

Cultura giuridica e diritto vivente

Rivista on line del Dipartimento di Giurisprudenza

Università di Urbino Carlo Bo

Note e Commenti



THE EUROPEAN ECONOMIC CONSTITUTION OBSERVATIONS ON THE CONCEPTUAL HISTORY OF AN UNWORKABLE IDEA

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Abstract

[La costituzione economica europea. Osservazioni sulla storia di un'idea irrealizzabile] This essay deals with the development of the integration project in the light of Polanyi's insights, first, with its so-called formative phase. Thereafter it addresses the post-foundational phase, which was characterized by enormous efforts to transform Europe's economy into a "highly competitive social market economy". Finally, it deals with the consummation of market integration by the establishment of Monetary Union. The monetary Union included an erosion of the notion of rule-oriented economic governance and, more drastically, the replacement of the economic constitution by emergency governance. A Governance that represents a technocratic exercise or a praxis that escapes the quest for democratic legitimacy and the constraint of the rule of law.

Key Words:

Economic Constitution, German Ordoliberalism, Integration through Law, Democratic legitimation

Vol. 7 (2020)





The European Economic Constitution. Observations on the Conceptual History of an Unworkable Idea

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Two Introductory Remarks

On the topicality of this topic. Why is it that since a number of years, more precisely, since the impact of the financial crisis was felt everywhere within and beyond the Eurozone and “new (unconventional) modes of economic governance” had been established outside the framework of the Treaty of Lisbon, the interest in our topic climbed up to such high peaks? According to many commentators, this is an affirmative move; Europe’s “crisis law” and its economic constitutionalism have to be accepted as our “new normalcy” and a factually and normatively valid response to the financial crisis. Other claim, that this response reflects German hegemony - the notion of the “economic constitution” is, after all, a profoundly German idea from early on promoted by German Ordoliberalism as Europe’s constitutional form.

My perception. In my entire work on the integration process,¹ I have understood the notion as a response to the conceptual design, the precarious legitimacy and more recently lately the so-called “crisis law” of the integration project. My suspicion is that the new topicality is an ambivalent, if contradictory phenomenon. The rather broad stream of comments defending economic constitutionalism as a potentially valid and effective response to the intricacies and problems of Europe’s at present precarious constitutional constellation, does not do justice to the ordoliberal tradition. This tradition is critique-

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¹ Many times since Ch. Joerges, *Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik*, in R. Wildenmann (eds.), *Staatsverdung Europas? Optionen einer Europäischen Union*, Baden-Baden 1991, pp. 225-268 (Traduzione inglese: <http://eiop.or.at/eiop/pdf/1997-019.pdf>).

worthy but must not be equated with Anglo-Saxon Neoliberalism.² The thesis that we must do without our inherited credentials of democratic constitutionalism is a response to an emergency, a new type of governance that has to be post-democratic. An enlightened technocracy, knowing and executing “whatever it takes” is welcomed as our saviour, at least as the best kind of rule to which we can aspire.

Are my original concerns with the economic constitution simply outdated? Does it still make sense to question the legitimacy of market governance in times of an obvious emergency? Indeed, I feel that I have to revise my prior critique. I do believe that we can better understand what happened with the help of a theorist who is attracting ever more attention in recent years, namely Karl Polanyi, the great theorist of the Great Transformation of the liberal economic order of the Gold Standard in the age of Fascism and National Socialism. His economic sociology submitted back in 1944 was never forgotten. Its topicality and its interest for lawyers, however, is more recent. This is so, I will argue, for good reasons. Polanyi will accompany each step of my argument.

Here is how I am going to proceed:

(1) The first set of remarks will deal with the relationship between economy and politics, to put it somewhat enigmatically, with “the political” of the “economic”. Contrary to conventional wisdom; I will argue that we must not neatly separate these spheres. We have instead to realise that the economy “is” a polity.³

(2) Thereafter I will deal with the development of the integration project in the light of Polanyi’s insights, first, with its so-called formative phase, which has been analysed by Joseph Weiler and his many followers by the integration through law paradigm that still rules the mindset of European law scholarship.

(3) Thereafter I will turn to the post-foundational phase, which started according to the same narrative with the Single European Act of 1985. This phase was characterized on the one hand by enormous efforts to deepen and “complete” the establishment of an “internal market”, but also or by the same token, the advent of “social regulation”, the establishment of sophisticated regulatory frameworks for the protection of health, consumer and environmental protection, and finally, to supplement the Europe’s market building by what is today called a “social union”⁴ and, to cite the Treaty of Lisbon, to transform Europe’s market economy into a “highly competitive social market economy.”⁵

(4) My fourth section will deal with the consummation of market integration by the establishment of Monetary Union as designed by the Treaty of Maastricht in 1992. Monetary Union, so I will argue, was but a pyrrhic victory of the idea of an economic constitution, which was followed by a Cannae defeat. This defeat, this is my critical concern, included an erosion of and brake with the notion of rule-oriented economic governance, more drastically the replacement of the economic constitution by emergency

² See J. Hien / Ch. Joerges, “Ordoliberalism as an irritating German idea”, https://www.researchgate.net/publication/313657667_ORDOLIBERALISM_AS_AN_IRRITATING_GERMAN_IDEA/stats

³ Bo Stråth, Peter Wagner, Christian/Joerges (eds), *The Economy as Polity: The Political Constitution of Contemporary Capitalism*, London: UCL Press 2005.

⁴ See Christian Joerges, Vladimir Bogoeski and Lukas Nüse, *Economic Constitutionalism and the 'European Social Model': Can European Law Cope with the Deepening Tensions between Economic and Social Integration after the Financial Crisis*, in Herwig Hofmann, Katerina Pantazatou and Giovanni Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution*, Cheltenham: Edward Elgar, 126-153.

⁵ Art. 3 (3) TEU.

governance.

(5) The pertinent jurisprudence of the ECJ and its “dialogue” with the German Constitutional Court deserve special attention; here we observe what is widely acclaimed as Europe’s new normalcy.

(6) After so many critical messages, I should conclude with a more positive outlook. I will have to be brief and vague...

Section I: “The Political” of “the Economic”/ The Economy “is” a Polity / Polanyi’s Economic Sociology

My first concern is with what I do not hesitate to call the “original sin” of European legal studies, namely its failure to understand and evaluate the inherently political and societal dimensions of the “the economic” in the European Economic Community as it was established by the Treaty of Rome. How can one discuss affirmatively the law of the European Economic Community, praise the handing down of a “Constitutional Charter” by the ECJ but never consider the operational and social function of economy law? It is, somewhat ironically, precisely the benign neglect of the economy that confirms the validity of Polanyi’s messages. This is the core of his Polanyi’s argument: the widely shared perception of the economy is its understanding as a self-regulating machinery, an entity operating somewhere out there under a logic of its own, dependent only on the core institutions of private law which the Member States of the EEC share anyway. To put this slightly differently: The European Economic Community is a community of market societies. Polanyi’s warning: “The control of the economic system by the market...means no less than the running of society as an adjunct to the market.” Moreover, famously: “Instead of economy being embedded in social relations, social relations are embedded in the economic system”.⁶ The embeddedness formula does not yet reveal the full gist of his critique. We have to add: marketization will never fully succeed. It will instead provoke counter-movements in particular with regard to the three false commodities: land, labour and money. To summarise: The economy is not an autonomously functioning machinery. Its ordering through markets will generate in the long or in the short social and political conflicts. This will occur were three particular commodities – land labour and money – are exposed to market governance. Nothing of this sort was within the mindset of European politicians and legal scholars in their certainly noble and well-minded efforts to overcome Europe’s bellicose past.

Section II: The formative phase of the integration project: the emergence of Economic Constitutionalism

The early stage, famously characterised by Joseph Weiler as the “foundational period” of the integration project,⁷ developed in line with these expectations. Generations of Law Students, first at the EUI in Florence and then all over Europe have understood Integration through Law (ITL) as a kind of mantra. The early history of the integration process⁸ and this history have been meticulously documented by legal scholars and legal

⁶ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston MA: Beacon Press 2001 (with Foreword by Joseph Stiglitz and Introduction by Fred Block), p. 57.

⁷ Joseph H.H. Weiler, “*The Transformation of Europe*”, Yale L.J. 190 (1991), pp. 1410-1431.

⁸ See, e.g., the informative collection of essays in D. Augenstein, *Integration through Law Revisited: The Making of the European Polity* with the introductory chapter by D. Augenstein and M. Dawson.

historians.⁹ The theoretical basis of this success story has been spelled out in a much cited contribution, co-authored by the former President of the EUI, Joseph H.H. Weiler and its present successor Renaud Dehousse: They conceptualised Law as both the “object and the agent of integration”. This theorem was published - nota bene - as late as 1990 and - nota bene again - in a collection of essays by prestigious political scientists.¹⁰ How could that happen and what does it indicate? In 1990, the American law and society movement, which advocated the study of “law in its social, economic and political context” flourished and stimulated all sorts of interdisciplinary studies. How could European law scholarship defend views and visions on the potential of “law as such” which looked so outmoded and were since long discredited?

There are good explanations if one considers the state of the European project, its fragile legitimacy, the need for some transnational mode of communication. This is all quite plausible as an explanation but it does not do away with the theoretical fallacies of ITL. They are manifold and they are enormous. Among the socio-economic fallacies is the disregard “the economic” in general and of the varieties of capitalisms in Europe in particular, of the divergence of cultural and political traditions. The normative premises are telling: uniformity is a good in itself because it will promote cross-border trade; diversity is a bad in itself because it is an obstacle to free trade. The ITL orthodoxy operated as a straightjacket. It imposed unity via uniformity on the integration project. Its “one size fits all” assumption and policy were not yet as implausible in the foundational period as it has become in the Union of 28 and now 27. However, even in the relatively homogenous orders of the former EEC, any unification at European level had disintegrative effects within national legal orders, which European law is unable to cure because it cannot reach down into the sphere of social norms within which the law operates and on which its social legitimacy and its functioning depend. The most recent and most disastrous illustration is Brexit. The “taking back control” mantra is a stark utopia, to put it very mildly. The same holds true, however, for the “one size fits all” assumption of ITL.

How can we explain the success story of such an obviously conceptually deficient agenda? Could that success rest upon grounds, which ITL did not explain explicitly? This is indeed my suggestion. Although ITL scholarship has treated the economy with benign conceptual neglect, it has furthered implicitly a neoliberal agenda. Consider some core assumptions: harmonisation of law creates better law and it establishes by the same token ever more Europe. On what grounds can we assume that harmonised law is better law? What does it improve? It does away with barriers to trade. It seems therefore economically reasonable to overcome legal diversity. There is hence an economic rationality in the ITL agenda, albeit somewhat hidden behind and covered by European idealism.

To put it slightly differently: Implicit in the doctrinal edifice of the integration through law paradigm is nothing less and nothing else than the kind of “economic

⁹ See Rasmussen, Morten and Martinsen, Dorte Sindbjerg, “EU Constitutionalisation Revisited. Redressing a Central Assumption in European Studies” (April 24, 2019). *European Law Journal*, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3377203>.

¹⁰ R. Dehousse and J.H.H. Weiler, *The legal dimension*, in: W. Wallace (ed.), *The Dynamics of European Integration*, London: Pinter, pp. 242-260.

constitutionalism”, as advocated from early on by Germany’s ordoliberalism.¹¹

It is easy to understand why the German ordo-liberals embraced the agenda of the integration through law project and, in particular, the conceptualisation of the economic freedoms as basic rights which Europe’s market citizens could invoke against their nation states, the commitment to a system of undistorted competition, the establishment of non-political, non-majoritarian institutions of economic governance. European law seemed to be perfectly in line with ordo-liberal notions not only substantively but also because of its institutional configuration which entrusted the judiciary with the institutionalisation of open markets and the European Commission with their protection against distortions of their competitive ordering.

My short sequence is, as I believe a fair restatement. It is by the same token one, which does not include the fierce critique which ordoliberalism has attracted in recent years. Werner Bonefeld, Professor of Politics at the University of York, is particularly prolific exponent in this regard. He makes an intellectual living out of his equation of the ordoliberal quest for a strong state with Carl Schmitt’s notion for a strong state in a healthy economy.¹² You can be a critic of ordoliberalism and nevertheless disagree with Bonefeld’s equation. The ordoliberal quest for a strong state is inspired to an essential degree by protestant ethics and the protestant critique of unfettered capitalism – the basis of the ordoliberal advocacy of the control of economic power “through law”, more specifically the reliance of “free” (later: “perfect”, thereafter “undistorted”) competition as the guide to on ordering of economy and society. This is the basis of Walter Eucken’s understanding of competition as the basic principle of the economic constitution.¹³ Important for us not note: The economist Eucken was a true believer in law; he understood the juridical and the economic as interdependent orders.¹⁴ The critics of ordoliberalism and its economic are right in that they underline that ordoliberal governance lacks democratic credentials. Ordoliberalism is essentially a product of the Weimar Republic. Its foundational fathers did not trust in the sustainability of a democratic order. They sought to exempt the ordering of the economic from democratic contestation. To repeat and to underline, the theory of the economic constitution deliberately and explicitly exempts economic governance from democratically legitimated political processes. It seeks to juridify the ordering of the economy by law and politically independent institutions. The critics of the ordoliberal tradition and its economic constitutionalism have this valid point. However, they are overdoing it when they equate the ordoliberal defence of economic rationality with the Schmittian defence of the primacy of authoritarian political rule over economy and society. The ordoliberal school is committed to the rule of law. My narrative and the resort to Polanyi has to be aware of another query. If Polanyi is right with his theses about the “always socially embedded economy” and the destructive effects of marketization, how comes that no significant social conflict can be perceived during the “formative period”? The simple answer is: During that phase Europe’s market building did not affect the welfare arrangements significantly; this was the finding of the famous Ohlin-Report, which the trade unions had

¹¹ See C. Joerges, “*The Market Without the State? The ‘Economic Constitution’ of the European Community and the Rebirth of Regulatory Politics?*”, *European Integration online Papers* (EIoP), Vol. 1, No. 19, November 24, 1997, Available at SSRN: <https://ssrn.com/abstract=302710> or <http://dx.doi.org/10.2139/ssrn.302710> (German original cited in note 1).

¹² Werner Bonefeld, *The Strong State and the Free Economy*: Rowman & Littlefield Publishers 2017.

¹³ See Marcel Hadeed, *The Ordoliberal Ghost*, <https://www.socialeurope.eu/the-ordoliberal-ghost>.

¹⁴ Walter Eucken, *Grundsätze der Wirtschaftspolitik*, 1st ed., 1952, 7th ed., particularly pp. 332–337.

mandated. – This message was endorsed by John Gerald Ruggie’s theory of an “embedded liberalism.”¹⁵

Section III. The Post-foundational Development in 1985.

With the intensification of market integration, however, this smooth constellation of the foundational period mutated profoundly. Europeanisation/integration looked ever more successful. I can assume that all this is well known. European law continued its steady constitutionalisation. As so often within European law, revolution derived from a seemingly trivial happening: the *Cassis de Dijon* case that saw the Court declare a German ban on the marketing of a French liqueur lower in alcohol content than its German counterparts to be incompatible with the principle of free movement of goods.¹⁶ The ECJ proclaimed its far-reaching doctrine of “mutual recognition” and adopted a constitutional competence for itself to set aside national legislation in order to enable market integration based on primary law alone. The Delors Commission followed suit with its legendary Internal Market programme.¹⁷ “Economic rationality”, M. Rainer Lepsius observed, has become the new paradigm of the integration project.¹⁸

How about Polanyi’s reservation and critique of marketisation? With the exception of Wolfgang Streeck, nobody referred explicitly to his economic sociology. However, Streeck’s famous promoter, Fritz Scharpf conceptualized in similar terms what happened in insightful theorems. He observed the primacy of “negative” as opposed to positive integration and the “decoupling” of economic and social integration¹⁹ and the gradual destruction of national welfare regimes. We have to add and to underline that the renewed integration impetus was accompanied by a move to social regulation and the establishment of modern institutional techniques.²⁰ Giandomenico Majone who has promoted the idea of Europe as a “regulatory state” always insisted that this transnational construct could not replace, and should respect, majoritarian democratic policies with distributive effects at the national level. Other renowned political scientists were less cautious.²¹ I am not trying to go into details here and to contrast the strength of marketisation processes on the one hand and the accomplishment of legislative, administrative and judicial containment on the other; such evaluations tend to portray the

¹⁵ Ohlin, International Labour Organisation, *Social Aspects of European Economic Co-operation. Report by a Group of Experts*, *International Labour Review* 74 (1956), p. 99.

¹⁵ J.G. Ruggie, “International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order”, *International Organization* 36 (1982), 375. See much later Alan S. Milward, *The European Rescue of the Nation-State*, London-New York, Routledge 1992 (2nd ed. 2000).

¹⁶ Case 120/78, ECR [1979] 649 – *Cassis de Dijon*.

¹⁷ Commission of the EC: https://ec.europa.eu/growth/single-market_en.

¹⁸ Lepsius, M. Rainer, *Die Europäische Union als Herrschaftsverband eigener Prägung*, in Joerges, Christian/Mény, Yves/Weiler, Joseph H. H. (eds.): *What Kind of Constitution for What Kind of Politics? Responses to Joschka Fischer*, EUI Florence, 2000, pp. 203-212.

¹⁹ Fritz W. Scharpf, *Regieren in Europa: effektiv und demokratisch?*, Frankfurt/M.-New York 1999, p. 47; id., *The European Social Model: Coping with the Challenges of Diversity*, (2002) 40 *Journal of Common Market Studies*, pp. 645-670.

²⁰ Majone, *Regulating Europe*, London Routledge 1989.

²¹ In particular J. Caporaso/S. Tarrow, “Polanyi in Brussels European institutions and the embedding of markets in society”, RECON Online Working Paper 2008/01; their euphemistic assertions have been repudiated by M. Höpner M/A. Schäfer, “Polanyi in Brussels?: embeddedness and the three dimensions of European economic integration”, MPIfG Discussion Paper 10/8; for an evaluation of this controversy see V. Bogoeski, *The Aftermath of the Laval Quartet. Emancipating labour (law) from the rationality of the internal market in the field of posting*, PhD thesis, Hertie School of Governance, Berlin 2020, p. 79.

nation state as a stronghold of “the social” and the opening of national economies by the integration project as a threat to welfare state accomplishments. The political philosopher Steven Klein has recently refined and substantiated this dichotomy. He reads the tensions between “the needs of the market” (marketization) and the counter-moves of “societal self-protection from market forces” as a conflict between “the market ideal of contractual equality” and “the democratic idea of political equality”, between “an ideal of the market society and democracy.”²² This is the concern that I will take up in my discussion of EMU as established by the Maastricht Treaty of 1992

Let us for now repeat the regulatory modernisation under the Delors Commission and its Internal Market programme was targeted to strengthen the competitiveness of the economy, two further initiatives were to respond to Polanyi’s concern for “the social”. The notion of a “social Europe” was given an air of constitutionalisation within the “social dialogue.”²³ The more extensively discussed “new modes of governance” were launched by the Prodi Commission in 2003. They promised to realise objectives of social justice outside the Treaty order of competences and the constraints by the “community method;” last but not least Art. 3 (3) of the Treaty of Lisbon committed the EU to “a highly competitive social market economy aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.” Was Europe’s “Social Mission” thereby accomplished? Not even the Commission does believe this, as their initiative on a European Pillar of Social Rights documents.²⁴ Academic observers have commented in the same vein from early on.²⁵ It is all the more remarkable and regrettable that the German Constitutional Court, in his judgment on the Lisbon Treaty of 30 June 2009,²⁶ came up with a very euphemistic assessment of social Europe and confirmed the compatibility of the Lisbon Treaty with the eternity clause of the Basic Law. To cite some passages

- “The Treaty of Lisbon does not restrict the democratic possibilities of the German *Bundestag* of shaping social policy in such a way that the principle of the social state (Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law) would be affected so as to raise constitutional objections and that the democratic scope for action necessary in this context would be inadmissibly curtailed.”²⁷

- “The argument ... that European economic policy is a purely market-oriented policy without a social-policy orientation and that its functional approach restricts the possibilities of the legislature in the Member States to conduct their own social policy is incorrect. The European Union is neither without any social-policy competences, nor is it inactive in this area. At the same time, the Member States have sufficient competences

²² See Steven Klein, “European Law and the Dilemmas of Democratic Capitalism”, *Global Perspectives* 1 (2020), <https://online.ucpress.edu/gp/article/1/1/13378/110925/European-Law-and-the-Dilemmas-of-Democratic> <https://doi.org/10.1525/gp.2020.13378.in> the next section.

²³ See Ruth Dukes, *The Labour Constitution. The Enduring Idea of Labour Law*, Oxford, Oxford University Press, 2014, p. 125.

²⁴ https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

²⁵ Fritz W. Scharpf, “The asymmetry of European integration, or why the EU cannot be a ‘social market economy’”, *Socio-Economic Review* 8 (2010), pp. 211-250; C. Joerges/F. Rödl, “Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*”, (2009) 15:1 *European Law Journal*, pp. 1–9.

²⁶ https://www.bverfg.de/e/es20090630_2bve000208.html

²⁷ Para. 392.

to take essential social policy decisions on their own responsibility”.²⁸ The European Union is neither without any social-policy competences, nor is it inactive in this area. At the same time, the Member States have sufficient competences to take essential social policy decisions on their own responsibility.

- The Charter of Fundamental Rights, which devotes its entire Title IV to them under the heading of “Solidarity” (Article 27 to Article 38 of the Charter).

- Last but not least, the Union aims at a “highly competitive social market economy, aiming at full employment and social progress” (Article 3.3(1) Lisbon TEU).²⁹

The law on paper is good. There is nothing to be seriously concerned about, the FCC concludes. This kind of benevolent complacency is hélas, characteristic of too much of Europe’s legal discourse.

Section 4: EMU in the Maastricht Treaty of 1992

The perception of the by now dilemmatic European constellation started with great confidence, even enthusiasm. “One market, one money” – this slogan was the creed of the 1990s. The Maastricht Treaty and the establishment of EMU “constitutionalised” – in quotation marks – the crowning of “the great integration.”³⁰ I cannot go into details here.³¹ Let me underline, however, a sociological and a normative objection.

(1) Economic sociology first: More than a century before Peter Hall and David Soskice published the discovery of the “Varieties” of democratic capitalism,³² Karl Polanyi had requested a political governance of the economy and concluded that democratic processes would generate different outcomes. There are important discrepancies between his economic sociology and the varieties of capitalism studies.³³ There is an equally important consensus with respect to the implications of the varieties of economic governance. These economies do not function according to the same uniform logic. They represent different political preferences and economic cultures, which are surprisingly resistant to, imposed changes. It is hence unsurprising: The multifaceted heterogeneity of the economies assembled within the Eurozone with its multiple causes could not and did not dissolve under the impact of the common currency. The uniformity of European monetary policy was instead to become ever more dysfunctional. What we have observed from the very beginning in the Eurozone is the resort to intergovernmental bargaining, soft supervision and tentative coordination—and simultaneously an irritating aberration from the commitment of the integration project to

²⁸ Para. 394.

²⁹ N. 6, para. 396.

³⁰ Matthias Goldmann, *The Great Recurrence Karl Polanyi and the Crises of the European Union*, *European Law Journal*, 23 (2017) pp. 272-289.

³¹ But see C. Joerges, *Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, *German Law Journal* 15 (2014), pp. 985–1028, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179595.

³² Peter A. Hall / David Soskice, *Varieties of Capitalism*, Oxford, OUP 2001.

³³ See Wolfgang Streeck, “*E Pluribus Unum? Varieties and Commonalities of Capitalism*”, MPIfG Discussion Paper No. 10/12, Cologne 2012 and Josef Hien, *A Cultural Political Economy Approach to the European Crisis*, in Hien/Joerges (eds.), *Responses of European economic cultures to Europe’s crisis politics: the example of German-Italian discrepancies*, European University Institute, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole 2018, pp. 108-119, available at <http://cadmus.eui.eu/handle/1814/59884>, 80-98.

the rule of law.³⁴

(2) With this observation, we touch upon the normative credentials of the Maastricht Treaty. Two objections are particularly important. One is the complete lack of a democracy compatible procedure for the resolution of conflicts over the course of economic governance, in particular of conflicts between fiscal policies of the Member States and the policies of the ECB. For this simple reason, we should not call the Maastricht EMU a constitutional order. More subtle, but equally important, is the arguments Wolfgang Streeck has submitted in footnote to his latest monograph “[W]hat I would suggest to call the *acquises démocratiques* of the national *demos* in Europe ... importantly comprises a wide range of political-economic institutions that provide for democratic corrections of market outcomes – for democracy as *social* democracy.”³⁵ In other words: we should respect the institutional infrastructures of market economies as accomplishments of constitutional dignity.

Section 5: THE CJEU and the Court that “often barks but never bites”³⁶

Objections against economic governance under the constraints of the financial crisis have reached Europe’s highest and most prestigious court in *Pringle*³⁷ in *Gauweiler*³⁸ and finally in *Weiss*³⁹ – objection which were to be dismissed resolutely by the Court’s Grand Chamber. These European judgments are, I submit with due respect, defective.⁴⁰ Suffice it here to repeat: One core assumption on which the CJEU relies is irreconcilable with what we have submitted about “the political” of “the economic.” Monetary policy, so the Court held, is not policy in the first place but merely an epistemic exercise delegated to the expertise of the ECB. This technical expertise can be neatly separated from, and insulated against, normative assessments and policy choices. A second weakness is equally disturbing. We have established in the Eurozone a governance regime, which does not

³⁴ It is the very logic of new economic governance, which “dictates that it must operate without any pre-defined rule and that the Commission’s *ad hoc* decisions must apply to individual Member States in unique circumstances rather than to EMU states in general. Regardless of the comparative quality of its economic expertise, the Commission lacks legitimate authority to impose highly intrusive policy choices on Member States...”, Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability*, in Streeck, W. and Schäfer, A. (eds.), *Politics in the Age of Austerity*. Cambridge, UK: Polity, 2013, pp. 108–142, 139.

³⁵ Streeck, *How Will Capitalism End?*, London, Verso, 2016, 198: “Mein Vorschlag für die Benennung der *acquises démocratiques* der nationalen *demos* in Europa würde eine breite Palette von politisch-wirtschaftlichen Institutionen einschließen müssen, die Marktergebnisse demokratisch korrigieren.”

³⁶ See J.H.H. Weiler, “Editorial. The Lisbon Urteil and the Fast Food Culture”, *European Journal of International Law* 20 (2009), pp. 505–509.

³⁷ Case 370/12, *Pringle v Ireland*, Judgment (Grand Chamber) of 27 November 2012, EU:C:2012:756.

³⁸ Case C-62/14, *Peter Gauweiler and others v Deutscher Bundestag*, Judgment (Grand Chamber) of 16 June 2015, EU:C:2015:400.

³⁹ Case C 493/1, *Heinrich Weiss and Others*, Judgment of the Court (Grand Chamber) of 11 December 2018, EU:C:2018:1000, responding to the Order of 18 July 2017 – 2 BvR 859/15 of the FCC, BVerfG, Order of the Second Senate of 18 July 2017 – 2 BvR 859/15 paras (1 – 137), available at: www.bverfge.de/e/rs20170718_2bvr085915en.html : www.bundesverfassungsgericht.de/.

⁴⁰ See Christian Joerges, “*Pereat iustitia, fiat mundus: What is left of the European Economic Constitution after the OMT-litigation*”, *Maastricht Journal of European & Comparative Law* 23 (2016), pp. 99–118, also available at SSRN: <http://ssrn.com/abstract=2691929>; *Where the Law Runs Out: The Overburdening of Law and Constitutional Adjudication by the Financial Crisis and Europe’s New Modes of Economic Governance*, in Sacha Garben, Inge Govaere and Paul Nemitz (eds.), *Critical Reflections on Constitutional Democracy in the European Union*, Oxford: Hart Publishing 2019, pp. 168–178.

content itself with the adjustment of interest rates and the use of other conventional monetary policy instruments. If it is just epistemic, how comes that it is politically controversial within our technocratic élites? An irresistible logic is at work here. The ECB cannot restrain itself to a focus on price stability and leave financial stability operations to national governments. The Bank's concerns for financial stability are unlimited in their scope. They reach into the whole range of economic and social policies with requests for structural reforms and adjustments. This is not merely a correction of political processes – it amounts to their replacement. What the courts tries to sell as an epistemic exercise is political fiat. The most recent of the three judgements, *Weiss*, has raised nothing less but an outcry, including the quest for an infringement procedure by the European Commission against the German government.⁴¹ The main normative concern of this outcry is the apparent disregard of the supremacy principle – a concern that cannot explain the democratic credentials of this dogma and fails to take its history into account.⁴² The pragmatic concern of the critics is already forgotten. What the German Constitutional Court had requested was *de facto* modest; the ECB complied without further ado.

The controversy is nevertheless a major theoretical challenge. Should a Polanyian perspective be in place here? I resort to an analysis recently submitted by the above-mentioned American political theorist Steven Klein. “At the heart of Polanyi's theory of money”, Klein argues, “is the tension between money as a means of exchange and money as a means of payment.”⁴³ Money in exchange relations functions like any commodity. However, this functioning is dependent upon an institution ensuring the supply of liquidity, the flow of credit, responses to liquidity constraints. “There is an inherently redistributive dimension to money as a means of payment, insofar as the state guarantee of credit ultimately points to a collective pooling across a community of fate.”⁴⁴ To put it slightly differently: Monetary policy as exercised by the ECB is a deeply political exercise.⁴⁵ The whole construction is such that the conferral of *de facto* unlimited discretionary powers upon the ECB and the necessarily “epistemic” character of its decision-making powers

⁴¹ See Federico Fabbrini, “*Suing the BVerfG*”, *VerfBlog*, 2020/5/13, <https://verfassungsblog.de/suing-the-bverfg/> and the manifesto of R. Daniel Keleman, Piet Eeckhout, Federico Fabbrini, Laurent Pech, Renata Uitz, “*National Courts Cannot Override CJEU Judgments*”, <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>.

⁴² On this aspect see Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, in Christian Joerges / Navraj S. Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* Oxford, Hart Publishing 2003, pp. 167-191, note 92.

⁴³ Klein, 10.

⁴⁴ Klein, 9.

⁴⁵ In my work on the institutional problematic of EMU, I have characterised the assignment of monetary policy to Europe and the defence of national powers in the spheres of economic and fiscal policy as a “diagonal conflict” which is irresolvable within the EMU framework. No authority has been entrusted with credible means to resolve conflicts arising out from the exercise of national and European powers. Steven Klein operates in a different language. He diagnoses the institutionalisation of the two functions of money at different levels: The Euro ensured the function of money as a means of exchange powers and the member states retained entrusted with powers to ensure the function of payment. It seems to me that our views converge inessential respects. My characterisations of EMU as an institutionalised “diagonal conflict” and the responses to the European crisis outside a legitimating constitutional frame as “executive” and “authoritarian” managerialism seem to identify the very configuration Klein calls “EMU's institutional separation between money as a means of exchange and money as a means of payment” which generated a “continuous reversion to the minimum winning coalitions”. And we both agree that all this came “at the price of democratic legitimacy, as the fabric of debtor states is reshaped based on the functional demands of the EMU.” And both of us conceptualise the present constellation as a tension / conflict / move and countermove.

attains the status of a command of the EMU design structure. This reasoning, so much the Court concedes, is incomplete in one respect. Economic and fiscal policy are still reserved to the Member States. There must therefore be some limit to ECB powers, one is tempted to assume. However, this would also require definition of the limits of monetary policy, which the Treaty fails to do. The Court's response to the "diagonal conflict" between (European) monetary policy and the national powers in the realm of fiscal and economic policy in plain English: the ESCB/ECB are entitled to define objectives of monetary policy and to determine the appropriate means in full autonomy. This, indeed, cannot be otherwise once it has been held that the conduct of monetary policy "requires an expertise and experience which, according to the Treaties, devolves solely upon the ECB."⁴⁶ Governance of the Eurozone, we are told, is a technocratic exercise. By definition, this praxis can never be subject to democratic legitimacy requirements or be reconcilable with the rule of law. What does this mean if it is to be taken literally? European law has emptied out into a functionalist sea devoid of normative character.

Section 6: A brief, and admittedly somewhat vague, outlook

What then are the lessons we have to learn? At one level, the message is surely a simple one: critique has a value all of its own – the *Gauweiler* judgment is normatively untenable. At another level, however, a further lesson left to us by the *Gauweiler* saga stands as a challenge to the foundations of legal critique itself: almost uniquely, the German Constitutional Court judgment had its own dissenters, Justices Gerhardt and Lübbecke-Wolff. The reasons given by Judge Gertrude Lübbecke-Wolff for her dissension are particularly instructive, where she urged that the German Court should not judge at all upon the provisions of the OMT because:⁴⁷

- "To do so would be to go beyond the limits of judicial competence under the principles of democracy and separation of powers." (paragraph 3)
- "The more far-reaching, the weightier, the more irreversible – legally and factually – the possible consequences of a judicial decision, the more judicial restraint is appropriate." (paragraph 7)
- "Where for reasons of law the judges' courage must dwindle when it comes to the substance, they ought not to go into the substance at all." (paragraph 27)
- "The democratic legitimacy which the decision of a national court may draw from the relevant standards of national law (if any) will not, or not without substantial detriment, extend beyond the national area." (paragraph 28)

Lübbecke-Wolff's formulations seem unashamedly formalistic in nature, founded in the limits to the competences of the law in general and the constitutional jurisdiction in particular; yet, in all their formalism, they both deliver one of the most stinging critiques of facticity *as* validity within national and supranational thinking and point the way forward to a refounding of European law.

Her final point is perhaps most telling: her critique in this instance is of the German Constitutional Court, and its determination to defend the budgetary competence of the German Bundestag while, by the same token, not caring at all for, e.g., the rights of the Greek Parliament. This is not an argument about proportionality and the limitation of

⁴⁶ Opinion AG Gruz Villalón, para. 111.

⁴⁷ The following numbers go to the paragraphs of her dissent in BVerfG, 2 BvR 2728/13 vom 14.1.2014, §§1–105, www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html.

discretionary decision-making. It concerns instead the jurisdictional mandate of constitutional courts. No national court is allowed to decide for the whole of the EU. Her preceding arguments are similarly weighty: no court is entitled to decide upon the survival of the common currency. The CJEU fails wholly to take note of this admonition, laying down instead a particular economic constitution for the Eurozone. Governance of the Eurozone, so the Court held, is a technocratic exercise, or a praxis that escapes the quest for democratic legitimacy and the constraint of the rule of law.

This is not where the argument ends. If we must not rely on supremacy and technocratic rule, we will have to live with diversity and deal with its challenges. That challenge is extremely demanding.⁴⁸ I content myself here with citing a passage from the last chapter of “The Great Transformation” in which Polanyi considers that: “... with the disappearance of the automatic mechanism of the gold standard, governments will find it possible to [...] tolerate willingly that other nations shape their domestic institutions according to their inclinations, thus transcending the pernicious nineteenth century dogma of the necessary uniformity of domestic regimes within the orbit of world economy. Out of the ruins of the Old World, cornerstones of the New can be seen to emerge: economic collaboration of governments and the liberty to organize national life at will.”⁴⁹

⁴⁸ As explained in C. Joerges, “How Is a Closer Union Conceivable under Conditions of Ever Deeper Socio-Economic and Political Diversity: Constitutionalising Europe’s *Unitas in Pluralitate*”, *ELJ* 24 (2018), pp. 257-267.

⁴⁹ Polanyi, *The Great Transformation*, pp. 253-254.

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Redazione

Luciano Angelini, Chiara Lazzari, Massimo Rubechi.

Collaborano con *Cultura giuridica e diritto vivente*

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Cultura giuridica e diritto vivente è espressione del Dipartimento di Giurisprudenza (DiGiur) dell'Università di Urbino. Lo sviluppo e la manutenzione di questa installazione di OJS sono forniti da UniURB Open Journals, gestito dal Servizio Sistema Bibliotecario di Ateneo. **ISSN 2384-8901**



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