



ARTICLES

SPECIAL SECTION – EUROPE AND “CRISIS” (FIRST PART)

INTRODUCTION

Europe finds itself in a problematic, unsettled condition of standing in-between crisis and post-crisis.¹ This is so for at least one reason – Europe’s crisis predicament produces transformations in both governance and law at once that alter key institutional and constitutional structures to the point that any possible “post-crisis condition” to come will embody the traces of crisis. These transformation processes include configurations that devalue law or, another variation on the theme of crisis through law, make (governance through) law over-powerful.

Law’s value is diminished whenever elementary notions of (European) law are surprisingly yet unequivocally set aside, as it has been the case of the General Court’s avoiding engagement with the issue of the potential relevance of the protection of fundamental rights in a highly contentious dispute in relation to the EU-Turkey Statement of 18 March 2016 as challenged before the Court – the context is the so called “refugee crisis”.² And the law is made over-powerful whenever it becomes instrumental to centralized economization, as in the case of the superimposition of the Economic and Monetary Union Memoranda of Understanding on the “debtor countries”.³

This co-existence of processes that make law at once weak and over-powerful may sound counterintuitive. And yet, the functional instrumentalisation of law in Europe works in this way – it defies logic (the logic of non-contradiction) and it is complex. One

¹ See M. DAWSON, H. ENDERLEIN, CH. JOERGES (eds), *Beyond Crisis. The Governance of Europe’s Economic, Political and Legal Transformation*, Oxford: Oxford University Press, 2015; L. NIGLIA, *Eclipse of the Constitution. Europe Nouveau Siècle*, in *European Law Journal*, 2016, p. 132 *et seq.*

² See E. CANNIZZARO, *Denialism as the Supreme Expression of Realism. A Quick Comment on NF v. European Council*, in *European Papers*, Vol. 2, No 1, 2017, www.europeanpapers.eu, p. 251-*et seq.*; and General Court, order of 28 February 2017, case T-192/16, *NF v. European Council*. See now Court of Justice, order of 12 September 2018, joined cases C-208/17 P to C-210/17 P, *NF and Others v. European Council* (appeal dismissed as “manifestly inadmissible”, pursuant to Art. 181 of the Rules of Procedure of the Court of Justice, namely: “by their arguments, the appellants merely express their disagreement with the General Court’s assessment of the facts, while requesting that those facts be assessed again, without claiming or establishing that the General Court’s assessment of the facts is manifestly inaccurate, which is inadmissible in an appeal”).

³ See C. JOERGES, *Comments on the Draft Treaty on the Democratization of the Governance of the Euro Area*, in *European Papers* 2018, Vol. 1, No 3, www.europeanpapers.eu, p. 75 *et seq.*; L. NIGLIA, *The New Transformation of Europe*, in *American Journal of Comparative Law*, forthcoming.

needs to become fully aware of this condition of the law's discourse, in particular when at work are crisis developments that go as far as threatening to undo the "new legal order" cathedral, as some commentators hold.⁴ Namely: Europe and its nations and collectivities are facing economic and monetary challenges, migration and security risks as well as a variety of forms of nationalism and of "populism" that the insiders conceptualize in terms of "crisis". Each area conveys certain declinations of "crisis" (e.g. economic downturn and austerity measures, or, migration and border control) and idiosyncratic ways in which the law is involved in crisis configurations (e.g. memoranda of understanding and the "strict conditionality" requirement as legalised by the European Council Decision of 25 March 2011 through amending Art. 136 TFEU; EU law in relation to nation-state surveillance of borders, including judicial review). Law is intertwined with "crisis talk" – some label European law "European crisis law". Correspondingly, Europe continues being caught in a state of multiple crises that some identify as defining a permanent critical condition, no longer necessarily leading to a better kind of integration as presumably it has been the case in the past. Law, in this view, plays a key role as structural variable of, and in, crisis configurations. To say it otherwise, crisis is revealing itself as a way to transform Europe once more – constitutionally, politically, socially at once – but no longer according to optimistic predictions of ever greater integration. Today "crisis" is frequently articulated as synonymous with "disintegration".

This Special Section proposes four readings of "crisis" through the law across areas (financial and debt, migration, nationalism and "populism") towards possible ways of crisis resolution. There is need for looking beyond the specifics of each crisis area and understand better the interdependences that lead to crisis through law and the contradictions between, on the one hand, ir-resolution and, on the other hand, potential for resolution.⁵

The Special Section starts with an *Article* by José Luis Villacañas. In agreement with the Editors, the *Article* is published in Spanish, a necessary exception to the linguistic regime of the *e-Journal*. The examples of "crisis" that emerge from this paper are the financial and debt crisis in relation to the EMU governance, and "populism". Villacañas' *Article* is a lucid and rather un-frequent, perhaps even unique, denunciation of the failures of various theories about integration, and about crisis, to deliver in relation to the apparently "external" aspect (to the law) of *the complex relationships between socialization and governance* (crisis as disassociation between socialization and governance). Public debt governance in the EU, it is submitted, hampers the possibility of the project

⁴ See e.g. T. SPIJKERBOER, *Minimalist Reflection on Europe, Refugees and Law*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 533 *et seq.* ("the widespread perception is that Europe has a refugee crisis on its hands, which potentially threatens the European project as a whole").

⁵ On this approach see L. NIGLIA, *The Struggle for European Private Law. A Critique of Codification*, Oxford: Hart, 2015. On interdependences see also below and, e.g., D. INNENARITY, *Democracy in Europe. A Political Philosophy of the EU*, London: Palgrave Macmillan, 2018; C. JOERGES, *Comments on the Draft Treaty*, cit.; L. NIGLIA, *The New Transformation*, cit.

of Europe's federalization. The Section continues with a reflection on crisis (specifically, the financial and debt, and the migration, "crises") through *pluralism* by Agustín Menéndez. Here pluralism emerges as being in itself contradictory and in need to be re-understood and re-mapped so as to capture better the state of integration through crisis. Menéndez refers to the need to take seriously law. He argues that, as we have reached the point of Europe's multiple crises resulting in a 'structural crisis of law', there is need to stay away from "purely formal conceptions of law" but nevertheless "to keep the analytical coherence of the concept of law, in the footsteps of classical legal positivism" towards a way ahead of the crisis through rethinking European constitutional law itself. Antonio Lopez's *Article* focuses on crises (financial and debt crisis; crisis through nationalism including within nation-state – specifically, including the so called secession crisis in Spain; and on crisis through "populism") through an analysis of the potential of *constitutionalism* for crisis resolution, as part of a broader debate in which others adopt distinct approaches to the topic of independentism and populism;⁶ with a view to do justice to the variety of conflicting positions in a rather contentious debate, Part II of this Special Section will include a comment on Lopez's *Article*. A fourth essay by Leone Niglia *inter alia* considers crisis as modern phenomenon and looks at the role of certain rising political conceptions of *solidarity* in crisis resolution (in relation to the financial and debt crisis and the EU public debt governance), unconcerned with issues of equality among the EU Member States and as such dismissive of understandings of solidarity as legal basis for forms of "alternative conditionality". Such political conceptions of solidarity are critically scrutinized as divisively and adversely impacting on the prospects for crisis resolution through federalization; it is argued instead that federalization in turn needs to be based on conceptions of solidarity and of equality made mutually supportive.

The four *Articles* converge in their pointing to the problematic of the need for recovering the law from the crisis – in arguing that law is resource for crisis resolution. Out of their combined focus on European and comparative constitutionalism, and philosophy of

⁶ Contrast Lopez's *Article* in Part II of this Special Section with the following two positions among the many that one can find in the debate: J.L. VILLACAÑAS, *Cataluña: luchar por la verdad*, in *El Mundo*, 19 October 2017, www.elmundo.es: "Los últimos acontecimientos han revelado que los dos actores principales de este conflicto han confiado solo en una última ratio: la fuerza. Una fuerza diferente, pero fuerza. El Gobierno, en la potencia mecánica de la ley; los líderes independentistas, en la fuerza compacta de la comunidad orgánica en la calle. Por eso, ambos actores han impreso a este proceso un aspecto bárbaro, que amenaza los aspectos civilizatorios de nuestras sociedades. Ninguna de esas dos fuerzas es decisoria. Es como si cada uno pretendiera arreglar un jarrón roto con la mitad de las piezas. Por eso no podemos demonizar a ese 40% de catalanes que quieren asegurar su permanencia como pueblo histórico. España debe ayudarles frente a las novedades que la Historia trae consigo". E. CANNIZZARO, *The Thousand Cataluñas of Europe*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, at p. 463 ("The question thus arises as to whether in European law this monolithic representation of statehood can be attenuated in favour of institutional solutions that reflect more faithfully the pluralistic nature of the modern forms of State").

law,⁷ it emerges that law rescued from the corrosive impact of crisis through the four perspectives of pluralism, socialization, constitutionalism and solidarity can help transcend, and contribute towards resolving, the current crisis condition. I surmise that no institutional resolution⁸ of the crisis *problématique* will be possible nor credible until these deep issues regarding the role of law in crisis are seriously and openly addressed.

Leone Niglia*

⁷ On aspects of (European) comparative constitutionalism see L. NIGLIA, *Market Integration*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford: Oxford University Press, 2018-2019.

⁸ See e.g. the Draft Treaty on the Democratization of the Governance of the Euro: S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, Paris: Seuil, 2017, now commented in this Journal's Special Section, edited by Ségolène Barbou des Places, *Democratising the Euro Area Through a Treaty?*, in *European Papers*, Vol. 3, No 1, 2018, www.europeanpapers.eu.

* Research Professor/Investigador Distinguido "Connecting Excellence", Instituto Bartolomé de las Casas, Universidad Carlos III de Madrid, Spain, leone.niglia@uc3m.es. The *Articles* have been presented at the symposium Europe and "Crisis" organized by L. Niglia at UC3M, Madrid, Spain and funded by UC3M. This initiative is part of a project led by Professor Leone Niglia that has received funding from the UC3M Connecting Excellence Programme (the Universidad Carlos III de Madrid, the European Union's Seventh Framework Programme for research and technological development under grant agreement no. 600371, el Ministerio de Economía, Industria y Competitividad (COFUND2014-51509), el Ministerio de Educación, Cultura y Deporte (CEI-15-17) and Banco Santander).