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Law and the Euro Crisis: A View from Political
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Department of Law

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Euro-Crisis: Law and Interdisciplinarity

In December 2014 a conference “Euro-Crisis: Law and Interdisciplinarity” was held in the context of a three-year project “Constitutional Change through Euro-Crisis law” funded by the EUI Research Council. This project intends to provide a comprehensive study of the effect of the crisis of the euro on national constitutional orders. In turn this study aims to offer a basis for further, especially comparative, studies of the legal status and implementation of legislative responses to the crisis at national level, the interactions between national legal systems and euro-crisis law, and the constitutional challenges that have been faced. The December conference brought together legal scholars and political scientists to reflect on the scope and limits of the legal discipline in reacting to the management of the crisis of the euro. Contributions were made on three topics: (1) how legal scholars have reacted to euro-crisis and the reforms adopted in its wake, with particular analysis of the main themes within legal scholarship on the issue; (2) whether and how other disciplines can help to understand and situate legal debates on euro-crisis; and (3) the relevance of the legal dimension for scholars from related social science disciplines such as political economy for their own perspective on euro-crisis and its policy consequences.

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Abstract

The euro crisis has triggered a healthy debate within law and other disciplines about the scope and limits of existing scholarly approaches. Debates between disciplines have been scarcer here and it is in this spirit of inquiry that this paper asks how political economists writing about the euro crisis understand the roles of law. Most (but not all) political economists show some appreciation of law, it is argued, and in so doing they go beyond the black letter reading of formal treaties and legal texts that legal scholars associate with political scientists. There is also some appreciation for the idea of law as normativity in the political economy literature on the euro crisis but the importance of legal interpretation is underplayed. Political economists are serious about law, it is concluded, but they need to take legal scholarship more seriously.

Keywords

Euro crisis; law; political economy; EU studies; interdisciplinarity

Table of Contents

INTRODUCTION	1
WHY POLITICAL SCIENTISTS (SUPPOSEDLY) DON'T UNDERSTAND LAW.....	1
THE ROLES OF LAW IN THE POLITICAL ECONOMY OF THE EURO CRISIS	2
CONCLUSION	6
REFERENCES	8

Introduction

European Union (EU) scholars have been hard pressed to understand the causes and consequences of the euro crisis.¹ This is so because the euro has faced a sequence of events since 2007 – when the collapse of the US subprime mortgage market triggered turmoil in European financial markets – that has unfolded at pace and in ways that challenge existing theoretical approaches to the study of European integration and governance. From a legal perspective, the crisis calls for a debate about the multifarious roles of law in, what Francis Snyder (1998: 3) has called, the EU’s ‘unfinished constitution’. Key issues here include: (i) the balance between hard and soft law commitments in euro area governance before and after the crisis; (ii) policy-makers’ recourse to crisis management mechanisms that went beyond (conventional readings of) the treaties; (iii) the litany of new legal provisions, including regulations, directives and treaty changes, adopted in the light of the crisis; and (iv) the extent to which the EU’s crisis response conforms to established conceptions of legitimacy. These and other concerns are addressed head on in the burgeoning legal literature on the euro crisis (e.g. Dawson and Witte 2013, Tuori and Tuori 2014).

The study of EU law has a long history of self-reflection (see, for example, Stein, 1981, Armstrong, 1998; and Hunt and Shaw 2000) and so legal scholars wasted little time before thinking through what the euro crisis means for legal studies. Writing at a comparatively early stage of the euro crisis, Ruffert (2011: 1805), for example, insisted that ‘... as an academic discipline European Union law cannot remain silent or reluctant but must actively participate in the assessment of the current crisis and in evaluating the instruments proposed and enacted to overcome it’. Similar soul searching can be found in other disciplines since the global financial crisis struck (e.g. Besley and Hennessy 2009, Earl 2010 and Bryan et al. 2012) but scholars have been slower to consider what they know – and could learn – about neighbouring disciplines. This paper asks not what political economists can learn about political economy in view of the euro crisis – the short answer is ‘a great deal’ – but about law. Its purpose is to set out some preliminary ideas about whether and how political economists working on the euro crisis think about law and what this tells us about the relationship between political and legal scholarship more generally.

The remainder of the paper is divided into three parts. The first section considers what political science (which is treated here as the parent discipline of political economy) knows and does not know about law. The second section considers, in the light of this discussion, how selected political economists writing about the euro crisis think about the roles of law. The final section concludes with some thoughts on why political economists and legal scholars need to talk in the light of the euro crisis.

Why Political Scientists (Supposedly) Don’t Understand Law

Political scientists typically do not lay claim to an in depth understanding of law but this does not mean they are indifferent to it. The claim that institutions matter is a mantra of modern political science (Weaver and Rockman 1993), which in its rationalist incarnation seeks to understand how political as well as economic factors influence the choices of actors, individuals, firms, governments, states, supranational actors and non-governmental actors (Shepsle 2010). Law is inextricably linked to political science conceptions of institutions, following Douglass North (1990), who saw law as one instance of the formal and informal ‘rules of the game’ that shape society. In the last two decades, political scientists such as Lijphart (1999) have delved deeper into the differences between national constitutional traditions and there is a growing interest in the role of legalisation in International

¹ A previous version of this paper was presented at the workshop ‘Euro-Crisis: Law and Interdisciplinarity’ at the European University Institute on 15 December 2014. Thanks to the conference organisers, Bruno De Witte, Claire Kilpatrick and Giorgio Monti, and other participants for constructive comments. The usual disclaimer applies.

Relations (Abbott et al. 2000). Legal variables are now commonplace regressors in empirical studies of political phenomena and there is a growing interest from political economists in explaining differences between constitutions across space and time (e.g. Negretto 2013).

Political scientists who study the EU have long been interested in law because of what is seen as the legal richness of European integration compared to other instances of international cooperation. This interest can be seen in Haas's seminal definition of political integration as being about the study of 'institutions [that] possess or demand jurisdiction over pre-existing nation states' (Haas 1958: 16). It is reflected too in Burley and Mattli's later reworking of this definition to include 'the gradual penetration of EC law into the domestic law of its member states' (1993: 43). Law occupies a less prominent place in Moravcsik's *Choice for Europe*, the most ambitious attempt to explain European integration since Haas's *Uniting of Europe*, but it is implicit in the book's focus on the study of grand 'constitutional bargains' such as treaty changes (Moravcsik 1998: 1). Law plays a role too in Moravcsik's emphasis on 'locking in' the gains from cooperation between member states through the pooling and delegation of sovereignty, the first of these terms referring to the switch from unanimity to qualified majority voting in the Council of Ministers and the second to the empowerment of supranational institutions such as the Commission and Court of Justice through the treaties.

In spite of political scientists' preoccupation with law their understanding of it is a source of concern for some scholars. Dunoff and Pollack (2013: 631), for example, see the emergence of international law and international relations (IR/IL) as a subfield of study since the 1990s as a welcome development that nonetheless suffers from 'substantial blind spots and gaps'. Among these deficiencies, they suggest, is that political scientists can 'unwittingly fall prey to a type of formalism that is insufficiently attentive to the practical realities of how the international legal order works' (Dunoff and Pollack 2013: 649). To overcome political scientists' 'black-letter' reading of international law the authors call for greater attention to customary law and legal interpretation and to move beyond the study of compliance with legal texts that are (wrongly) assumed to have a clear cut and incontrovertible meaning (Dunoff and Pollack 2014: 2).

This rallying cry echoes Howse and Teitel (2010: 4), who argue that rule compliance 'is much too narrow an angle of vision to comprehend international law's normative effect'. The relationship between law and compliance is complex. Significant sanctions provide no guarantee of compliance (e.g. drug law), they note, while lax sanctions and monitoring are sometimes associated with high rates of compliance (e.g. laws on seatbelts). The effect of law can also run deeper than compliance. Here the authors give the example of the International Criminal Court, which has seen comparatively few cases brought before it but which has arguably shaped domestic law and the interaction between states in ways not foreseen by the Rome Statute. Above all, Howse and Teitel (2010: 5) call for scholars to look beyond the idea that 'law is only really law when accompanied by authoritative interpretation and enforcement' towards law as a form of 'normativity' that tells us how we should act.

The Roles of Law in the Political Economy of the Euro Crisis

Political economy is a broad church that has seen no shortage of schisms. Views within the discipline on the causes of – and potential cures for – the euro crisis are diverse (Arestis and Sawyer 2012, Jones 2014). So too are the range of research questions to which the euro crisis has given rise within the political economy literature, which range from what went wrong (Hancké 2013) to how we are to conceptualise the cure (Puetter 2012). As such, it makes little sense to say how the median political economist writing about the crisis thinks about law. What follows instead is an interrogation of what role, if any, law played in some political economy accounts of the crisis. The aim here is not to evaluate these contributions in political economy terms but rather to explore what the underlying conception of law is in these papers and whether it is as narrow as the survey of scholars in the preceding section would lead us to expect. The political economy literature on the euro crisis is sizeable and what follows is merely a (non-random) sample.

Some political economists, it must be admitted, show scant regard for the role of law in the euro crisis. De Grauwe (2013) makes no reference to law in his review of the political economy of the euro crisis, which is premised instead on a clear but unconvincing distinction between economists who understand the challenges of a single currency and politicians who do not. Disregarding the role of EU law is, perhaps, better than denigrating it. Willem Buiter and Ebrahim Rahbari (2010) are guilty of the latter. Although the authors offer an astute economic analysis of the options available to EU policy-makers at the height of the euro crisis, law is treated in their account as a mere institutional irritant. The solution to the sovereign debt crisis, the authors argue, lay in some combination of fiscal austerity, debt monetisation and bailout, the third of these options being ‘complicated by the legal and institutional constraints of EA membership’. The paper can be read as a search for ways around these constraints with Buiter and Rahbari (2010) among the few to argue that the bailouts were by no means prohibited by the no-bail out rule of Article 125 TFEU.

This elastic reading of EU law should be seen in context— the authors were writing at a time when the euro area seemed close to unravelling – but it still sits uneasily in a paper that purports to consider ‘the normative aspects of the crisis and policy responses’ (Buiter and Rahbari 2010). The Treaty does allow some room for interpretation on this point, to be fair, but the authors are unambiguous in their view that political rather than legal reasoning will dominate here. Germany’s Federal Constitutional Court would be unlikely to object to a bail out, Buiter and Rahbari (2010: 14) predict, because the ‘decision of the Court, like that of Supreme Courts in other countries, will likely be driven by political concerns and considerations, rather than textual exegesis’.

Hall’s (2012) essay on the economics and politics of the euro crisis is much richer but he too treats EU law as something that policy-makers must work around rather than within. Reflecting on the European Central Bank’s (ECB) role in the euro crisis, he calls for ‘a creative legal interpretation built on the mandate of the ECB to maintain financial stability in Europe or the granting of a banking licence to a special purpose vehicle’ (Hall 2012: 365). The consequences of such creativity for EMU’s legitimacy is not explicitly considered by Hall, who is quick to demarcate EMU’s political rationale from its economic logic but slow to consider the single currency as a legal project. Compelling though Hall’s diagnosis of EMU’s ills are, his lack of interest in the role of law in this instance rests uneasily with the varieties of capitalism’s promise to serve ‘as the basis for a fruitful interchange among scholars interested in many kinds of issues in economics, industrial relations, social policy-making, political science, business, and the law’ (Hall and Soskice 2001: 68).

A concern for the role of law runs much deeper in other political economy writings about the euro crisis. Nowhere more so than in the work of Kenneth Dyson (2013), who explores how the EU’s actions in the name of ‘supreme emergency’ during the crisis have been justified. Dyson considers both political and legal justifications for such measures and, in discussing the latter, employs H. L. A. Hart’s ‘rule of recognition’ to understand how EU authorities have balanced different treaty provisions and legal interpretations in seeking to tackle the sovereign debt crisis. The crux of this issue, Dyson suggests, is how EU authorities came to create the European Stability Mechanism (ESM) with reference to the amended Article 136 of the Treaty on the Functioning of the European Union (TFEU) in spite of Article 125’s ‘no-bail’ out rule. This legal interpretation is problematic, Dyson suggests, because it reveals the absence of ‘a satisfactory treaty basis for acting in supreme emergency’ as well as giving EU policy-makers an incentive to prolong the perceived sense of crisis so as to push through reforms. With this warning, Dyson shows a concern for legal history – he draws a link between the EU’s lack of emergency powers and German lawyers’ unease with such provisions following the Nazi’s rise to power in 1933 – and the role of law more generally. The EU is a polity founded on law, Dyson (2013) suggests, warning that any failure to honour treaty commitments in relation to EMU could undermine the EU’s economic and political credibility.

A concern for law is also discernible in Streeck’s powerful political economy critique of EMU. For Streeck (2014), the euro crisis has its roots in deep-seated changes in the character of advanced industrial democracies, which he sees as having been transformed from tax states to debt states.

Whereas tax states rely on government revenue to finance government expenditure, debt states are dependent on government borrowing and the servicing of the national debt. A legal corollary of this transformation, Streeck (2014: 80-81) argues, is that states are now accountable not only to their citizens via constitutional law but also to their international creditors via civil law. Streeck sees this transformation as being deeply problematic because it allows a small number of large investment management firms to 'vote out' governments by selling or refusing to buy bonds.

Civil law is treated with suspicion by Streeck, who sees governments as having entered into contracts with bondholders without informing citizens of the attendant 'risks and side effects' of such arrangements (2014: 162) and, more generally, warns that governments and parliaments are no match for 'international law firms' (2014: 123fn49). Streeck is more optimistic about constitutional law but only moderately so. A new European constitution could help to 'democratize the Euroland by taming market capitalism', he suggests, but it is likely to come too late (Streeck 2014: 180). Europe's existing constitution is part of the problem rather than the solution here for Streeck, who sees the Court of Justice of the EU and the European Commission as part of a 'machine for the liberalization of European capitalism' (Streeck 2014: 105). EU law is not a mask for politics, in other words, so much as a mask for neo-liberal political economy.

That a concern for the role of law features in Fritz Scharpf's writing on the political economy of the euro crisis is not surprising given his long-standing interests in legal matters (e.g. Scharpf 1966) and the legitimation of European integration and policy-making (Scharpf 1999). Scharpf (2011) offers a trenchant critique of the EU's response to the euro crisis, which he sees as being built on a flawed conception of input legitimacy. That the euro crisis leaves EU member states with uncomfortable policy choices and hence few opportunities for output-orientated legitimation, Scharpf sees as unavoidable. He is critical, however, of the fact that such choices are 'pre-empted by external domination' rather than 'collective self-determination' (Scharpf 2011: 35). Here Scharpf takes aim at the troika, the ad hoc grouping of officials from the European Commission, European Central Bank and International Monetary Fund, that has been given responsibility for negotiating and enforcing the terms attached to EU and IMF loans (see also Hodson 2014a). The troika's influence over member states seeking external financial assistance during the crisis is criticised by Scharpf (2011: 26) as a form of economic 'receivership'. The excessive imbalance procedure, meanwhile, he sees as foisting the Commission's 'liberalizing agenda' on member states (Scharpf 2011: 34). The language he uses in this paper is couched in terms of normative political economy but a concern for procedural legitimacy and the EU's perceived violation thereof in response to the euro crisis shines through. Whereas the economic ends justify the legal means for Buitter and Rahbari, there are legal limits that Scharpf is reluctant to see EU authorities cross whatever the economic consequences might be.

Majone (2014) also cries foul over the legitimation of EU policy-making in the light of the euro crisis and in so doing shows a subtle understanding of the role of law. The crux of his argument is that the crisis has taken the EU yet further away from its roots as a regulatory regime in which national governments agreed to delegate narrowly defined powers to non-majoritarian institutions at the supranational level. Whereas Moravcsik measures such delegation in terms of credibility, Majone highlights the importance of procedural legitimacy; regulatory agencies in the United States, he notes, tend to be independent from day to day interference by politicians but subject to constitutional checks and balances through general and enabling statutes and oversight by the courts. Comparable checks and balances tend to be lacking in the EU, Majone argues, because of the unwieldiness of the Commission's mandate and the European Parliament's own limitations as a legitimate legislature. This situation has been made worse by the new powers of economic surveillance entrusted to the EU executive, he argues, which go well beyond the kinds of functions that are and, more importantly should be, delegated to non-majoritarian institutions.

Scharpf (2011) and Majone (2014) thus see a role for law that goes well beyond political scientists' supposedly narrow preoccupation with rule compliance. Neither allows much room for legal interpretation, however, with the assumption being that the reforms to economic governance enacted

under the Six Pack and Fiscal Compact will be binding in the extreme. Take the case of the excessive imbalance procedure, which Majone (2014: 1220) sees as subjecting member states to an intrusive process of surveillance underpinned by a 'strict disciplinary approach' and Scharpf (2011: 33) as a means for the Commission to insist on change in very sensitive areas such as health care. Such warnings are powerful but also problematic because they rest on a particular reading of how the legislation and treaty reforms underpinning recent reforms to euro area governance will work. EU policy-makers will be hell bent on ensuring enforcement, this reading seems to suggest, irrespective of what member states and the general public want.

This is an area where greater attention to the inherent ambiguities of law and the role of various actors in interpreting it might yield a different perspective on the political economy of the euro crisis. Early experiences of the implementation of the excessive imbalance procedure suggest that it has made limited difference to euro area surveillance. Following the publication of the Commission's first Alert Mechanism Report in February 2012, seven euro area members were selected for an in-depth review because of concerns over the risks posed by macroeconomic imbalances: Belgium, Spain, France, Italy, Cyprus, Slovenia and Finland. These reviews fed, in turn, into a set of country-specific recommendations on macroeconomic imbalances endorsed by EU finance ministers in July 2012 as part of the European Semester. Far from revealing ideological or bureaucratic zeal, the Commission's scoreboard suggested a reluctance to be too critical of errant member states. Of the seven countries subject to in-depth review in 2012 the EU executive cited none for having excessive imbalances. This included Cyprus which was adjudged to be facing imbalances that were 'very serious' but 'not excessive' in May 2012 (European Commission 2012: 4) even though it exceeded a number of the indicative thresholds associated with the macroeconomic imbalance procedure scorecard and found itself facing a full blown financial crisis a matter of months later.

This early experience of the excessive imbalance procedure gives us only a fleeting sense of how the enforcement of this new legislation may play out but it is sufficient to call for a more nuanced discussion of how the Commission and Council are likely to interpret their roles under the reforms enacted in the light of the financial crisis. We have, it is important to remember, been here before. Both the Broad Economic Policy Guidelines and the Stability and Growth Pact saw early attempts at disciplinary action against member states over macroeconomic imbalances backfire before paving the way for a more pragmatic exercise of these instruments (see Hodson 2011: chapter 5). Such pragmatism is seen by some as contributing to the euro crisis (Schuknecht et al. 2011) but criticisms of this sort are premised on a very simplified understanding of what role law can play in such a sensitive area of policy-making. Critics also overlook the fact that the reforms to the Stability and Growth Pact adopted in 2005 may have made the prospects of financial penalties less likely but they also saw compliance with the corrective arm of the agreement increase. Such was the downturn in euro area public finances in 2009 that it is easy to forget that, with the fateful exception of Greece, all euro area members entered the global financial crisis with government borrowing below 3% of GDP. Such compliance cannot be reduced to the upturn in economic growth in the mid-2000s; it also reflected a strong show of fiscal discipline from member states such as Portugal, Germany and the Netherlands.

Also implicit in some political economy accounts of the euro crisis is a concern for the process of constitutional change in the EU. This can be seen, for example, in Majone's (2014) account of the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (the Fiscal Compact), which he sees as having been driven by a sense of economic necessity rather than popular choice. That all (participating) member states ratified the Fiscal Compact in accordance with their national constitutional traditions – Ireland even held a referendum – is not sufficient to secure legitimacy for this reform, this argument seems to suggest, because such ratification was secured under political duress. This reading of the euro crisis is at odds with Moravcsik (2012: 55) who argues that 'Europeans should trust in the essentially democratic nature of the EU, which will encourage them to distribute the costs of convergence more fairly within and among countries'. The role of law bubbles beneath the surface here, as in *The Choice for Europe*, with national governments seen as not

only driving the EU's response to the crisis but also legitimating it insofar as national governments are accountable to the people through domestic constitutional structures that continue to function fairly well.

Bickerton, Hodson and Puetter (2015) agree that national governments have been in the driving seat during the euro crisis but question their fitness to drive. They see the EU's response to the euro crisis as symptomatic of a new intergovernmentalism in which national governments remain committed to cooperative solutions but reluctant to delegate new powers to old supranational institutions along traditional lines. This reluctance, they argue, is located in a rift between national policy-makers, who are committed to cooperation with EU partners, and the wider public, who have grown more sceptical over the last two decades about the European project and national political processes more generally. From a new intergovernmentalist perspective, the most striking feature of the euro crisis is not the empowerment of the Commission but the enhanced role played by the heads of state or government in economic governance. Far from representing the triumph of politics over law, this empowerment of the heads of state or government is symptomatic of the legalisation of the European Council since its recognition in the Single European Act and its designation as an EU institution in the Lisbon Treaty.

Delegation, where it has occurred in response to the euro crisis, has focused primarily on the empowerment of *de novo* institutions rather than the Commission and the Court of Justice. Whereas these traditional bodies saw their role in EU economic surveillance extended through the Fiscal Compact such surveillance ultimately relies on peer pressure rather than the threat of pecuniary sanctions, or so it would seem thus far (Hodson 2014b). More significant here is the transfer of new powers over crisis resolution to the ESM. The creation of this institution in September 2012 epitomises the reluctance of national governments to empower the Commission, being a new body operating at one remove from the treaties and serving as a successor to the European Financial Stability Mechanism (EFSM) that the Commission came forward with in May 2010. Whereas the Commission exercised a degree of autonomy over the operation of the EFSM, it plays only an observer role on the ESM Governing Council, which is comprised of euro area finance ministers and chaired by the head of the Eurogroup.

The ESM's statutes are underpinned by an intergovernmental treaty but buttressed by the briefest of changes to Article 136 TFEU. This fact speaks to national governments' preference for small-scale over large-scale treaty revision in response to the euro crisis but also their determination that there must be some treaty change nonetheless. This tendency can also be seen in the Fiscal Compact, an intergovernmental treaty, which reinforced reforms to euro area governance introduced under the Six Pack but without going significantly beyond them, and in German Finance Minister Wolfgang Schäuble's (2013) suggestion that European Banking Union would require a retroactive revision of the treaties. This uneasy embrace of EU law is a defining feature of the new intergovernmentalism, Bickerton, Hodson and Puetter (2015) suggest. Such 'hyper-legalism' – as Cardwell and Hervey (2015) refer to it – speaks, moreover, to Howse and Teitel's (2010: 24) conception of law as form of normativity to which governing elites turn when 'the capacity of politics and/or economics to guide solutions to basic global problems has eroded'.

Conclusion

This paper has offered a first cut at thinking about the role of law in political economy accounts of the euro crisis. Its tentative findings are four-fold. Firstly, most of the scholars surveyed showed an interest in – and an appreciation of – the role of law in the euro crisis. Secondly, the treatment of law by political economists typically goes beyond the black-letter reading of treaties and fixation with rules-based compliance that students of international law have come to associate with political science. Thirdly, political economists are over-reliant on narrow readings of treaty articles and legislative proposals that allow limited room for legal interpretation by those actors entrusted with responsibility for enforcement. Fourthly, the political economy literature on the euro crisis has given rise to a lively

debate about the link between national constitutions and EU policy-making with scholars differing not only over the influence of national governments but also over their essential legitimacy.

The optimism associated with these findings should not be overstated, of course. A striking feature of the literature reviewed in this paper is how those political economists who are serious about the role of law do not take seriously the role of legal scholars. Political economists working on the euro crisis rarely cite legal scholars and the few that do focus on canonical figures rather than cutting edge scholarship in this field. Political economy is, in this sense, behind the curve compared to International Relations, which as Dunoff and Pollack (2013: 3) argue, has rediscovered International Law after decades of benign and in some cases malign neglect.

To overcome such shortcomings, political economists must begin a new conversation with legal scholars in order to better understand how the overlapping spheres of economics and politics themselves overlap with the sphere of law. EU studies used to serve as an interdisciplinary stronghold for such encounters but it has been overrun by political scientists in the last two decades as well as undermined by the absence of a galvanising political project of the kind that the single market programme provided to EU political scientists, economists and legal scholars in the 1980s and 1990s. The euro crisis – even if it has not yet done so to date – could serve as a catalyst for this conversation because political economists and lawyers have a shared interest in understanding how the EU's unfinished constitution fell short and where it is headed after the ructions and reforms of recent years.

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