The Transformation of the Economic and Monetary Union: Solidarity, Stability, and the Limits of Judicial Authority

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Vestert Borger, *The Currency of Solidarity: Constitutional Transformation during the Euro Crisis* (Cambridge University Press 2020) pp. 410.

Introduction

On Thursday, 11 February 2010, the political leaders of the EU initiated what would turn out to be no less than a constitutional transformation of the Economic and Monetary Union. They declared their joint commitment to the *financial stability* of the Eurozone and the Union.[1] This commitment upgraded the currency union's central focus on *price stability*, dating from the Treaty of Maastricht. More fundamentally, however, this transformation brought about a normative change from a currency union based on negative solidarity to one based on positive solidarity between member states. Or so argues Vestert Borger in his *The Currency of Solidarity*, based on the author's PhD thesis at Leiden University. When the European Court of Justice had to rule on the legality of the key manifestations of this transformation in *Pringle*[2] and *Gauweiler*,[3] Borger contends, it

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[1]'Statement by the Heads of State or Government of the EU', Brussels, 11 February 2010, available at ⟨https://www.consilium.europa.eu/media/20485/112856.pdf⟩, visited 6 January 2022.

[2]ECJ 27 November 2012, Case C-370/12, *Thomas Pringle* v *Government of Ireland and Others*, EU:C:2012:756.

[3]ECJ 16 June 2015, Case C-62/14, *Peter Gauweiler and Others* v *Deutscher Bundestag*, EU:C:2015:400.

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had no choice but to approve. The constitutional change of the Economic and Monetary Union had been so fundamental that the Court lacked the authority to reject it.

The constitutional characteristics and implications of the Euro crisis have led to a substantial amount of scholarly commentary and analysis.[4] This is unsurprising, as this crisis presented us with a fascinating cocktail of law, economics and politics, and exhibited the intertwining of constitutional and economic law that is typical of EU constitutionalism. Many legal scholars identified the Euro crisis with a 'transformation' of the European economic constitution.[5] The concept of 'transformation' is as elusive as it is forceful. It is crystal clear that the European constitutional landscape is different from pre-2010 times, but to *understand* this change, rather than merely observe it, is a complex interpretative task that is necessarily interdisciplinary.

The large amount of existing scholarly commentary notwithstanding, *The Currency of Solidarity*, and Borger's earlier writings on which it is based,[6] stands out as one of the most sophisticated attempts to understand the Economic and Monetary Union's constitutional transformation. This hermeneutic ambition is not limited to a reconstruction of plain historical facts, but includes an attempt to persuade its audience that the overall *narrative* is the best way to understand what actually happened.[7] The result is a thought-provoking study that combines legal study with history and political science; political and social philosophy with legal doctrine; and the economics of the currency union with its constitutional dimensions.

The Currency of Solidarity constantly reminds us of the profound interaction between rhetorical discourse and political action in the face of a financial and economic crisis that put Greece on the verge of economic collapse, and threatened the existence of the EU. Thus, the political leaders' statement of 11 February 2010 can be understood first and foremost as a speech act in which they vowed to

[4]For an overview of recent literature, *see* V. Borger, *The Currency of Solidarity: Constitutional Transformation during the Euro Crisis* (Cambridge University Press 2020) p. 15-18. For a comprehensive overview of the early literature until 2015, *see also* T. Beukers, 'Legal Writing(s) on the Eurozone Crisis' (2015) *EUI Working Papers* LAW No 2015/11.

[5]*See* e.g. the references in Borger, *The Currency of Solidarity*, *supra* n. 4, p. 16.

[6]*See* in particular V. Borger, 'The ESM and the European Court's Predicament in *Pringle*', 14 *German Law Journal* (2013) p. 113; V. Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area', 9 *EuConst* (2013) p. 7; V. Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*', 53 *Common Market Law Review* (2016) p. 139.

[7]Historical narratives, as some philosophers of history remind us, cannot be entirely reduced to empirical facts 'as they "actually" happened'. *See* e.g. H. White, *Metahistory: The Historical Imagination in Nineteenth-century Europe* (Johns Hopkins University 1973); F. Ankersmit, *Narrative Logic: A Semantic Analysis of the Historian's Language* (Martinus Nijhoff 1983).

support the Union with their full political weight. This rhetoric – far from being empty – created genuine political obligations and indeed resulted in transformative political action in the following years. Similarly, Mario Draghi's promise on 26 July 2012 that the European Central Bank would do 'whatever it takes to save the Euro'[8] proves, if anything, the power of rhetoric; Borger recalls that his words alone were enough to calm markets and suppress yields, while the European Central Bank also delivered on its president's words by subsequently announcing the Outright Monetary Transactions programme.[9]

The book is structured around two key claims, already mentioned above. The first claim is that the political leaders of the EU, starting with the Statement by the Heads of State or Government of the EU on 11 February 2010,[10] radically changed the nature of the currency union by extending its focus on price stability to financial stability as well, and by complementing the negative solidarity on which it was based with an element of positive solidarity. The second claim is that the European Court of Justice had no choice but to approve of this transformation in *Pringle* and *Gauweiler*, notwithstanding tremendous tension between the transformation and Treaty law. More precisely, the European Court of Justice could not disapprove because the constitutional transformation pertained not to the law itself but to what Borger terms the 'Founding Contract' between the member states.

In what follows, I briefly outline the main claims of *The Currency of Solidarity* in more detail, focusing on the book's key theoretical concepts and its main narrative. I then discuss three aspects of the book that I found particularly interesting and worthy of critical analysis: (1) the interrelationship between solidarity, stability and transformation as the key explanatory concepts of the book's narrative; (2) the claim that the European Court of Justice could not disapprove the constitutional transformation of the Economic and Monetary Union; and (3) the cognitive dissonance generated by the Court's duty not to disapprove and the Rule of Law as a founding value of the EU.

Solidarity, law, and contract

The Currency of Solidarity comprises seven chapters and a separate conclusion. The first two chapters set out the theoretical framework of the book by fleshing

[8]M. Draghi, 'Speech at the Global Investment Conference', London, 26 July 2012, verbatim available at ⟨https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html⟩, visited 6 January 2022.

[9]ECB, 'Press Release: Technical Features of Outright Monetary Transactions' (6 September 2012), available at ⟨https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html⟩, visited 6 January 2022.

[10]Statement of 11 February 2010, *supra* n. 1.

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out the concept of solidarity in general (chapter 1), and as it applies between states (chapter 2). In the next two chapters, Borger describes the original design of the Economic and Monetary Union and the single currency as envisaged by the Maastricht Treaty (chapter 3) and analyses the economic flaws in this design (chapter 4). In chapters 5 to 7, Borger offers a comprehensive historical, political and legal analysis of how the Union's political leaders at the highest level initiated a constitutional transformation of the Economic and Monetary Union by re-imagining the currency union as including a notion of positive solidarity (chapter 5). Then, the book describes the parallel actions of the European Central Bank to calm financial markets and maintain financial stability (chapter 6). Chapter 7 shows how the European Court of Justice managed to reconcile this constitutional transformation of the Economic and Monetary Union with the text of the Treaty on the Functioning of the European Union. The concluding chapter advances the abovementioned claim that the European Court of Justice did not just sanction this transformation, but simply could not disapprove of it.

The first two chapters on solidarity are crucially important to understand the basic narrative of *The Currency of Solidarity*. Building on general philosophical, sociological and political theory, Borger arrives at two distinctions in relation to the concept of solidarity: normative versus factual solidarity, and negative versus positive solidarity. Normative solidarity is solidarity arising out of a normative obligation, while factual solidarity involves solidarity to serve one's own interest. It is obviously somewhat controversial whether something like 'normative solidarity' exists among states, or whether, in the end, all solidarity among states can be reduced to considerations of self-interest. Borger draws on the literature on normative obligations and joint commitments to argue that states can create normative obligations vis-à-vis each other through joint political commitments. The EU is one such joint commitment in which the member states have created mutual normative obligations of a political nature to uphold their Union.

Negative solidarity is a kind of solidarity that is exercised by a state (or an individual, for that matter) when it acts in the interest of the collective by focusing on its own condition, for instance by maintaining budgetary discipline. Positive solidarity, in turn, occurs when a state acts directly in relation to other states of the collective, for instance by granting financial assistance.

Adding to normative and factual solidarity and negative and positive solidarity, chapter 2 introduces the term 'Founding Contract'. Borger emphasises that the joint commitment of the member states to uphold the EU is not just a legal commitment to uphold the rules enshrined in the EU Treaties. It is also aimed at maintaining the very existence of the Union as such. Borger calls this fundamental commitment to the existence of the Union the 'Founding Contract'. The Founding Contract characterises itself by a *political* commitment to uphold the Union.

Political commitment, technocratic action, and judicial restraint

Chapter 3 of *The Currency of Solidarity* tells the story of the initial constitutional design of the currency union. Starting with the early plans to work towards monetary union in the late 1960s, the chapter explains how the political leaders experimented with several attempts at achieving monetary stability, before deciding on a common currency. Borger also shows how a strong focus on price stability and central bank independence was indispensable for Germany's consent. This constitutional design of the currency union, moreover, was heavily based on the idea of negative solidarity, entailing strict budgetary discipline and market discipline in respect of member states' public finances.

This Maastricht paradigm, however, suffered from four flaws, which were exposed in the course of the Euro crisis. As chapter 4 explains, the first flaw was that financial markets were an unreliable disciplining device. During the Euro crisis, for instance, the spread between German bonds and Italian and Spanish bonds increased to such an extent that it no longer represented the respective countries' economic fundamentals.[11] The second flaw of the Economic and Monetary Union's constitutional design was the lack of sufficient public discipline on budgetary deficits and sovereign debt levels. Third, while the negative solidarity paradigm had focused on fiscal discipline and public policy, this design did not acknowledge that the fiscal positions of member states could deteriorate rapidly as a result of private sector problems, such as the bursting of housing bubbles in several member states. Fourth, by focusing exclusively on price stability, Maastricht's constitutional design had failed to take into account the need to maintain financial stability, especially in times of crisis.

Chapters 5 and 6 are the core of the narrative of *The Currency of Solidarity*. The former describes in detail how the political leaders initiated the 'shift in solidarity' that involved a greater role for positive solidarity among member states through the mechanism of financial assistance, and a transformation of the currency union towards taking into account financial stability. The Statement by the Heads of State or Government of the European Union of 11 February 2010 is worth quoting here, given its importance to Borger's analysis:

[11]In making this point, Borger relies on the macroeconomic theory of 'multiple equilibria' and the fact that countries such as Greece arguably were in a 'bad equilibrium', i.e. a situation in which interest rates do not reflect objective economic fundamentals. *See* Borger, *The Currency of Solidarity*, *supra* n. 4, p. 160-165, referring in particular to P. de Grauwe and Y. Ji, 'Mispricing of Sovereign Risk and Macroeconomic Stability in the Eurozone', 50 *Journal of Common Market Studies* (2012) p. 866.

> All euro area members [...] have a shared responsibility for the economic and financial stability in the area. Euro area Member States will take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole. The Greek government has not requested any financial support.[12]

In the years following 2010 the political leaders effectuated this statement among others by granting ad hoc financial assistance to Greece, by creating several mechanisms including the European Stability Mechanism to support member states more generally, and by setting up a European system of banking supervision. The 11 February Statement, however, is *the* key constitutional moment in the Economic and Monetary Union's transformation. This is when the member states jointly committed themselves to safeguarding the Eurozone's financial stability, and to the possibility of positive solidarity.

Chapter 6 focuses specifically on European Central Bank action during the Euro crisis. The chapter situates the European Central Bank's role squarely within the political commitments expressed by the member states. While the European Central Bank has been widely lauded as the institution that saved the Euro, Borger emphasises that Draghi's promise 'to do whatever it takes' and the subsequent Outright Monetary Transactions programme could only be introduced because the political leaders had agreed, in the Summer of 2012, to create a European Banking Union. And more generally, 'Draghi could only make that pledge [to do whatever it takes] because the heads of state and government had made it first, on 11 February 2010'.[13]

The Court's judgments in *Pringle* and *Gauweiler* – and more recently in *Weiss*[14] – have taken centre stage in academic commentary on the constitutional dimensions of the Euro crisis. *The Currency of Solidarity*, in contrast, only discusses them in the penultimate chapter of the book. This is no coincidence, because one of Borger's main points is precisely that the transformation of the Economic and Monetary Union was first and foremost a political, not a judicial or technocratic project. Chapter 7 nonetheless analyses both judgments of the European Court of Justice and the engagement of the Bundesverfassungsgericht in *Gauweiler* in great detail.[15] Borger remains admirably neutral in fleshing out the virtues and vices of the Court's reasoning. He makes clear that although there may be serious disputes about the best interpretation of the no-bailout clause

[12]Statement of 11 February 2010, *supra* n. 1.

[13]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 289.

[14]ECJ 11 December 2018, Case C-493/17 *Proceedings brought by Heinrich Weiss and Others*, EU:C:2018:1000.

[15]*See* BVerfG, 2 BvR 2728/13 of 14 January 2014 (OMT preliminary reference decision) and BVerfG, 2 BvR 2728/13 of 21 June 2016 (OMT final judgment).

(Article 125 TFEU) and the prohibition of monetary financing (Article 123 TFEU), the reasoning of the Court is legally defensible.

The concluding chapter takes a birds-eye view of the shift from negative to positive solidarity and defends the claim that the Court could not resist this transformation. As the previous chapters emphasised as well, the key to understanding the transformation of the Economic and Monetary Union is the *joint political commitment* of the member states to maintain the Euro, to ensure financial stability, and to allow for positive solidarity among them. This transformation of the Founding Contract was, practically speaking, non-justiciable.[16]

Borger entertains several possible explanations and justifications for the inability of the Court to disapprove of the constitutional transformation. While the nature of this inability remains somewhat unclear to me – a point to which I return below – Borger connects it to the principle of loyalty. In the face of a renewal of the Founding Contract underlying the Union, the Court was bound by a duty of loyalty towards both the primacy of political commitment and the Union as such to sanction the Economic and Monetary Union's transformation.

How to understand the transformation of the Economic and Monetary Union?

Solidarity and stability

The Currency of Solidarity aims to show that the radical change of the Economic and Monetary Union as a result of the Euro crisis should be understood as a single constitutional transformation. Borger takes solidarity as a guiding narrative to explain the transformation from a currency union focused on price stability to a currency union which also takes into account financial stability. While the move to include financial stability is the 'key manifestation' of the constitutional transformation, its 'driving forces' are '[t]he political decisions and actions to maintain [the Union's] unity'.[17] In turn, these political decisions can be understood from the perspective of solidarity: 'Solidarity allows for an understanding of that unity, the political decisions taken in support of it, and the transformation they have initiated'.[18]

I wonder whether Borger's understanding of the relationship between stability and solidarity actually turns the narrative on its head. The unity of the Union that the political leaders tried to maintain, it seems to me, is more closely linked to

[16]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 366-69.
[17]Ibid., p. 19.
[18]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 19.

financial stability than to solidarity. Was solidarity not the key manifestation – i.e. the necessary *means* – of the need to maintain stability, rather than the other way round? This appears to me to be more in line with the historical narrative as Borger presents it. Few member states were keen to show positive solidarity with Greece. Rescue mechanisms such as the European Financial Stability Facility, the European Financial Stabilisation Mechanism and the European Stability Mechanism were set up because the member states were desperate to avoid a degree of financial instability that could tear the Union apart.

This reverse relationship between solidarity and stability appears to me logically plausible as well. Although Borger is obviously right to say that solidarity is not necessarily a matter of self-interest, it is no surprise that the transformation from negative to positive solidarity occurred only when the Union faced an existential crisis. To put this point differently, while *The Currency of Solidarity* takes normative solidarity as its key lens, this framework may underestimate the salience of factual solidarity as an inevitable *co-product* of the joint commitment to maintain financial stability. Could the normative solidarity which Borger describes not be an emergent phenomenon, ultimately reducible to the self-interest and factual solidarity of the member states? To what extent is this a matter of framing and narrative rather than the actual motivational reasons of the member states? These are, it seems to me, important questions that merit further attention.

How many transformations?

In arguing that the changing nature of the Economic and Monetary Union should be understood as a single transformation, *The Currency of Solidarity* resists the main alternative understanding of this transformation, provided by Michael Ioannidis, according to which the Economic and Monetary Union experienced a dual constitutional transformation: the acceptance of public financial assistance to Eurozone member states; and the replacement of market discipline by bureaucratic discipline and conditionality.[19] Both narratives highlight important aspects of the transformation of the currency union, and it is useful to briefly compare some of their respective virtues.

Compared to Ioannidis' dual transformation, *The Currency of Solidarity* emphasises the central importance of the financial stability of the Eurozone, and more generally the political stability of the Union. This transformation towards taking into account financial stability is less prominent in Ioannidis' analysis, and Borger in my view convincingly shows that concerns about stability have been at the core of political decision-making. The acceptance of public financial assistance for

[19]M. Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis', 53 *Common Market Law Review* (2016) p. 1237.

member states and bureaucratic discipline and conditionality could then be seen as supervening on the more fundamental transformation that Borger describes. Furthermore, by adding solidarity as a key part of its narrative, *The Currency of Solidarity* adds an interesting layer of depth to the transformation(s) already described by Ioannidis and others.

By contrast, conditionality and bureaucratic discipline remain somewhat in the background in *The Currency of Solidarity*. In focusing on normative, positive solidarity, Borger elaborates the gradual acceptance of financial assistance to maintain financial stability. But how does conditionality fit into this picture? This remains quite unclear, and I found this a surprising lacuna in the book. Presumably one could conceive of conditionality as part of the 'limits' or 'qualifications' of positive solidarity. How exactly the relationship between solidarity and conditionality should be defined, however, is a question left unanswered by *The Currency of Solidarity*.

When it comes to conditionality, therefore, Ioannidis arguably provided the more sophisticated analysis. He emphasised that the acceptance of conditionality and bureaucratic discipline transformed the vertical division of powers between the Union and the member states by allowing for previously unacceptable interventions in national economic policies.[20] Borger resists Ioannidis' interpretation of a twofold transformation in the prologue of *The Currency of Solidarity*, but the remainder of the book does not directly engage with his thesis. Given the clear and lasting importance of conditionality and bureaucratic discipline, more explicit attention to these aspects would have been justified.

More specifically, conditionality would have enriched Borger's analysis of *Gauweiler*. *Gauweiler* seems to pose some explanatory problems for Borger because financial stability plays no role in the Court's reasoning.[21] Moreover,

[20]Ioannidis, *supra* n. 19, p. 1267-74.

[21]Borger nonetheless conceives of *Gauweiler* as an integral part of the Economic and Monetary Union's transformation towards a monetary union partly based on financial stability. He consequently finds it surprising that the Court does not speak about financial stability (or even price stability) as the purpose of the ban on monetary financing in Art. 123 TFEU (Borger, *The Currency of Solidarity*, *supra* n. 4, p. 342-43). Borger aims to place financial stability into the normative framework by considering it an intermediate purpose of the Outright Monetary Transactions programme, in the sense that dysfunctional bond markets hamper monetary policy and price stability (Borger, *The Currency of Solidarity*, *supra* n. 4, p. 337). However, from the ECJ's perspective there may be no value in bringing in financial stability as an 'intermediate purpose' towards price stability: if price stability is *the* purpose of the European Central Bank's mandate, introducing intermediate purposes adds nothing to the legal analysis and makes it more vulnerable to doctrinal critique. Alternatively, as I discuss in the next subsection, financial stability in this narrative may in fact just be a proxy for political stability, and political stability features as *the* overarching driver of the Economic and Monetary Union's transformation, an interpretation which Borger at times entertains. However, political stability is an objective at the highest level of generality that one can imagine in any legal and political order, which arguably makes it quite useless for legal reasoning.

the transformative effects of *Gauweiler* are not fully appreciated by Borger to the extent that the Court's interpretation of Article 123 TFEU specifically accepted bureaucratic control and conditionality as means to ensure budgetary discipline. Borger focuses on the role of budgetary discipline as a key objective of the prohibition of monetary financing. He does not, however, elaborate on the fact that the crucial difference between the traditional understanding of Article 123 TFEU and the logic of the Outright Monetary Transactions programme lies in the difference between budgetary discipline induced by the market and budgetary discipline enforced by conditionality. At this point, I also found Ioannidis' analysis more convincing.[22]

The question of how many transformations the currency union experienced is obviously a matter of interpretation and emphasis. And it seems to me that both Borger and Ioannidis have highlighted separate and equally important aspects of this history for their constitutional narratives. However, while fully appreciating the impressive manner in which Borger managed to conceive of the change in the currency union as a single transformation, I would have been interested to read a more detailed engagement with Ioannidis' work. Future research, perhaps, could aim at integrating the various dimensions of the Economic and Monetary Union's transformation to a greater extent.

From financial to political stability?

At times, the book tentatively suggests that it was not merely financial stability, but *political stability* that guided the Economic and Monetary Union's transformation.[23] Although the European Stability Mechanism aims to ensure financial stability, Article 136(3) TFEU refers to the 'stability of the euro area as a whole'.[24] As Borger notes, however, the Court's analysis in *Pringle* and *Gauweiler* defers to the European Stability Mechanism's purpose of safeguarding financial stability.[25]

There is, it seems to me, little doubt that what motivated the political leaders of the Union was not *merely* financial stability but in fact the political stability and survival of the Union as a whole. Chapters 5 and 6 of *The Currency of Solidarity* show very clearly that the unprecedented action taken by political leaders and the European Central Bank reflected a concrete fear of an unravelling of the Eurozone. But although this deep interconnection between financial and political stability – inherent in the supranational design of the monetary union – becomes clear in the book's narrative, it gets snowed under in its ultimate conclusions,

[22]Ioannidis, *supra* n. 19, p. 1260-62.
[23]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 259–60, 314.
[24]Ibid., p. 314.
[25]Ibid., p. 314, fn. 132 and accompanying text.

which emphasise the transformation towards an Economic and Monetary Union taking into account *financial* stability.

Borger's reluctance to structure his narrative around political stability seems based on the fact that the political leaders expressly referred to financial stability, among others in their Statement of 11 February 2010. Borger seems to take this framing as historical fact, and mostly eschews possible speculation about whether they were concerned about a more fundamental level of stability.[26]

However, a methodological objection against taking the political leaders' rhetoric at face value is that Borger certainly does not shy away from a sceptical interpretative attitude towards the express language used by the Court in both *Pringle* and *Gauweiler*. Borger argues convincingly that the Court's reasoning is not quite faithful to the history of the currency union (in *Pringle*) as well as the present objectives of European Central Bank action (in *Gauweiler*).[27] The book, therefore, seems quite comfortable in presenting a logic of constitutional transformation that does not take the Court's legal reasoning at face value. This would make it all the more interesting to apply a similar 'hermeneutics of suspicion' vis-à-vis the rhetoric of *financial* stability at the political level as well.[28]

Did the transformation of the Economic and Monetary Union exceed judicial authority?

One of the most interesting claims of *The Currency of Solidarity* is that the Court of Justice could not resist the transformation of the currency union. Borger rejects therefore Ioannidis' claim that the Court's judgments in *Pringle* and *Gauweiler* take centre stage in the Economic and Monetary Union's transformation because 'it is the constitutional adjudicator that essentially sanctions a constitutional

[26]At the very end of ch 5, for instance, Borger writes: 'But a joint commitment [to political stability] of similar importance as the one of 11 February 2010 to financial stability is still lacking, at least on paper' (260). My question in turn would be whether we should not conceive of the joint commitment of 11 February 2010 as precisely a commitment to political stability, even though this is not the express language used.

[27]Borger's main critique of *Pringle* is that the Court plays with history by suggesting that financial stability had always been an objective of Article 125 TFEU, and that member states had always been allowed to grant financial assistance, in order to reach its conclusion that this provision simply allowed for the creation of the European Stability Mechanism (Borger, *The Currency of Solidarity*, *supra* n. 4, p. 307-14). In *Gauweiler*, Borger argues, the Court played with the present by suggesting that financial stability played no role in the Outright Monetary Transactions programme, and merely analyse the compatibility of the programme with Art. 123 TFEU in light of budgetary discipline as that provision's objective (Borger, *The Currency of Solidarity*, *supra* n. 4, p. 338-43).

[28]For the term 'hermeneutics of suspicion', *see* P. Ricoeur, *Freud and Philosophy* (Yale University Press 1970) ch 2.

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transformation'.[29] The Court was under a normative obligation to sanction the political decision to transform the currency union and the Founding Contract underlying the EU as such:

> 'Any account of the euro's transformation is consequently incomplete without consideration of the Court's judgments in *Pringle* and *Gauweiler*. But the Court did not simply sanction the transformation. The Court *had* to sanction. Or to be more precise, it could not disapprove. Primacy did not lie with the *judiciary* but with *politics*'.[30]

While the book's narrative analysis in chapters 2 to 7 aims to substantiate this claim in general, the argument is only explicitly addressed in the concluding chapter. The Court's duty not to disapprove, according to Borger, is based on a specific conception of the duty of loyalty. This duty is not merely the principle of loyalty in Article 4(3) TEU, however, but a specific 'expression of basic solidarity' which 'connects the law to the Contract that grounds it'.[31] This sounds fairly esoteric, and the reason may have to do with the fact that Borger wants to avoid grounding the Court's duty only in a concrete Treaty provision. The whole point of this part of *The Currency of Solidarity*, after all, is to show that the Economic and Monetary Union's transformation was deeply at odds with the law, so that a solution can only be found outside of it.[32]

After rejecting a Schmittian approach which would qualify the entry into force of Article 136(3) TFEU as an exercise of 'de facto power',[33] Borger notes that the change in the Founding Contract was 'a political act, and exercise of constitutional power outside the law' which however '*does* receive recognition in the law'.[34] It is not quite clear what 'constitutional power outside the law' means. Borger relies in this regard on a distinction between a 'constitutional document' and the wider 'constitutional settlement' made by Eijsbouts, Beukers and Reestman.[35] This wider constitutional settlement includes 'the political constitution or the constitution with a "small c"', which is not dependent on the existence of a formal Constitution or Basic Law.[36] The EU's constitutional settlement accordingly depends on 'the Union's real *political* authority, insofar as this is

[29]Ioannidis, *supra* n. 19, p. 1244.

[30]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 18 (emphasis in original).

[31]Ibid., p. 362.

[32]Ibid., p. 361.

[33]Ibid., p. 357-58.

[34]Ibid., p. 358 (emphasis in original).

[35]W.T. Eijsbouts et al., 'Between the Constitutional Document and the Constitutional Settlement', 10 *EuConst* (2014) p. 375.

[36]Ibid., p. 375.

autonomous from the Member States and their societies'.[37] *The Currency of Solidarity* likewise distinguishes the Treaties from the Founding Contract that underlies Treaty law and that is part of the EU's political constitution. This does not yet answer the question of why this political constitution and the Founding Contract are 'outside the law'. Even hardcore legal positivism has no trouble recognising the legality of (political) constitutionalism beyond the formal constitutional document.[38] Perhaps it might have been appropriate to refer to constitutional power outside the Treaties, but within the law. However, this would have made it more difficult for Borger to claim that the Court could not disapprove this constitutional change, given the Court's task to ensure that in the interpretation and application of the Treaties the law is observed.[39]

Borger applies the distinction between Founding Contract and law to the entry into force of Article 136(3) TFEU roughly as follows. The Founding Contract can only be changed by the member states when they are acting in their full capacity as member states. Within the EU law *acquis*, the member states typically act in their executive capacity, for instance as principals of their representatives in the European Council and the Council. Sometimes, however, member states act in their full capacity, in which case they are able to modify the Founding Contract. 11 February 2010 is one of those constitutional moments, when the member states vowed to preserve their Founding Contract, and in doing so changed it dramatically. Borger subsequently argues that the duty of loyalty expresses the solidarity between member states and connects the law to the Founding Contract. It follows that '[w]hen the Court has to rule on a measure that has proven essential to preserve the Founding Contract in an emergency, this study argues, it is under a duty of loyalty to abstain from disapproving it'.[40]

At times, Borger's analysis is quite convoluted. He argues, for example, that the Court owed its duty of loyalty towards the member states in their full capacity as

[37]Ibid., p. 376 (emphasis added).

[38]*See* e.g. J. Gardner 'Some Types of Law', in *Law as a Leap of Faith* (Oxford University Press 2012). For legal positivists, the wider constitutional settlement may in fact be easier to explain *as law* than the constitutional document, because the rule of recognition of a legal system takes shape by the customs of legal officials – including among others judges but also political leaders and other legal actors – and cannot be formulated in a canonical document. *See* e.g. J. Gardner, 'Can There Be a Written Constitution?' in *Law as a Leap of Faith*; and in an EU context, J. Lindeboom, 'The Autonomy of EU Law: A Hartian View', 13 *European Journal of Legal Studies* (2021) p. 271.

[39]Art. 19(1) TEU. However, as I discuss in the next sub-section, Borger also argues that *Pringle* and *Gauweiler* were 'hard cases' that involved 'political questions'. Since the concept of a 'hard case' and the political question doctrine are firmly rooted in conventional legal theories of adjudication, perhaps *The Currency of Solidarity* could have reached the same conclusions without the distinction between 'Founding Contract' and 'law' and without resorting to the notion of 'constitutional power outside the law'.

[40]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 362.

the Union's *pouvoir constituant*, even though the principle of loyalty only applies *within* the framework of the Treaties.[41] Borger explains that the principle of loyalty is applicable because the member states 'are not only the Union's constituent power but, in their *executive* capacity, also exercise constituted power, especially in the European Council'.[42] This argument appears quite incredible to me. Basically, the principle of loyalty is only applicable because the European Council acted as *pouvoir constitué*, while the practical content of this duty of loyalty – the Court's duty not to disapprove – is owed to the member states only because they acted within the European Council as a *pouvoir constituant* in disguise. This argument seems to try to have its cake and eat it too.

I also question the 'could not disapprove' thesis in relation to *Gauweiler*. Pragmatically, the thesis forcefully applies to *Pringle* because the Court had to rule on a unanimous decision by the European Council to amend the Treaty. *Gauweiler*, by contrast, was about a policy decision of the European Central Bank. In chapters 5 and 6, Borger persuasively argues that the European Central Bank could only resort to the announcement of its Outright Monetary Transactions programme because the member states had already acted.[43] He therefore qualifies that programme as one of the 'most essential manifestations' of the currency transformation, and specifies that the Court could not disapprove of these manifestations which the political leaders 'decided on, *or approved of*, at the height of the crisis'.[44] But I am not entirely convinced that the European Central Bank's Outright Monetary Transactions programme was an 'essential manifestation' of the change in the Founding Contract. The member states did not direct the European Central Bank to adopt the programme, nor is that programme the inevitable consequence of the decision of the member states to set up a Banking Union. Borger also emphasises that the essential manifestations of the constitutional transformation 'concern the *basic capacity* of Member States to preserve the Contract that ties them together and founds the Union'.[45] So why would this same argument extend to actions by the European Central Bank, even if aimed at preserving the Euro? Judicial deference to collective member state action is not the same as judicial deference to central bank action, even if the latter was made possible – but not determined – by the member states. In his earlier analysis of *Gauweiler*,[46] Borger was also far less categorical about the normative inevitability of the Court's approval, and it seems that

[41]Ibid., p. 362.
[42]Ibid., p. 362.
[43]*See* in particular Borger, *The Currency of Solidarity*, *supra* n. 4, p. 284-88.
[44]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 363 (emphasis added).
[45]Ibid., p. 363 (emphasis in original).
[46]Borger, 'Outright Monetary Transactions', *supra* n. 6.

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The Currency of Solidarity goes at great lengths to incorporate *Gauweiler* into its overarching narrative and theoretical framework.

What kind of duty?

At a more fundamental level, the scope and normative characteristics of a duty not to disapprove of a constitutional transformation remained somewhat unclear to me. As I discussed above, Borger seems to conceive of this duty as a duty of loyalty for the Court that is both *constitutional* and *extra-legal*. In addressing the question of how the Court lacks the power to decide negatively while it – apparently – does have the power to judge, Borger turns to the View of Advocate General Kokott in *Pringle*[47] and the political question doctrine in American constitutional law.[48] This argument seemed to me distinct from the arguments directly based on the categorical distinction between 'constituting power' (in respect of the Founding Contract) and 'constituted power' (in respect of the content of the law). Borger observes that the Court:

> is under a duty of loyalty to use the interpretive space at its disposal in 'hard' cases, allowing it to favour a certain reading of the law over others, in such a way that it can approve of the change in the Contract *as defined* by political leaders in an emergency.[49]

This claim is weaker than the earlier claim that the Court is forced to defer to the political leaders' change of the Founding Contract. In fact, if all Borger aims to demonstrate is that *Pringle* and *Gauweiler* were 'hard cases' and that the Court therefore was required to defer to political commitments, his analysis would be squarely within much more conventional theories of adjudication.[50] Whether the EU legislature has the power to adopt internal market harmonisation under Article 114 TFEU, for instance, is sometimes a 'hard case'. Consequently, in such cases the Court grants the EU legislature 'broad discretion'.[51] However, surely Borger wants to maintain the distinctions between constituting and constituted power and between Founding Contract and law. The vocabulary of 'hard cases' runs

[47]View of AG Kokott in ECJ 26 October 2012, Case C-370/12, *Thomas Pringle* v *Government of Ireland and Others*, EU:C:2012:675.

[48]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 363-70, with further references to the literature.

[49]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 364-65.

[50]*See* e.g., E. Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* (Harvard University Press 2008).

[51]*See* e.g. ECJ 8 June 2010, Case C-58/08, *Vodafone and Others*, EU:C:2010:321, para 52; ECJ 3 December 2019, Case C-482/17, *Czech Republic* v *Parliament and Council*, EU:C:2019:1035, para. 77.

the risk of conflating these distinctions. It seemed to me, therefore, that Borger's attempt to reconcile the Court's inability to disapprove with its power to judge led him to a confusing and perhaps unnecessary elaboration on the main argument, which would in my view be stronger without reference to the idea of a 'hard case'.

This criticism is reinforced by the fact that the concept of constitutional transformation fits uneasily with the vocabulary of 'easy' and 'hard' cases. A hard case is a case in which multiple interpretations of the same legal rule(s) seem equally defensible to the relevant interpretative communities, and the court has to exercise judicial discretion. *The Currency of Solidarity* clearly shows that before the Euro crisis, there was a broad consensus about the meaning of Articles 123 and 125 TFEU, which was strongly linked to negative solidarity and market discipline.[52] In the pre-crisis paradigm, the reasoning of the Court in *Pringle* and *Gauweiler* would simply be frivolous.[53] After *Pringle* and *Gauweiler*, there is an equally broad consensus that that meaning has now radically changed. In both paradigms, therefore, the cases seem to be easy ones. Borger may have in mind something like Ronald Dworkin's point that 'questions considered easy during one period become hard before they again become easy questions – with the opposite answers'.[54] Nonetheless, qualifying *Pringle* and *Gauweiler* as 'hard cases' detracts from the book's more fundamental narrative of constitutional transformation. The core of constitutional transformation is precisely a radical change of meaning in what were – and what have immediately become again – easy cases. If Borger's claim that the '*legal* meaning [of the key provisions of the single currency's original set-up] was far from obvious'[55] were true, speaking of a constitutional *transformation* of the currency union would arguably be a misnomer.

The nature of the normative duty not to disapply is further obfuscated by the book's reference to the political question doctrine. Borger makes an intriguing analogy with English feudalism and a common law case from 1460. When Richard, Duke of York, claimed that he was entitled to the Crown, the Lords in parliament sought legal guidance from the judges of the King. They refused to give advice because the case was 'so high, and touched the Kings high estate and regalie, which is above the lawe and passed ther lernyng'.[56] Borger cites a commentator stating that the judges 'could not rule for Richard without ousting the source of their own authority'.[57]

[52]*See* Borger, *The Currency of Solidarity*, *supra* n. 4, p. 121-25. *See also* Ioannidis, *supra* n. 19, p. 1249-52, 1256-63.

[53]On frivolous legal argument in relation to 'hard' and 'easy' cases, *see* S. Levinson, 'Frivolous Cases: Do Lawyers Really Know Anything at All?', 24 *Osgoode Hall Law Journal* (1986) p. 353.

[54]R. Dworkin, *Law's Empire* (Harvard University Press 1986) p. 354.

[55]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 293.

[56]Quoted in Borger, *The Currency of Solidarity*, *supra* n. 4, p. 368.

[57]Ibid., p. 368.

This analogy raises more questions than it provides answers. As Borger concedes, the sovereignty of the King in medieval and early modern times is incomparable to contemporary constitutionalism and the normative relationship between politics and the judiciary.[58] Yet, Borger maintains that the analogy is useful to the extent that 'the change in the Union's Founding Contract that national leaders initiated on 11 February 2010 concerns a political question' and '[i]t was for political leaders to decide whether and how to preserve the unity between their states'.[59] Consequently, '[q]uestioning the use of this power lies beyond the reach of the Court, or any other institution for that matter'.[60]

Even if the analogy with the unchecked authority of the English Kings works even heuristically, it raises many questions about the nature of the duty of loyalty. Does the duty of loyalty entail a duty for the Court not to deny the presuppositions that allow the law to exist? Can the Court disapprove of the Economic and Monetary Union's transformation if the consequence is the unravelling of the currency union, which according to many commentators would mean the end of the Union, and therefore also the end of the Court itself? This argument seems to add some sort of existentialism to the normative duty of the Court not to disapprove. Borger certainly suggests that this may be the case, but then quickly returns to the more conventional 'political question' qualification.

On some other occasions, Borger appears to be close to suggesting that the political question doctrine collapses into power, notwithstanding his insistence earlier in the chapter that the political leaders were not '*only* exercising de facto power'.[61] He emphasises that the Court could not question the use of the power of the political leaders when 'they mobilized their political authority in support of the rescue of the euro'.[62] He also concludes that:

> the only actors capable of [questioning the use of this power] are the Member States in their *full* capacity. At the level of constituted power, it is for political leaders to safeguard a basic capacity to preserve the Union by initiating a change of its Founding Contract.[63]

It seems as if Borger is close to arguing that the Court simply has an obligation to accept the power of the member states acting jointly and in full. But it is unclear to me whether the duty of loyalty is necessary or even appropriate for this conclusion. How can one distinguish between a normative duty to accept

[58]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 368-69.
[59]Ibid., p. 369.
[60]Ibid.
[61]Ibid., p. 358 (emphasis in original).
[62]Ibid., p. 369.
[63]Ibid., p. 369 (emphasis in original).

whatever the member states decided was necessary to save the Euro and a *de facto* inability to resist the power of the member states to decide whatever they deemed necessary to save the Euro?

The exact nature of the normative duty of the Court not to disapprove remains, in my view, underdeveloped and, given its central role in the prologue to the book, the concluding chapter's argument is somewhat disappointing. More generally, this concluding chapter is quite crammed and the topics addressed by it would all together merit at least another book-length contribution. After 350 pages of detailed political and constitutional history, the conclusion takes only 20 pages to defend the thesis that the Court could not disapprove of the constitutional transformation, while entertaining – along the way – Schmitt's theory of sovereignty, various theories of legal interpretation, the political question doctrine, and Borger's own complex analysis of the role of loyalty in linking law to contract. In my view, the chapter simply tries to do too much in too few pages.

Cognitive dissonance

Moving on to my final point, if we agree with Borger that the European Court of Justice had no choice but to sanction the transformation of the Economic and Monetary Union, this conclusion does seem to cause a sense of discomfort. The conclusion that 'the only actors capable of [questioning the use of this power] are the Member States in their *full* capacity',[64] implies that certain actions of the member states are shielded from judicial review. Not only does this create problems of demarcation between constituting and constituted powers, as discussed above, it also points at the profound tension between Borger's account of the transformation of the Economic and Monetary Union and the Rule of Law.

In other words, what about the Court's task to 'ensure that in the interpretation and application of the Treaties the law is observed'?[65] No EU lawyer can fail to commit to the fundamental values and principles of the EU legal order. But as Borger's narrative convincingly shows that primacy 'did not lie with the judiciary but with politics',[66] the Court's role in the concluding chapter of *The Currency of Solidarity* almost reads as a vulgar version of legal realism, in which the Court is prepared to do anything to reconcile the law with the political commitments of the member states.[67]

[64]Ibid., p. 369.

[65]Art. 19(1) TEU.

[66]Borger, *The Currency of Solidarity*, *supra* n. 4, p. 18.

[67]I borrow the term 'vulgar legal realism' from S. Levinson, 'Why I Do Not Teach *Marbury* (Except to Eastern Europeans) and Why You Shouldn't Either', 38 *Wake Forest Law Review* (2003) p. 553 at p. 566.

The marginal role of the Court in *The Currency of Solidarity* aligns, in this regard, with broader discussions about the scope of judicial protection in EU law and its relationship to political decision-making.[68] In the *Sharpston* case, for example, the Court held that a declaration by the representatives of the governments of the member states to the effect of ending Eleanor Sharpston's mandate as Advocate General on 1 February 2020, was not subject to judicial review.[69] According to some scholars, this judgment violated the principle of judicial protection and the independence of the Court.[70] In *Chyrsostomides*, the Court ruled that decisions of the Euro Group are not subject to judicial review in a non-contractual liability action, because the Euro Group is not a 'body of EU law'.[71] This judgment can likewise be criticised for failing to ensure full judicial protection.[72] An important difference between those cases and *Pringle* and *Gauweiler* is that the Court decided the latter two on the merits. Accordingly, it was the Court itself that ultimately decided to defer to politics.[73] While Borger concedes this point at the end of the book, this concession hardly detracts from his key point that the Court *had* to approve. In this regard, there is a strong functional similarity between the Court's relationship to the member states in *Pringle*, *Gauweiler* on the one hand, and *Sharpston* and *Chyrsostomides* on the other. In Borger's words, even though the Court 'control[s] the question of when a case, and which aspects of it, qualifies as a political question', '[t]he substantive constitutional change by the currency union is [outside its reach]'.[74]

Borger does not raise the question of how we can square the seemingly irreconcilable beliefs that on the one hand the Court was forced to approve of the political decision to transform the Economic and Monetary Union regardless of how incongruent with the law it was, and that on the other hand the Court's fundamental task is to ensure that the law is observed. He does, however, seem to try to avoid this cognitive dissonance. For instance, Borger locates the obligation

[68] *See generally*, E. Spaventa, 'Constitutional Creativity Or Constitutional Deception? Acts of the Member States Acting Collectively and Jurisdiction of the Court of Justice', 58 *Common Market Law Review* (2021) p. 1697.

[69] ECJ 16 June 2021, Case C-684/20, *Eleanor Sharpston* v *Council of the European Union*, EU:C:2021:486.

[70] D. Kochenov and G. Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the *Sharpston* Affair', 28 *European Law Journal* (forthcoming).

[71] ECJ 16 December 2020, Case C-597/18 P, *Council* v *K. Chrysostomides & Co. and Others*, EU:C:2020:1028.

[72] P. Nicolaides, 'The Euro Group and Judicial Protection: Has the Court of Justice Created a Loophole?', *Maastricht Journal of European and Comparative Law* (2021) advance access at ⟨https://doi.org/10.1177/1023263X211048602⟩, visited 6 January 2022.

[73] Borger, *The Currency of Solidarity*, *supra* n. 4, p. 370.

[74] Ibid., p. 370.

not to disapprove in the principle of loyalty, which is firmly enshrined in primary law, even though Borger's conception of the principle transcends the Treaty as such.[75] As I mentioned above, Borger also frames *Pringle* and *Gauweiler* as 'hard cases'. This qualification justifies the use of extra-legal principles and values, while an 'easy case' by definition can be resolved on the basis of the generally accepted meaning of positive law.[76]

The important distinction between 'the law' and 'the Founding Contract' further complicates the tension between Borger's narrative and our commitment to the Rule of Law. In *Pringle*, there had been a Treaty amendment which linked the change in the Founding Contract to a concrete change in the law itself. This does not fully remove the interpretative tension with the straightforward meaning of Article 125 TFEU, as Borger demonstrates, but at least Article 136(3) TFEU ensured that the change in the Founding Contract was reflected in the Treaties. But in *Gauweiler* this is of no avail. All we have is an acknowledgement that the Court could not resist the European Central Bank's commitment to do whatever it takes to save the Euro. The picture of the Court is not quite flattering: if Borger is right about the Court's inability to disapprove of the Outright Monetary Transactions programme, the Court in *Gauweiler* almost makes a mockery of the Rule of Law.

Ioannidis' analysis of the transformation of the Economic and Monetary Union offers a useful complementary analysis. As Ioannidis explains, the concept of transformation among others distinguishes itself from other instances of interpretation in the sense that pre- and post-transformation interpretations of the same text are incommensurable.[77] The new meaning of the text was epistemically inaccessible to the interpretative communities before the transformation, and has become commonplace afterwards. Consequently, the question of whether the transformation is 'illegal' makes no sense.[78]

Borger's book does not elaborate to the same degree on the exact meaning and characteristics of a 'constitutional transformation'. Perhaps partly as a result, his narrative seems profoundly at odds with the Rule of Law. By contrast, these tensions are interpreted away in Ioannidis' account, to the extent that the Court in *Pringle* and *Gauweiler* realised that the term 'illegality' simply was no longer available in respect of the contested decisions. While Borger's focus on the distinction between law and Founding Contract has considerable explanatory force, Ioannidis' analysis may better capture the *juridical* aspect of the Economic

[75]Ibid., p. 361-62.

[76]This is at least how Borger understands the distinction (ibid., p. 292-93). *Cf* Dworkin, *Law's Empire*, *supra* n. 54, p. 350-54, in which Dworkin deconstructs the distinction between easy and hard cases.

[77]Ioannidis, *supra* n. 19, p. 1241-44.

[78]Ibid., p. 1243-44.

and Monetary Union's transformation. By trying to understand the transformation as an interplay between law and contract, and between the judiciary and politics, Borger inevitably creates a tension between what he calls the primacy of politics and what we generally believe is the primacy of law.

However, perhaps this is a virtue of *The Currency of Solidarity* after all. Perhaps Ioannidis is too charitable in taking for granted that illegality is not a useful concept in the context of constitutional transformations. *The Currency of Solidarity* concludes up front that the Court was forced to approve of the political decision-making process. And while Borger goes to great lengths to show how this narrative is normatively acceptable from the perspective of loyalty, the primacy of politics, and the distinction between law and Founding Contract, what *The Currency of Solidarity* demonstrates too is that our conventional beliefs about the balance of power and the primacy of law simply break down in times of transformation.

Concluding remarks

The Currency of Solidarity is an authoritative narrative of the constitutional transformation of the Euro crisis. The book is unrivalled in its comprehensive discussion of the fundamental changes which the Economic and Monetary Union experienced, and presents an original and complex explanation of how politics, technocracy and the judiciary interacted as the Euro crisis unfolded.

Borger's narrative account of the Economic and Monetary Union's transformation is persuasively argued as well as controversial. His analysis of the relationship between solidarity and stability, between politics and law, and between the Union's Founding Contract and EU law, may not entirely convince everyone. This conclusion, however, hardly seems a vice, but rather a virtue of a book that is both brilliant and audacious.

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