Introduction

This book returns to the pivotal question that stood at the cradle of the European Union: will accelerated economic integration of a number of European nation states and their societies lead to heightened degrees of social integration within those states and at a European level? And what does the European Union's law contribute to constituting the conditions of economic and social integration?

These questions are as current as ever, and possibly even more so after the Treaty of Lisbon entered into force on 1 December 2009. That date marks the end of an enhanced constitutional phase within the European integration process. The process of developing first a 'capital letter' Constitutional Treaty and then returning to the mundane process of a Reform Treaty was also accompanied by a heightened public awareness of the potential negative consequences that economic integration may exert on the social fabric of the European Union within its Member States and beyond.

There is some evidence that the negative referenda in France, the Netherlands and Ireland were at least partly influenced by fears that a further intensification of the EU integration process would damage the social models developed nationally.¹ Clearly these fears could not be backed up by the contents of the Constitutional Treaty: it did not change the EU's existing 'economic constitution', but rather added some more explicit social values. Nevertheless, the referenda demonstrated a realistic assessment of what economic integration without accompanying social policy will achieve: the demise of social integration both nationally and at EU level.

This book urges its readers to return to the original purposes of European integration, which always included enhancing the lives of the people living in Europe. If there was failure in the capital letter Constitutional phase, this failure lay in not displaying proper regard for this mission. Of course, it cannot be denied that the processes of economic and social integration in their interrelation pose a challenge both for the European Union and its constitutional law. This challenge needs to be addressed, to which goal this book seeks to contribute from a legal studies perspective. Clearly, the goal of striving towards economic and social integration cannot be achieved through law or

¹ See Schiek, 2010d, p. 162 with further references.

European legal integration exclusively. However, it has also been said that ‘nearly everything the European Union touches turns into law’.² Even if this is an overstatement, the role of law in enabling or restricting societal processes such as economic and social integration must not be underestimated. This is especially true of constitutional law, which constitutes – whether with a capital C or not – higher law, against which other regulation is measured.

Accordingly, this book sets out to expose the extent to which EU constitutional law, in particular as developed by the EU judiciary, contributes to economic and/or social integration at EU and national levels and in how far it disembeds the economic and the social dimensions of European integration. Throughout, it engages with the influence of the EU and its constitutional law on societies in Member States and on the emerging European society. Therefore, the concern with constitutional law is from substantive – as opposed to institutional – perspectives, including the values which are supported by EU constitutional law in practice. Issues which will not be discussed include whether and how democratic legitimacy of a global polity can be secured³ or how exactly transnational authority is capable of being legitimised.⁴ The book is also not concerned with developing yet another theory of polyarchic democratic experimentalism⁵ or an analysis of discourses between courts and other authorities for different entities.⁶ All these questions have been covered extensively elsewhere, most recently in relation to EU constitutionalism after the Treaty of Lisbon.⁷ In pursuing its aim of investigating challenges for EU constitutional law emanating from economic and social integration the book proceeds as follows.

Chapter 1 positions the legal studies perspective from which the argument departs within approaches of other social sciences to European integration and Europeanisation. It considers that the EU can neither be comprehended as a mere top-down process, through which EU policy making is ‘downloaded’ to Member States’ spheres, nor as a bottom-up development through which

² Kelemen, 2011, p. 29.

³ The question of how best to secure democracy through constitutionalism beyond states has inter alia been the theme of the ‘Venice Commission’ (for some documentation of its results see Nolte, 2005).

⁴ This is, to name only a few examples in chronological order, the focus of Schmitter, 2000, Longo, 2006, de Búrca, 2008, and Walker, 2010.

⁵ Developing deliberative polyarchy is the aim of Sabel, which he has pursued in cooperation with many authors, most recently – using dialogues between courts as an exemplary field – with Gerstenberg in Sabel and Gerstenberg, 2010.

⁶ For a cultural-critical perspective on discourses between courts see Cartabia, 2009; on the impact of EU courts’ case law on Member States’ prerogatives see Micklitz and de Witte, 2012.

⁷ On this see Schiek et al., 2011 and Wouters et al., 2009, see also Piris, 2010.

(some) Member States' perspectives are 'uploaded' to the European level.⁸ Rather, the simultaneous processes of European integration governed from above and Europeanisation of national policy and societies from below influence each other and contribute to establishing European level polities and societies. Within these processes law is relied upon for justification of developments as well as for limiting political or social action, constituting an important factor of EU integration. The chapter further develops the notions of economic and social integration, identifying a number of challenges for pursuing social and economic integration in an integrated fashion. These include the impact of economic globalisation on EU discourse, the preference of (some) nation states to achieve social integration through closure rather than openness and the increasing dedication of the European integration project to purely economic principles such as competitiveness, growth and efficiency. The chapter concludes that such a mainly economic orientation risks the marginalisation of social values and along with this the alienation of large proportions of the citizenry. For the EU to regain credibility and its citizens' trust and to become an example of furthering social justice through models avoiding closure, it needs to engage with social integration.

Chapter 2 develops a notion of constitutional law beyond nation states suitable to take into perspective the interaction of law and society, corresponding to the societal notion of European integration developed in Chapter 1. It outlines the historical development of Western European national constitutionalism, demonstrating how national constitutions emerged from liberal constitutionalism and developed towards socially embedded constitutionalism. In considering two main elements of Western European constitutions, i.e. the protection of (human) rights and the establishment of spheres for democratic rule-making and collective governance, liberal constitutionalism is characterised by limiting its aspirations to narrowly defined public spheres, while socially embedded constitutionalism also strives to constitutionalise socio-economic spheres, to constrain private as well as public power and to enable women and men unable to rely on their wealth in cushioning their lives against being ruled by others to achieve true self-governance, individually or collectively. This rich concept of constitutional law at the same time is capable of meeting the challenges of social and economic integration. However, national frames of constitutionalism have become dysfunctional. While constitutional law can be developed beyond states, such constitutionalism has been more successful in relation to liberal rights than to socially embedded rights and democracy. The chapter considers how EU constitutional law could overcome these shortcomings, as a merely liberal EU constitutionalism would

⁸ The uploading/downloading metaphor is used by Börzel, 2002.

imply for the EU a failure to engender social integration. The question for the rest of the book is thus how EU constitutional law relates to the dichotomy of liberal and socially embedded constitutionalism, especially after the EU's 2004 Enlargement with its vastly increased diversity and socio-economic tensions.

Chapter 3 retraces the trajectory of EU constitutional law between those two poles up to 2004. It demonstrates that rights protection and democracy in the EU have developed on a specific trajectory that differs from those followed by European nation states. The EEC started with an economic constitution, which not only established new individual rights to access the common market beyond one's state, but also engendered embryonic social rights for free moving workers. This constitution was contradictory in that it engendered regulatory competition between Member States on the one hand and, on the other hand, created *fora* for social integration across borders. Elements of liberal constitutionalism such as effective human rights protection are relatively young at EU level, having been formalised only with the Treaty of Lisbon. Also, democracy in public spheres is of more recent origin. The interrelation between liberal and socially embedded constitutionalism at EU level was thus patchy on the eve of Eastern Enlargement and largely dependent on the Court of Justice (CJEU) for its development.

Chapter 4 analyses the development of the EU's judicial constitution, as it has been specified and reconfirmed in case law by the Court's Grand Chamber since Eastern Enlargement (2004). This chapter contains a numerical analysis of 173 out of 244 cases heard by the Grand Chamber relating to their positioning along the axes of liberal constitutionalism and socially embedded constitutionalism for the protection of rights and establishment of spheres for collective rule-making. It also offers a doctrinal and content analysis of these cases, distilling tendencies of development for the European judiciary as a key player in EU constitutionalism after Eastern Enlargement. The in-depth analysis and closer reading of cases demonstrates that the focus of CJEU case law is still on enforcing the internal market as the main element of economic integration, with an increasing tendency to support citizen's rights. This creates tensions within the EU legal order in relation to other elements of modern constitutionalism such as proactive conceptions of rights to penetrate socio-economic spheres and establishing European spheres of collective rule-making.

Chapter 5, in its first part, contrasts this factual judicial constitution with the EU's value and programmatic base as established by the Treaty of Lisbon. This part concludes that the Court of Justice will need to develop beyond today's achievements if it is to respect the recent changes, in particular in the normative notions relating to economic and social integration. However, the values now acclaimed by the EU cannot be realised by case law alone. This depends on active policy development through a range of forms of governance. The chapter's second part analyses how EU constitutional law allocates

competences for the realisation of these values between Member States and the EU. It concludes that the multilevel competence regime is incomplete if only public actors are considered and that an open constitution is necessary to enable societal actors at national and EU levels to contribute to the social embedding of the predominantly economic constitution of the EU. It proposes that a constitution of social governance is read into the Treaties, which would offer the potential to meet the challenges of economic and social integration.