**The economic crisis and the rule of law in Europe: A hidden face for the rule of law?**

**Key words: Constitutional theory, rule of law, constituent power, Eurozone crisis, solidarity**

**Abstract**

As a critical lens to assess the rule of law the article confronts the often used term of criticism levelled at it: that it is inherently elusive or uncertain. Taking this as a starting point the article considers whether there is something productive in this apparent uncertainty which renders this challenge both misleading and also apt to neglect key aspects of the concept in favour of adopting a version of rule of law based on predictability. The article develops an account of what can be termed ‘the constitutive’ dimension of the rule of law which it is argued here has been neglected due to an emphasis on predictability and also ‘regulatory’ dimension which concentrates on the rule of law as the control or restraint of political power. The constitutive dimension of the rule of law explores the meaning of the foundational moment of the constitutional community and the language used to express this as a basis for solidarity and as a point of orientation during points of considerable change or crisis. In this regard the article establishes that there is an important theoretical relationship between the rule of law and ideas about the constituent power which require development and further reflection.

The second part of the article, in section 3 and 4, takes the theoretical investigation of the constitutive dimension to the rule of law and considers how this concept can provide a basis for critical reflection regarding the economic crisis of the EU. The focus on the economic crisis in the EU is two-fold: in the first instance the economic crisis is a moment of stress on the political and legal understanding of the EU and shows up the complexity of the commitment to the rule of law in this context. Secondly, given the aspect of the EU as a ‘polity’ under construction (Shaw, 2005) the economic crisis and its response underscores the problematic aspect of the constituent power in the EU. The article primarily focuses on the contributions made by Jurgen Habermas in respect of the crisis and its response in terms of the rile of law. Habermas argues for a reciprocal understanding of political solidarity and justice to be made part of the solution and response to the EU economic crisis and a rejection of the executive federalism dominated approach which is characterised by a technocratic approach to political question. Habermas’ approach is noteworthy for the manner that it focuses on a response which articulates how the crisis can become a basis not only for an appreciation of the importance of political solidarity but equally to allow Europe to confront the constitutive meanings of the EU as a legal and political project.

**1. Two dominant models of the rule of law and the problem of uncertainty**

The rule of law has become ubiquitous and as such any domestic or international legal instrument demonstrates its constitutional credentials by outlining a commitment to the rule of law. This can be reassuring but more often we may question what exactly a commitment to the rule of law entails and what precisely does it bind a state or international organisation to uphold? Such concerns become more prominent when we are living through times of crisis (economic, social or political) when we might anticipate that those who hold power come under the greatest pressure or temptation to take action which might depart from commonly held beliefs about the rule of law. Times of crisis place the question ‘what does the rule of law demand?’ at the forefront of our constitutional concerns and yet it might be highly problematic that for all the references to the place of the rule of law in our constitutional lexicon it is argued that it remains an ‘exceedingly elusive concept’ with as many versions or definitions as there are people defending it (Tamanaha, 2004, p.3)

Taken at face value, however, the claim that the rule of law is inherently ‘elusive’, ‘vague’ or ‘uncertain’ does have the potential to mislead. Looking at the tradition of thinking about constitutionalism in terms of rules of predictability (Holmes, 2003, p.2) the rule of law emerges as a formal or procedural property of the claim or desire for certainty. For instance, one of the most well-known positions focusing on the link between the rule of law and the predictability claims about law is that of Joseph Raz. For Raz the rule of law is concerned with the formal ‘conditions’ surrounding the making and application of law, the list of ‘conditions’ includes: that laws should be prospective, not retrospective; that they should be relatively stable; that particular laws should be guided by open, general and clear rules; that there should be an independent judiciary; that there should be access to the courts; and that the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules (Raz, 1977, 93). The value of the rule of law, on this view, is dependent on avoiding the ambiguity that might result from involving the concept in a broader discussion of ‘just’ laws which would require making the rule of law dependent on expanding on a broader social and political philosophy (Raz, 1977). The virtue of the rule of law is to providing formal conditions under which it is possible to make predictable calculations about the exercise and restraint of power under the law.

Predictability, as a formal or procedural property of the rule of law, adopts a largely negative or regulatory conception about the role of law in preserving the domain of individual liberty (Berlin, 1969). Constraining the exercise of power to predictable conditions or rules helps to foster the protective space between the individual and the locus of power at the same ensuring that these rules are not undercut by political and social contestation and disagreement. Nevertheless, ensuring that the rule of law is not compromised by the ambiguity of political, moral or social philosophy does risk a certain levelling or truncating of the concept itself. This becomes particularly apparent in the context of the socio-legal work of scholars such as Roberto Unger who has emphasised that a view of the rule of law based on the predictability of constraining power to formal rules becomes untenable set against the background social context of the post-liberal welfare societies in which the state is both interventionist and couches this intervention in terms of social, moral or egalitarian purposes (Unger, 1977, p.192-223)

Confronting the shifting role and power of the state entails a choice to be made in respect of the rule of law.[[1]](#footnote-1) For the rule of law to continue to be a restraint or limit on the exercise of power and the guarantor of individual liberty it must engage with the political, social and moral theories or considerations which underpin the exercise of state power even if to do so leads to greater ambiguity or uncertainty for the concept of the rule of law itself. Under this view the rule of law must proceed beyond formal predictability by also embrace substantive values or principles.

Most influential, at least in the Anglo-American literature, was the substantive conception of the rule of law adopted under an interpretive theory of law and justice by Ronald Dworkin. Here Dworkin argues that the formal or procedural conception of the rule of law, what he terms the ‘rule book conception’, is narrow and limited because it does not enable a view to be taken about the content of a law in relation to a substantive theory of justice (Dworkin, 1985, p.11). Moving to a substantive theory of justice, as underpinning a commitment to the rule of law, does however introduce the real possibility of disagreement, and therefore uncertainty, about what kind of political or moral basis ought to secure the rule of law. Given this challenge it is not surprising that two themes emerge as a result of adopting a substantive conception of the rule of law: the first is a greater emphasis on the importance of adjudication and judgement as a mode of exploring and resolving competing conceptions of justice that arise from the political community (Dworkin, 1986, 55-67) and the second, which can be seen as corollary of the first, that courts or judges become a significant institutional site for the resolution of disputes which touch on the fundamental theory(ies) of justice of a political community. Further a substantive conception of the rule of law also mitigates definitional uncertainty (and also disagreement) by the commitment to a key presupposition underlying the rule of law: namely, that it protects individual liberty by imposing restraints or limitations (formal and substantive) on power. In this way it can be understood that both modes of understanding the rule of law are committed to a *regulative* understanding which operates within the constituted power (*pouvoir constitué*) of the legal order. In short, it can be observed that in fact, despite initial appearances to the contrary, the substantive conception does not disavow predictability as the core of the constituted legal order.

What then becomes of the claim about the elusiveness or the fundamental uncertainty of the rule of law? In terms of the *regulative* conception which is also a *substantive* conception of rule of law uncertainty can be the disagreements of a political community about the substantive theories of justice which restrain the exercise of political power within a constituted legal order. But there remains a significant question to resolve: does the debate about whether to adopt a procedural or a substantive conception of the rule of law exhaust the issue of uncertainty in the concept? Is the sense of uncertainty or elusiveness around the different understandings of the rule of law actually telling us something deeper or more significant about the place of this concept in our constitutional thinking (is elusiveness a negative quality of the rule of law in any case)? I hope to indicate these questions are important if we are properly to understand the relationship the rule of law under conditions of crisis.

**2. The regulative and constitutive dimension of rule of law**

Up to now the rule of law has been presented as a regulative concept, as operating within the constituted legal order in order to limit or restrain (regulate) by rules or wider principles, however, this narrow focus does lead to a partial picture of its role in constitutional thinking. In this section the question of the rule of law uncertainty or elusiveness will be considered in relation to how the rule of law can perform a constitutive function for the legal order. Pursuing this issue, the article seeks to explore the inter-relationship between the rule of law and another central concept in the cannon of constitutional theory, the constituent power.

In his account of the social construction of reality the philosopher John Searle argues that in the conduct of games and language there exist both regulative and constitutive rules. For Searle common activities of social construction require not only rules which are able to regulate or control behaviours but also a recognition that those rules can come to constitute or define the nature or purpose of that common activity (Searle, 1969 and 1995). The constitutive rules or norms entail the formulation of beliefs or intentions about the social practice, or the stance that we might take in relation to the regulative rules of the social practice. Particularly in the case of complex social practices such as language and law; the attitude or stance in relation to the purpose of the practice becomes integral to the question of how changes and innovations occur over time (diachronic change). There is of course a connection between changes to regulative rules and how the practice is constituted but critically this depends upon an interpretive stance in relation to the meaning or purpose of how the practice is conducted. So, for instance, given a particular attitude about the nature of a practice one might advocate changes to the regulative rules which in turn prompt constitutive transformation of the social practice.

Returning to the theme of uncertainty it is possible that the constitutive rules of a social practice introduce the greatest extent of elusiveness because it will depend upon forming a societal attitude in respect of the social practice and the consequent change or innovation to the regulatory rules. There is clearly an open space of debate, discussion or contestation to be worked out in respect of constitutive rules which must take place prior to the application of the regulatory rules (including substantive principles). It is, therefore, important to probe further into the matter as to how constitutive rules are formed, and by what kind of practical involvement, before coming to any particular conclusions about the problem of uncertainty in constitutive rules.

At the heart of the problem of understanding constitutive rules is the relationship between the individual agency or participation in complex social practice. How do individual acts of participation provide collective meaning and shape the way a practice unfolds or changes? This question has been central to the social and political philosophy of the Canadian thinker Charles Taylor who has provided a response which draws upon the role of language in framing both our individual perception of agency and the creation of collective meaning. In *Human Agency and Language* Taylor develops the understanding that in its most basic sense participation, or the exercise of human agency, will emerge through language – our practical involvements can only become constituted through linguistic expression. Taylor draws upon certain insights made by Harry Frankfurt; according to Frankfurt (1971, 5-20) it is not unusual to find that other species have desires and to some extent make choices, but what is distinctively human is the ability to make assessments and evaluate those desires in order to determine a course of action (Taylor, 1985, 16). However, Taylor wishes to explore this further and enquire as to the sort of assessments or evaluations humans make about their practices, as distinct from simply suggesting that evaluations are simply linked to needs and desires. Accordingly, Taylor argues that there are two senses in which we can understand assessments: the first he calls ‘weak evaluations’ and the other he terms ‘strong evaluations’. In making weak evaluations we are basically concerned with outcomes, with bringing things about, whereas strong evaluations are those that are concerned with questions of quality or worth (Taylor, 15). Let me now explore in a little bit more detail how we might understand this distinction.

Weak evaluation assessments are primarily conducted on the basis of how much certain contingencies correspond with our interests. For example, we may face a decision about measures or rules which are intended to protect the borders of the EU and so underpin ‘security’ this would involve making a calculation about the effectiveness of those measures in bringing about the need (security) and limiting or isolating any contingency that might compromise the effectiveness of these measures (freedoms). There is nothing necessarily easy about ‘weak evolutions’ given that satisfying societal need (security) and limiting contingency (freedoms) to an acceptable level entails calculations of great complexity; however, the critical point is that weak evaluation *instrumentalise* the social goals of a practice. By contrast, strong evaluations depend upon an assessment of worth or value with which we explore the meaning that a need such as security or freedom has in *constituting* the social practice of legal borders in the first instance and as such become connected to the way we think about the worth or purpose of what a legal border *is*. As Taylor points out strong evaluations depend upon a language of rich or deep qualitative contrasts which recognises the open-endedness of different possibilities of meaning and therefore the public space for legitimate collective disagreement about them. In this sense strong evaluations require language which reflects the intrinsic worth of values or principles capable of constituting or underpinning the meaning of particular social practices.

In the light of this investigation of constitutive rules it might be possible to argue that the rule of law is to be understood not merely as a regulative rule which encompasses predictability alongside substantive theories of justice but can also be constitutive of the legal order itself. This is a much broader claim about the rule of law and its place in constitutional theory. In the first instance the problem of the elusiveness of the rule of law is placed into sharper relief by highlighting that the potential of the rule of law operates at the *very outset* of a constituted legal order. The second is that there must be some ‘positive’ or ‘productive’ aspect to arguing that the rule of law *must be uncertain/elusive* if it is to perform this constitutive role.

To begin with the first issue, it is important to acknowledge that recently constitutional theorists have reappraised the idea of the constituent power and this discussion has a bearing on the problem of uncertainty and the rule of law as well as to understand its constitutive function. This rethinking of constituent power has two main aspects; in the first place there is a challenge to a dualist perspective, associated with Carl Schmitt, which asserts that there is a rigid distinction between the normative legal order and the moment of power or sovereignty which establishes it. Kalyvas argues instead that the moment of beginning, the constituent power, is not as rigidly dualistic as this instead we must understand, ‘that the constituent power is a juridical power is to recognize that although it is outside established law, it is nevertheless of the law’ (Kalyvas, 2005, 234) This sense that there is an inter-connection between the normativity of the constituted legal order and its foundation is further emphasised by Loughlin and Lindahl both of whom endorse an approach which sees the necessity of linking normative concerns about the established constitutional order to the ‘existential’ conditions which give rise to it – as Loughlin writes he is concerned with the ‘way of being’ of the constitution (Loughlin, 2005, 183). These insights lead to the second plank of this re-modelled sense of constituent power – that the moment of foundation becomes a continuous and open-ended question for the constitutional order. Kalyvas articulates the present and continuous role of the constituent power in quite a direct sense, arguing that ultimately this is about the constant attentiveness to the conditions of individual and collective participation in the process of co-instituting the constitutional order (Kalyvas, 239). Lindahl’s approach is more abstract; it places emphasis on reflexivity involving, ‘modes of *questionability* and by way of its acts, of *responsiveness*’ (Lindahl, 2008, 21) which give rise to an understanding of collective selfhood (ontology). In both instances the framing role of the law in constituent power is a necessary aspect of the continuous task of holding a legal order open to the possibilities of its beginning and future existance. If the rule of law, in its constituent form, is an integral part of the link between the constituted legal order and its beginning then this goes some way to account for why it can be termed a fundamentally ‘uncertain’ or ‘elusive’ concept.

This then focuses attention on the second issue, namely whether this uncertainty be a positive or productive dimension to the rule of law. Taking ‘strong evaluations’ from Taylor alongside the constituent power and the existential conditions which give rise to the legal order then it becomes possible to conceive that the constitutive dimension of the rule of law becomes integral to the way that the rule of law acts as an orientation point for the political community. As strong evaluations express and represent our understandings and meaning of the rule of law (in a substantive sense), which are constituted at the beginning of the legal order, this becomes an ongoing and continuous engagement for the political community and therefore acts as a point of orientation around which these meanings can be explored. The importance of the constitutive sense of the rule of law, acting as an orientation point, allows the political community both to make sense of (or cope with) the demands of constitutional change in the light of a common understanding of the rule of law – and in turn the extent to which this is transformative of the constituent power. It is precisely this capacity of the rule of law, in its constitutive form, to act as a point of orientation that is developed by Friedrich Kratochwil as a critical aspect of understanding the role that law plays in the circumstances of change or rupture of the political (Kratochwil, 2014, 77). The apparent ‘uncertainty’ of the rule of law is in fact a productive possibility to respond to fundamental changes or transformations of the constitutional understandings concerning the foundation, or constituent power, of the political community.

If the constitutive understanding of the rule of law is able to provide an ‘orientation’ point around which a community can both respond to change, or transformation, then it would in turn provide a basis for shedding further light on the manner in which the rule of law is deployed in moments of crisis. If nothing else a time of crisis is a point of change which threatens to destabilise the *meaning* of the constituent power and as such places the constitutive function of the rule of law – and its capacity to foster strong evaluations regarding the social practice of law – into play. By focusing on the role of crisis it is possible to test and explore how the theoretical model of the constitutive function of the rule of law can provide insights into the more applied issue of a political community which is coping with crisis. It is to this particular matter that the article now turns with a particular focus on the EU financial debt crisis and response.

**3. Crisis and response in Europe**

A focal point for thinking about crisis and its impact both on our understanding of the rule of law and politics in the European Union has been the ongoing economic and financial difficulties faced by the Eurozone. In recent years the focus of this crisis has been the bailout programmes for Greek debt but, of course, the economic crisis embraces a much wider set of problems about the changing circumstances faced by declining living standards, high rates of youth unemployment, cutting back the welfare provision of the state. The austerity agenda, sanctioned and overseen by European Union institutions, as part of bailout packages for Ireland, Portugal and Greece have raised important questions about how the EU is to respond both politically and legally to the changing common experience of financial and economic impoverishment or uncertainty faced by many in the Eurozone.

Into this question, about the wider implications of the Eurozone economic crisis on the question of the political future of the EU, one of the leading European public intellectuals, Jurgen Habermas, has contributed a growing corpus of interviews, articles and books. In this section the article seeks to reflect on the character of this intervention but also to consider how Habermas employs a version of the rule of law which, it is argued, embraces the constitutive function and therefore amplifies how it is possible to think about the relationship between rule of law, crisis and the political foundation of the EU.

At this point, and before proceeding further with the analysis of Habermas’ contribution, it is worth emphasising that Habermas takes the economic crisis of the EU as emblematic of a failure to consider the deeper dimensions of the crisis particularly as it pertains to the constitutive foundation of the EU as a political project. In terms of the implications for the rule of law in the crisis we can say that this amounts to a reluctance to think about the constitutive function of the rule of law at all. However, this may also be a much stronger claim – namely that without the proper consideration of the constitutive function of the rule of law it is not possible for it to effectively perform its regulative function. In other words, the two roles or functions of the rule of law, introduced at the beginning of the article, are closely interconnected; particularly where the regulative function employs substantive values or principles based on the constituted political morality (such as in Dworkin’s account) in order to place limits or restraints on the exercise of political power. As such the focus on the constitutive function of the rule of law becomes critical to understanding a more complex lens through which to explore the kind of crisis facing the EU because the absence of this form the rule of law also becomes decisive for questions about constitutional restraints.

In the essay *Transitional democracy/post-democratic federalism* Habermas sets out the essential dilemma, or dichotomy, not only through which to understand the crisis but also to respond to the wider sense as to how law and politics ought to respond. Habermas presents a choice between an authentic sense of transnational democracy and the ‘gubernatorial-bureaucratic style’ of executive federalism which has tended to dominate the EU response to the economic crisis. Following in the steps of recent contributions by political thinkers such as Hauke Brunkhorst (2005) Habermas argues that transnational democracy entails a commitment to certain building blocks which underpin any authentic form of political action which is carried out in the name of a community of people(s). These building blocks can be understood as involving the coming together of free, equal and rights-granting individuals within a specific geographic space; the organising and distribution of collective actions and the civic solidarity resulting from a shared horizon of a lifeworld in which collective action can be shaped through dialogue (Habermas, 2012, 21-22). An important aspect to note about Habermas’ diagnosis of the EU’s foundational problems that bear directly on the analysis of the rule of law is the relationship between the difficult task of construing a language and epistemic basis for what constitutes the EU as a transnational political community and the fact these building blocks cannot be confined or limited to the nation state, even though we often think of these questions in such terms (Walker, 2006). This means that for the EU the constitutive dimension is significant to explore and debate if it is to be understood as having an authentic stance as a legally bound political community.

A prominent plank to thinking about the unfolding of the state constitutional tradition in relation to the problem as to how the EU can respond to the building blocks of a genuine transnational democracy is through law. Habermas writes that the EU must acknowledge that ‘in democratic states characterized by the rule of law, the nation states are not only actors on the long historical path towards civilizing the violence at the core of political power…they also represent lasting achievements…as *guarantors of law and freedom* (Habermas, 2012, 41)*.* Any effort to explore how the rule of law can become part of efforts to develop transnational democracy by becoming guarantors of freedom and law must in the first place acknowledge its essential and continuing role in the Member States of the EU. To become the mode of coordinating activity as well as a conduit for shared solidarities beyond the state, then the rule of law must be in a position to convey ‘strong evaluations’ about critical values which stem from the common historical and social experiences of European political life. For Habermas this is expressed through the concept of human dignity, as articulated in the commitment to individual autonomy and equal respect (Habermas, 2012, 84). Tracing the commitment to human dignity from its Judeo-Christian roots in morality to its legal articulation as a liberal-legal expression of the secular state through the development of human rights instruments Habermas argues that, ‘the translation of the first human right into positive law gave rise to a *legal duty* to realize exacting moral requirements which has become engraved into the collective memory of humanity’ (Habermas, 2012, 94)

The capacity of law to convey the on-going place of human dignity at the centre of any political solidarity at the transnational level may be Habermas’ particular interpretation of the problem or difficulty surrounding transnational democracy in the EU but it does underlie a salient issue. Whereas Member States may be able to draw on a much wider cultural, historical and social resource in moments of crisis and so appeal to ‘strong evaluations’ regarding the constitutive dimension of the rule of law with greater ease such an option becomes more challenging for the EU. As Habermas outlines the case for making the connection between transnational institutions and the historical unfolding of freedom and law is one that must be actively made for the EU and its place as the guarantor of these values cannot be taken as given, particularly during moments of crisis. In fact, this problem is compounded in the EU context by a readiness to avail itself of an alternative kind of thinking – one which is not based around exploring the three building blocks of social solidarity through law but instead seeks executive and top-down driven solution to the problems that a crisis throws up. Habermas describes this way of thinking as ‘technocracy’ one of the consequences of the propensity of the EU resort to technocracy to deal with the economic crisis – is that it conceals the possibility of genuine political solidarity.

**4. Technocracy, crisis, solidarity and the rule of law**

The economic crisis of the Eurozone revealed the extent to which the EU adopted a model of executive federalism in order to respond to the challenge of meeting market concerns about the Eurozone’s capacity to restructure the debt incurred by its members. Executive federalism is, therefore, a term which is used by Habermas to express how deepening economic *and* political integration is achieved not by a democratic process of political engagement but instead by EU institutions putting forward far-reaching solutions in order to deal with economic crisis (Habermas, 2015, 3-11). Emblematic of such an approach by the EU has been the critical role played by the ‘informal eurogroup’[[2]](#footnote-2) of Eurozone finance ministers which alongside stake-holder creditors required Greece, and others, to propose far reaching political, social, economic and welfare reforms as part of debt restructuring. For example, in the Cypriot banking crisis of 2013 the Eurogroup was able to effectively impose a solution on Cyprus which involved a levy on bank deposits above a certain amount in return for a bank bailout.[[3]](#footnote-3) Clearly, the problem is that although the Eurogroup is mandated by both the EU and the market to provide solutions, through bailout agreements, it is not directly accountable to the people for whom its decisions most impacts upon.

Adopting a model of integration based around executive federalism as a consequence of the economic troubles of the Eurozone raises two kinds of problems. Firstly, the EU institutions attempt to bridge the gap between what is economic mandated by markets (creditors) and the political or democratic feasibility of implementation by adopting a process of managerial governance which gives a primary role to institutions such as the ‘eurogroup’ which enjoy the confidence of the market (Habermas, 2015, 12) Second, the implications of executive federalism is not so much as a term to describe the practices of further integration in the context of economic crisis but also a manner of institutional thinking about delivery of technical solutions to satisfy market concerns – this style of thinking Habermas calls ‘technocracy’.

What distinguishes technocracy, is that it privileges instrumental decisions to provide solutions to political, social and economic problems; in other words, it translates all questions, including those that implicate the meaning of the EU as a political community, into issues of technocractic control. In the Eurozone crisis this meant that the maintenance of the Euro currency and the integrity of the Eurozone is paramount[[4]](#footnote-4), whereas the concerns about democracy and the impact on individuals *de facto* and *de jure* becomes a constitutional and political issue primarily for the Member States. Habermas explores the attraction of technocracy, in the context of the economic crisis, by contrasting it with political solidarity which he describes as an alternative path for the EU (Habermas, 13). Political solidarity is a manner of thinking about the ethical dimension of the civic context of life; and is formed out of the reflections concerning the complex reciprocal relations, over time, which give rise to a distinctive practice of political community (Habermas, 2015, 22-23). Habermas emphasises that what he means by solidarity is not a pre-existing kind of social context or bond but rather something much more creative or productive: ‘solidarity does not refer to an existing social context but to one which, although presupposed, has to be created through politics’ (Habermas, 2015, 26). This is important because it chimes to the earlier discussion about shifting understandings of constituent power; presented not as a distinct and isolated (mythic) moment which founds the legal order but rather a continuous exercise of exploring and re-founding the meaning (and reciprocal solidarities) of the political community. Employing the language of an *ethics* in the way we come to reciprocal social solidarities, or *Sittlichkeit*,Habermas understands that solidarity is not as rigid as moral or rule bound responses but becomes a means of, ‘refer[ing] to an interest in the integrity of a shared form of life that includes one’s own well-being’ (Habermas, 2015, 26). Implicit in such an approach is the importance of language in coming to an understanding of political solidarity and the expression of the reciprocal relationships integral to the constitution of a political community. This, of course, follows a long trajectory in Habermas’s work through a theory of action (*praxis*) being combined with an ethical account of linguistic interpersonal and social communication or dialogue (Habermas, 1981). Furthermore, such a stance resonates with the ‘strong evaluations’ developed in the context of the role of language in constituting the meaning of social practices in Charles Taylor’s work; any expression of solidarity which is to provide the basis of ethical reciprocity must be able to convey the actuality of shared experiences in the form of political life which ‘technocracy’ is unable to.

In the context of the current economic crisis solidarity becomes a shared perspective on growth and competitiveness in the EU as well as an appreciation about how the crisis has impacted upon the marginalized and vulnerable. Habermas cites, as a particular example, the relationship between solidarity and political justice during the Portuguese ‘bailout programme’ when the Portuguese President referred aspects of the austerity measures introduced by the government to the Constitutional Court because it raised important question regarding the overall justice of the proposed cuts and how these were to be distributed between public and private sector workers. Decided in April 2013 the Constitutional Court outlined how various parts of the Government’s proposed budget, in response to the bailout programme, violated aspects of the Constitution, particularly in relation to the unequal treatment between public and private sector retirees.[[5]](#footnote-5) The inter-relationship, highlighted by Habermas, between solidarity and the broader question of political justice, framed by the constitution, returns the analysis full square to focus on the rule of law. For in the example from Portugal we find the two kinds of dimensions of the rule of law, referred to at the outset of the paper, and as a result it is possible to understand the critical importance of both. In the first instance, the President’s referral to the Constitutional Court is an illustration of the regulatory function of the rule of law – should the proposed austerity measures be restrained or limited by specific rules or substantive principles enshrined in the Constitution? Additionally, it can also demonstrate the wider significance of the constitutive function of the rule of law - do the austerity measures undermine the meaning of political justice which underpins the common commitment to the Constitution with the result that reciprocal solidarity is undermined? Whilst this latter question may be more elusive or open-ended it none the less critical to the rule of law as argued for in this article. Equally, to respond to both these questions performs the critical task of getting a sense of the constitutional bearings, or points orientation, around which the political community is able to gauge how the economic measures will affect constitutional commitments to each other as aspects of mutual reciprocity *in the future*

For the EU the example of the Portuguese reference case is also highly salient as it demonstrates how a ‘technical’ solution arrived at by the key institutional actors can still be translated into questions of political justice and solidarity at a national level. This must hold two kinds of key lessons: pragmatically the EU institutions must allow space for any technocratic solution arrived at to be adjusted by the concerns about political implementation at the national level (including legitimate demands of justice and solidarity). This involves care and tact on the part of the EU institutions to allow space for member state political institutions to be able to respond, and if necessary, adjust the demands made upon it in order to meet the democratic and constitutional concerns of due process. An issue that is amplified by Tuori and Tuori, in a recent the crisis and its impact on the understanding of constitutionalism in the EU, underscoring that national institutions (including constitutional courts) must be capable of engaging in the national constitutional dialogue but this should be seen as being part of a common European discourse (Tuori and Tuori, 2014). Secondly, the EU must also be capable of providing the underpinning of political reciprocity, justice and solidarity as a response to the economic crisis and its effects rather than assuming the constitutional and distributive costs of upholding the integrity of the Euro ‘at all costs’ fall squarely with the Member States. Such an approach places an undue burden on particular Member States but also enables the EU institutions to persist in the logic of ‘technocracy’ rather than confront the deeper questions about political solidarity that becomes part of a response to the crisis and which can provide the basis for exploring the constitutive role of the rule of law during times of crisis. Unless the EU can change it will be unable to seize its own constitutional destiny in the economic crisis of the Eurozone.

**5. Conclusions**

This article began by exploring different understandings of the rule of law which have been adopted in academic literature with the intention of challenging the criticism often laid at the door or the rule of law that it is inherently uncertain or elusive. The argument pursued was that in fact the ‘uncertainty’ or ‘elusiveness’ of the rule of law could be understood as something positive as opposed to a weakness because it exposes a particular dimension to the concept of the rule of law which can be neglected: the constitutive dimension. There are two features of the constitutive dimension of the rule of law which are highlighted in this article: the first, is an understanding of the constitutive power as the continuous effort of the constitutional community to explore the meaning of the foundational moment and the features of reciprocal solidarity that it gives rise to. Secondly, exploring the meaning of the social practice of the constitution requires an attentiveness to the language of qualitative contrast, articulated by Charles Taylor as ‘strong evaluations’, which underscore the way a political community is able to express commitments in the constituted order.

In the second part of the article the focus turned to the question as this theoretical understanding of the rule of law provides a basis to consider the economic crisis of the EU and its response. Focusing on the work of Habermas, who has emphasised the need to cultivate the language of solidarity and reciprocity in response to the economic crisis, the article has sought to draw out the implications for the rule of law. In doing so, further questions for research on the constitutive dimension of the rule of law become apparent. Although expressed as being more ‘elusive’ it is undoubtedly also far more political in that it draws on the expression and meaning of constitutional commitments which underscore political solidarity. As with the example of the constitutional reference to the Constitutional Court of Portugal, by the President in response to austerity measures during the economic crisis, to engage the rule of law may require courts to enter heightened political debates about the kind of political justice or fairness guaranteed by the Constitution. This could provoke profound structural constitutional questions about the manner in which courts can both discharge obligations surrounding the rule of law at the same time as observing structural limits imposed by other competing principles of constitutionalism. It is perhaps possible that times of crisis require greater imagination about the proper limits and function of legal argument and the part played by courts in them.

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1. It should be clarified that I am not necessarily drawing direct causal connections but rather acknowledging that the shift power of the state, particularly in the mid-twentieth century, creates space for different conceptions of the rule of law. [↑](#footnote-ref-1)
2. <http://www.consilium.europa.eu/en/council-eu/eurogroup/> (accessed 2nd March, 2016). Under protocol 14 of the Lisbon Treaty – its terms of operation are described as ‘informal meetings’. [↑](#footnote-ref-2)
3. For an overview of the Cypriot reaction to the initial eurogroup proposal see: <http://blogs.lse.ac.uk/eurocrisispress/2013/03/17/cypriot-press-ire-and-disenchantment-over-bail-out-plan/> (accessed 2nd March 2016) [↑](#footnote-ref-3)
4. As illustrated by Mario Draghi’s speech about the ECB mandate to do ‘whatever it takes to preserve the Euro’, (26th July 2012, London): <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> (accessed, 31st March 2016) [↑](#footnote-ref-4)
5. Ruling 187/13 (5th April 2013) [↑](#footnote-ref-5)