systems. This emphasises the pathway of *integration through law* in the classic sense of *integration through jurisprudence*. While it clearly serves a purpose of efficiency within the legal community, it challenges legitimacy claims of the EU and its institutions in disagreeing Member States. *Schmidt* cites various examples of politicisation generated by the jurisprudence across Member States and reasons, why judicialisation can be a cause for the rise of anti-democratic populism.

In contrast, *Clemens Ladenburger* focuses on the demands made by Member States to the European Commission and argues that the Commission only acts when there is a claim (Pages 105 to 122). This shifts the focus from *integration through jurisprudence* to *integration through legislation* by tracing the initiatives for law-making. *Ladenburger* argues against the assumption that the European Commission is too activist by providing a closer look at the input channels for legislative development on European level. He considers the effective inclusion of different actors and their policy goals in the development of the strategy agenda, as well as the multi-annual and annual programmes of the European Commission. The emergence of policy demands is illustrated at the example of the process towards adopting a reform of the Common European Asylum System between 2020 and 2024 and the common travel restrictions policies during the Covid pandemic crisis 2020–2021.

### 2.3 Rule of Law and the Legal Community: Resilience in Times of Crisis

Integration through law is closely linked to the concept of rule of law: since *integration through law* relies on the authority of law and particularly the recognition of the judiciary.

In the EU's multi-level system, characterised by parallel federal power centers, the Member States play a crucial role in upholding respect for EU law through its application and recognition for the judiciary. Questions addressed in this section include: How do we make institutions and electorates resilient for rule of law battles? How can we strengthen bottom-up a legal culture of democracy and rule of law? How could authoritarian political systems be less appealing?

*Marcin Gorski* reminds us of the developments in Poland that led to the democratic backsliding in the years 2015–2023 and embeds this trend in a wider political and social context (Pages 125 to 147). An emphasis is placed on the political and legal elites and their responsibility for renegotiating democratic principles using legal tools with damaging effects for the Polish political system. *Gorski* argues that the European Court of Justice and the European Court of Human Rights replaced the non-performing highest national constitutional court to uphold democratic norms and to remind Polish elites about their responsibility to align their political actions with fundamental values and freedoms. In this sense, integration through (case) law again reconnects with challenges that relate to the core not only of

the democratic state, but also the backbone of the EU: the principle of rule of law. *Gorski* also reminds us that illiberal democratic episodes may reoccur in Poland or other countries which makes it all the more important to prepare for challenges to the rule of law by investing in education, supporting civil society organisations to enhance a substantial rather than a formalistic legal culture.

The following Chapter (Pages 149 to 172) then delves deeper into the rule of law crisis and the responses of the Court of Justice more generally. *Darinka Piqani* situates the rule of law challenges in the complexities of the EU multilevel system which strives for unity and collective action but is increasingly characterised by diversity and particularism. *Piqani* demonstrates how the case law related to rule of law questions leads to further constitutionalisation between the Member States and the EU. In the classic sense of *integration through law* by way of jurisprudence, this contribution is substantiated by an analysis of individual cases and their significance to secure not only in particular the independence of courts in the Member States, but also judicial protection in the sense of the Charter of Fundamental Rights. *Piqani* shows how these cases gain importance in relation to the organisation of the judiciary.

## 2.4 EU Perceptions in Light of Financial Instruments and Crisis Management

The self-conception of the EU viewed from its financial capabilities determines the fourth section. This is where the EU significantly diverges from other international organisations: in its capacity to shape European policies by legislation and funding. Given that the financial constitution is a key component of a democratic political entity, this is a very good reason to look into the finances of the EU: how they developed generally and recently and what this tells us about the current state and the future of the EU. Questions addressed include: What is the role for the financial constitution of the EU? How does the financial constitution of the EU shape the perceptions of the EU as political system?

This is why *Ruth Weber* traces the development of the financial architecture from a classically contribution-financed European Economic Community towards a EU with ever more capabilities to introduce own resources – and with the funding programme of NextGenerationEU as a major step in diversifying the financial activities of the EU (Pages 175 to 196).

The following chapter then provides us with a connection between crisis response policies during the financial and state debt crisis (2010–2012) and the Covid pandemic (2020–2021) in comparison. *Domenica Dreyer-Plum and Anna Wenz-Temming* compare ideational concepts and coalition-building in the different crisis contexts and their effect on European integration through legally-based instruments (Pages 197 to 219). They argue that new forms of EU budget financial instruments have been developed with an unprecedented level of risk-sharing and liabilities, but that former institutional and financial ideas stay in place.

## 2.5 Results and Outlook

Finally, *Domenica Dreyer-Plum* concludes on the reasoning of this edited volume with view to *integration through law* and its different and extending current formats related to the conceptions of law, legitimacy, rule of law and self-conception (Pages 223 to 243). The integration of legal systems in the EU has progressed far through regulation, which is why an integration of the law can be clearly stated. This development is subject to criticism, as the continued comprehensive regulation at European level has a significant impact on the lives of citizens. In this context, the legitimisation by Member States will remain a critical factor in all integration formats. The “governance of governments”<sup>8</sup> at the EU level continues to rely fundamentally on this legitimisation, despite the existence of supranational structures and institutions.

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<sup>8</sup> See in this volume: Susanne K. Schmidt (Pages 79 to 104).