



Flaws, Old and New, of Economic Governance in Europe

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1. Unity in Diversity as Europe's Vocation

It has become difficult for a German to give a talk in Italy. Even at occasions which do not deal with the future of Europe, the crisis is somehow present. And this presence is an uncomfortable one. And *vice versa*, how do Italians feel when they address a German audience? Their task is different, but by no means easy. I refrain from reporting my experiences and instead try to say what I feel we would need, namely, a type of communication and interaction in which we are aware of our differences, try to understand the background of the other, and learn to synthesise respect and critique.

Do we have examples? Jürgen Habermas in his numerous interventions, maybe?¹ Ulrich Beck with his reference to Thomas Mann's plea for a "European Germany", instead of a "German Europe"?² Not only our master thinkers but also many academics and publicists, to some degree even my own writings³, could be cited here. This is a way to make friends abroad, but it is not what I have in mind. Much closer to what I believe could be helpful are works such as Angelo Bolaffi's *Cuore Tedesco*⁴. Bolaffi has a profound intellectual background, is intimately informed about Germany's cultural heritage, its history, its institutions, the functioning of German politics, and its intellectual life. However, he seems to be deeply conservative, and his plea for German leadership is "a non-starter"⁵, but he is nonetheless incredibly generous in the way he treats my country. And nevertheless, this is a very enlightening and helpful contribution both to German-Italian relations and to the miserable state of the European Union.

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¹ E.g., The interview "Ora in Europa il populismo sta conquistando anche i governi", available at: http://www.repubblica.it/esteri/2014/12/02/news/habermas_ora_in_europa_il_populismo_sta_conquistando_anche_i_governi-101916768/Repubblica; "Una partita a poker per i posti di potere ma così l'Europa sarà colpita al cuore", *La Repubblica*, 31 May 2014, available at: http://www.repubblica.it/esteri/2014/05/31/news/jrgen_habermas_una_partita_a_poker_per_i_posti_di_potere_ma_cos_l_europa_sar_colpita_al_cuore-87728583/; "Più democrazia, meno mercati finanziari", *La Repubblica*, 19 March 2012, available at: <http://temi.repubblica.it/micromega-online/europa-habermas-più-democrazia-meno-mercati-finanziari/etc/etc>.

² U. BECK, *German Europe*, Cambridge, Polity Press, 2013, VII.

³ C. JOERGES and S. GIUBBONI, "Diritto e politica nella crisi europea", (2013) 31 *Rivista critica del diritto privato*, 343-367; a co-authored essay is a nice step, but not yet what I envisage.

⁴ A. BOLAFFI, *Cuore Tedesco. Il modello Germania, l'Italia e la crisi europea*, Roma, Donzelli Editore, 2013 [*Deutsches Herz. Das Modell Deutschland und die europäische Krise*, Stuttgart, Klett-Cotta, 2014].

⁵ See C. OFFE, *Europe Entrapped*, Cambridge, Polity Press, 2015, 90-108.

Reading Bolaffi, you will experience that our countries and “we”, their citizens, are different. Thinking about these differences, you may prioritise this or that on this or that side. But you will also have to consider whether anything can or should be done about it.

At this point, it is about time to go *in medias res*: “*Die Wirtschaft ist das Schicksal*” (the economy is our destiny) – Walther Rathenau’s frightening insight from the early years of the Weimar Republic has gained a critical topicality as, by now, we all know so well. His economic philosophy was that of a variety of an “organised liberalism” and the motto that I have cited concerned the state of Germany’s first republic – albeit in its European context⁶. What I will complain about in this essay is the disregard of history and conceptual history in European law scholarship both in general and in my own discipline, namely, European economic law, in particular. This is not the kind of discourse which dominates the perception of the economy in European law scholarship. To be sure, this scholarship is meticulously documenting, analysing and discussing each and every element of the European legal materials pertaining to the economy. It is, nonetheless, characterised by a benign neglect of the constitutional importance of the economy and not well prepared to comprehend its political dimensions and context.

The implications of this forgetfulness are dramatic, as I will briefly try to explain with the help of three non-legal disciplines: economic sociology, political economy, and economic history. On the first: Karl Polanyi, in his legendary *Great Transformation*⁷, has argued that the market and the economy are always “socially embedded”. It follows that we have to take the institutional, historical and context into account when observing our economies and trying to make them “more competitive”. It also follows that we have to be aware of the “varieties of capitalism”⁸. Torben Iversen and David Soskice, in a paper entitled “A Structural-Institutional Explanation of the Eurozone Crisis”, have relied on the theory and methodology of this approach in a comparison of the German and the Italian economy⁹. They refrain from any moralising in their diagnosis of the current Italian difficulties and their origins on the one hand, and Germany’s present performance and its origins, on the other. Werner Abelshauser, Germany’s leading economic historian, is less cautious and contained. In a recent manifesto, entitled “*Europa in Vielfalt einigen*” (European *unitas in pluralitate*)¹⁰, he argues that Europe risks the destruction of its competitive advantages through the streamlining of its economies. This is precisely the message, to cite another great Italian, in Giandomenico Majone’s recent monograph¹¹. It is also the creed underlying this essay¹². I cannot explain, let

⁶ See U. MADER, “*Die Wirtschaft ist das Schicksal?* Walther Rathenau als Reichsminister 1921 und 1922”, *WRG-Mitteilungen* 2002, available at: www.waltherrathenau.de/fileadmin/Material/Mitteilungen/WRG-Mitteilungen-2002.pdf.

⁷ K. POLANYI, *The Great Transformation: The Political and Economic Origins of Our Time* [1944], Boston MA, Beacon Press, 1957.

⁸ P.A. HALL and D. SOSKICE (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford, Oxford University Press, 2005.

⁹ T. IVERSEN and D. SOSKICE, “A Structural-Institutional Explanation of the Eurozone Crisis”, Cambridge MA, Harvard University, Department of Government.

¹⁰ W. ABELSHAUSER, “*Europa in Vielfalt einigen. Eine Denkschrift*”, available at: <http://wwwhomes.uni-bielefeld.de/wabelsha/Denkschrift.pdf>; see, also, W. ABELSHAUSER, *Kulturkampf: Der deutsche Weg in die Neue Wirtschaft und die amerikanische Herausforderung*, Berlin, Kadmos, 2003; *id.*, D. GILGEN and A. LEUTZSCH (eds), *Kulturen der Weltwirtschaft*, Göttingen, Vandenhoeck und Ruprecht, 2013.

¹¹ G. MAJONE, *Rethinking the Union of Europe Post-crisis*, Cambridge, Cambridge University Press, 2014.

¹² C. JOERGES, “Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form”, in R. NICKEL and A. GREPPI (eds), *The Changing Role of Law in the Age of Supra- and Transnational*

alone defend, all the premises which underlie what I shall be submitting in these few pages, and it is equally impossible to summarise the works which lead to this submission in the subtlety which such a complex and delicate topic deserves in such difficult times. What I will, instead, present are some daring broadsheets which do not elaborate on the analyses in economic sociology, political theory and economic history. They focus on law. Section II is an assault on the orthodoxy of European legal studies. It submits that European economic integration has not only affected the reach of democratic politics and the welfare state legacy of post-war Europe negatively, but, by the same token, gradually disembedded the formerly national economies. Section III will deal with the establishment of the EMU. It will argue that the EMU was neither a re-embedding exercise nor a victory of economic constitutionalism. The EMU will, instead, be characterised as a “diagonal conflict”, creating an irresolvable dilemma. Section IV will turn to Europe’s crisis management and its new modes of economic governance. It is here that the drama transforms into tragedy. The price for the defence of the EMU high: economic prospects remain vague and social recovery is out of sight. The Epilogue (Section V) is on a theoretically viable, but politically unlikely, alternative.

2. The Disintegrative Effects of Economic Integration

The reference to Walter Rathenau alludes to a long-term *problématique* and a critique of European legal scholarship. The problem concerns the relation or tension between markets and politics, more specifically between the democratically-legitimated political rule in constitutional states and the autonomy of their economies.

2.1. The Integration Through Law Project and Economic Constitutionalism

What, other than law, was conceivable as the distinctive medium that kept the Community, which the Treaty of Rome had established, together? The story of the early jurisprudence of the ECJ, which transformed the rule of the Treaty into a Constitutional Charter, is well known, and not just to lawyers. So is the characterisation of the Community by Walter Hallstein, the first President of the Commission with an explicit commitment to ordo-liberalism right after the war¹³, as “*Schöpfung des Rechts, Rechtsquelle, und Rechtsordnung*”¹⁴. European integration was deliberately launched as an economic project. By necessity, provisions concerning the organisation of the economy were to become extraordinarily important. Here lies the origin of the powerful alliance between the agenda of integration through law and ordo-liberalism. The two allies, however, were hardly aware of the fact that they were operating in tandem. Hardly anybody

Governance, Baden-Baden, Nomos Verlag, 2014, 125-176, also available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723249; *idem*, “Conflicts-Law Constitutionalism: Ambitions and Problems”, in M. CREMONA, P. HILPOLD, N. LAVRANOS, S.S. SCHNEIDER and A.R. ZIEGLER (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann*, Leiden, Brill/Nijhoff, 2014, 111-138, also at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182092.

¹³ See his “Wiederherstellung des Privatrechts”, (1946) *Süddeutsche Juristenzeitung*, 1 et seq.

¹⁴ W. HALLSTEIN, *Die Europäische Gemeinschaft*, 5th ed., Düsseldorf, Econ, 1979, 33.

outside Germany knew what ordo-liberalism and its commitment to *Ordnungspolitik*¹⁵ were about. And the same is true *vice versa*. Germany's European law community did not pay much attention to discussions in other countries and foreign??/other languages. "Integration through law", which was to become a trademark of the European project, was to achieve an umbrella status. Law was famously conceptualised as the "agent and the object of integration"¹⁶. The assignment of both instrumental functions and inherently legitimating values was by no means pursuing, indeed, it was not even aware of, a notion such as "economic constitutionalism". And yet, what happened through the so-called constitutionalisation of European law through the doctrines of "direct effect", "supremacy", and "pre-emption", was fully in line with ordo-liberal premises and aspirations. In particular the conceptualisation of the economic freedoms as basic rights which Europe's market citizens could invoke against their nation states was very much to the liking of the one and only school of thought which took the legal dimensions of the economy really seriously. It seemed now plausible to assign a constitutional status to the core institutions of the Europeanising market economy.

One aspect and a crucially problematical implication of the ordo-liberal conceptualisation of legitimate governance through an economic constitution was to constitute a steadily deepening dilemma, namely, the unresolved tensions between the juridification of "the economic" according to the "logic of the market", on the one hand, and the primacy of democratic legitimacy, on the other. We are currently witnessing a dramatic intensification of this tension. This brief re-construction of the foundational period reveals that this tension is not new and not a late by-product of the financial crisis. It is, instead, a so-to-speak foundational flaw of the integration project.

As already underlined, the *de facto* alliance between economic constitutionalism and integration through law was hardly noticed in European law scholarship, not even in Germany. Economic constitutionalism was a theory residing in the private law compartments of our discipline, whereas European law was understood as public law. This lack of sensitivity is difficult to explain because the young Federal Republic had witnessed an intense debate on the notion of an "economic constitution" in its Basic Law. This debate concerned the conceptualisation of the ordering of the economy as a self-legitimating *ordo* which required a legal institutionalisation beyond the reach of politics. In this debate, the ordo-liberal school and its allies in the German *Staatsrecht* were confronted with the quest for *democratic* legitimacy and the primacy of the legislative authority in the ordering of "economy and society". The primacy of democratic politics was defended at the time by a clear majority of Germany's constitutional lawyers even in instances where its policies appeared opportunistic and unprincipled¹⁷. It is worth recalling that ordo-liberalism experienced a first defeat when

¹⁵ An anecdote may explain my hesitation to search for a translation: "Ordnungspolitik" was the German name of Working Group VI in the European Convention in 2003. The English name was "Economic Governance". Was this an innovative translation? Not really. It was the Convention Secretariat that was responsible for the introduction of the term, in which someone remembered the fierce controversies between "Ordnungspolitik" and "industrial policy" in the Maastricht Intergovernmental Conference in 1991 – a case of "linguistic-discursive path-dependency", according to Andreas Maurer, which confirms that the German notion is resistant to translation.

¹⁶ R. DEHOUSSE and J.H.H. WEILER, "The Legal Dimension", in W. WALLACE (ed), *The Dynamics of European Integration*, London, Pinter, 1990, 242-60, at 243. On this legacy, see D. AUGENSTEIN, "Integration through Law" Revisited: *The Making of the European Polity*, Farnham, Ashgate, 2012.

¹⁷ See the re-construction in K.W. NÖRR, *Die Republik der Wirtschaft. Teil I. Von der Besatzungszeit bis zur Großen Koalition*, Tübingen, Mohr Siebeck, 1999, *passim*. The reference to the legal validity of the

that debate reached the German Constitutional Court¹⁸. Ordo-liberalism was again the loser in the spectacular debate on the co-determination statute in the seminal judgment handed down on 1 March 1979¹⁹. This is all the more remarkable given that the same court arrived at fundamentally different conclusions when it had to evaluate the constitutional validity of Monetary Union in its Maastricht judgment²⁰, to which Section III.1 will return.

2.2. Foundational Flaws

The tension between democratic legitimacy as it was institutionalised in the Member States of the EC, on the one hand, and the establishment of an economic order of supranational validity, on the other, is the most problematical legacy of the foundational period of the integration project. But we have to note some more flaws. One is methodological. The famous formula characterising law as the “object and the agent of integration” was coined at the height of the American law and society movement which promoted the sociological study of law and all sorts of interdisciplinary “law and...” explorations. This revival of legal realism has attracted much attention, not least in the “law-in-context” approach which is very much *en vogue* at the law department of the European University Institute. “Integration through law”, however, was an agenda which disregarded the embeddedness of law in all sorts of social norms. The attractiveness of “integration through law” in European studies is, nevertheless, unsurprising. Its methodological solipsism, doctrinal rigidity and its formalism enabled transnational interactions and acting, and fostered the emergence of a European community of lawyers and legal scholarship long before social scientists started to take Europe seriously.

The primacy of law and its methodological poverty came at a high price, however. “Progress” in European integration was equated with the accomplishment of more legal uniformity, while legal diversity served to provide conclusive reasons for more legal harmonisation. The deficiencies of the integration-through-law fantasy and ideology are precisely the two main flaws of which Giandomenico Majone and Fritz Scharpf keep reminding us: (1) Integration through law rests upon a “one-size-fits-all” assumption and proceeds accordingly; and (2) In integration-through-law, programmatic integration as more uniformity figures as a goal itself, as Europe’s *finalité*, which needs no further justification²¹.

constitutional “Sozialstaatsgebot” usually recalls the seminal Abendroth/Forsthoff debate, re-constructed, e.g., in C. JOERGES, “The *Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process”, (2010) 9 *Comparative Sociology*, 65-85.

¹⁸ Bundesverfassungsgericht, Judgment of 20 July 1954, Investitionshilfegesetz, BVerfGE 5, 7 ff.

¹⁹ BVerfG 50, 290, unfortunately never translated.

²⁰ Judgment of 12 October 1993, *Brunner v European Union Treaty*, (1994) 57 *CMLR*, 1.

²¹ See, e.g., G. MAJONE, *Rethinking the Union*, n. 11 above (*passim*); F.W. SCHARPF, *Community and Autonomy. Institutions, Policies and Legitimacy in Multilevel Europe*, Frankfurt/New York: Campus Verlag, 2010.

3. Economic Constitutionalism: its Pyrrhic Victory and Failure in the EMU

The Treaty of Maastricht, signed in 1992, is an extremely important turning-point in the development of the integration project. It was perceived at the time as both a continuation and a deepening of what had been accomplished to date at that time, a move towards “an ever closer union”, marked by an opening of new policy-fields and the crowning of the completion of the internal market by monetary union²². In hindsight, we see a more complex picture, and what we are becoming aware of are both its institutional defects and the failures to deal with their tragic consequences.

3.1. The Judicial Fiction of a “Stability Community”

The judgment of the German Constitutional Court on the Treaty of Maastricht, which was handed down on 12 October 1993, opened the way to the ratification of the Treaty in Germany. And it proved to be more controversial than the Treaty itself. Tellingly enough, and confirming my introductory remarks on the benign and unfortunate neglect of the economy in European constitutional scholarship, critics found that the Court has mis-stated the views of Hermann Heller, were irritated by the characterisation of the Union as a “*Verbund*”, rather than a “*Gemeinschaft*”, and even found a touch of Schmittianism in the judicial reasoning²³. What the Court had to say about the economy seemed less interesting but was, indeed, exciting. The pertinent passages on the European Monetary Union, and the economic constitution with its substantive and institutional substitution of politics and policies by legal rules, was, so the Court held, nothing less than a *sine qua non* for German participation within the Monetary Union. This assertion was the Court’s response to the argument that the European Union was about to acquire such wide-ranging competences that nation states could no longer act as the masters of their “*democratic statehood*”. Economic integration, so the Court replied, was an autonomous and *apolitical* process, which might, and indeed must, take place beyond the reach of Member State political influence. By virtue of a constitutional commitment to price stability and rules that guarded against inappropriate budgetary deficits, the EMU was, in the Court’s view, well structured. Accordingly, all doubts about the democratic legitimacy of economic integration were diverted. To rephrase the argument slightly: yes, the Treaty is compatible with the Basic Law. But this is true only because it is inspired by Germany’s stability philosophy and only as long as this stability pact is actually respected.

The Court had been warned, for example, by the President of the *Bundesbank*, “that a currency union, especially between States which are oriented towards an active economic and social policy, can ultimately only be realized in common with a political union (embracing all essential economic functions) and cannot be realized

²² See, for an early and still valuable collection of pertinent analyses, R. DEHOUSSE (ed), *Europe after Maastricht: An Ever Closer Union?*, Munich, C.H. Beck, 1994.

²³ See J.H.H. WEILER, “Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision”, (1995) 1 *European Law Journal*, 219-258.

independently thereof or as a mere preliminary stage on the way to it”²⁴. It could not be so naïve as to believe in the autonomy and sustainability of the “stability community”. And indeed, Ernst-Wolfgang Böckenförde, one of the renowned judges of the deciding 2nd Senate, has recently underlined that the judges were, indeed, fully aware of the fragility of the *Stabilitätsgemeinschaft* (stability community) which they defended as a constitutional command:

“The decision to agree on a monetary union and put it into operation without a simultaneous or immediately subsequent political union is a political one, for which the institutions with competence on the matter must take political responsibility”²⁵.

One remains perplexed. The judges knew very well that it would be simply inconceivable to correct politically the deal to which they had given their legal blessing. And they decided accordingly when they were confronted with the request to prevent the EMU from entering the third stage²⁶. The dynamics which had been set in motion became irresistible. The common currency had created financial interdependencies in a socio-economically ever more heterogeneous Union which had gone out of control. The new exclusive European competence for monetary policy was too weak an instrument to govern the European economic sphere, but strong enough to deprive the Member States of crucially important governmental powers. Europe continued to be a “market without a state”, while the former masters of the treaties had become “states without markets”²⁷.

My queries as a German lawyer are twofold. The first: in the two important judgments – *Investitionshilfe*²⁸ and *Mitbestimmung*²⁹ – the Court had rejected the idea of economic constitutionalism. What is the rational of this turn? The query is, rather, an objection: the German Court is not entitled to write the constitution for the entire Union. To be sure, it based its reasoning upon German principles which affected the rest of Europe only indirectly, but it is precisely this kind of external effect of national decision-making which has to be avoided in a Union of equals³⁰.

My objection as a German citizen is that the Court is, in the end, not in a position to accomplish what it solemnly proclaims. The “stability community” of the EMU existed only on paper. It is a fictitious order which cannot be implemented. The Treaty of Maastricht simply did not provide for mechanisms to enforce its conceptual basis.

²⁴ On the intense controversies in Germany over the common currency at the time of its introduction, see, recently, F. HEINEMANN, “Zwischen ‘Kernschmelze’ und ‘Fass ohne Boden’ – zum Dissens deutscher Ökonomen in der Schuldenkrise”, (2013) 60 *Zeitschrift für Politikwissenschaft*, 207-219.

²⁵ “Not kennt keine Gebot” (necessity knows no rules), *Neue Zürcher Zeitung*, 21 June 2010, available at: http://www.nzz.ch/nachrichten/kultur/literatur_und_kunst/kennt_die_europaeische_not_kein_gebot_1.6182412.html.

²⁶ Decision of 31 March 1998 - 2 BvR 1877/97 und 2 BvR 50/98 - available at: http://www.bverfg.de/entscheidungen/rs19980331_2bvr187797en.html.

²⁷ See, in more detail, C. JOERGES, “The Market without a State? States without Markets? Two Essays on the Law of the European Economy”, EUI Working Paper Law 1/96, San Domenico di Fiesole, 1996, available at: http://eiop.or.at/eiop/texte/1997-019_and_-020.htm.

²⁸ Note 18 above.

²⁹ Note 19 above.

³⁰ This is the core assumption of “The Idea of a Three-dimensional Conflicts Law as Constitutional Form”, in: C. JOERGES and E.-U. PETERSMANN (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford-Portland OR, Hart Publishing, 2011, 2nd ed., 413-455.

Nor did the successive Stability Pact of 1997³¹ complement the Treaty accordingly. The operation of the whole new regime was dependent on good economic luck and constant political bargaining.

Against this background, it seems hardly surprising that the Stability Pact was disregarded by such central players as Germany, France and the Netherlands when they felt they had reasons to do so, or that the Commission's much vaunted efforts to take action against deficits dwindled into nothing³². It has, nevertheless, become routine to assign the failure of the EMU to the non-compliance with its rules, and to conclude that such laxity would, in the future, have to be impeded by ever-stricter economic governance. An alternative, more honest and more intriguing interpretation would attribute non-compliance to the economic, social and political costs of the enforcement of a regime which represented an ill-defined political compromise, rather than a sustainable accomplishment of constitutional validity and strength. This is the point to which I will now turn in a somewhat unusual perspective.

3.2. The Maastricht Compromise as a Diagonal Conflict

The oddity of the Maastricht EMU is by now widely recognised. Sergio Fabbrini has characterised it as a “compromise” between German *Ordnungspolitik* and the majority preference for national sovereignty in the realms of economic and fiscal policy³³. Kaarlo and Klaus Tuori, in their monograph on the crisis, discern “two layers of the European Economic Constitution”³⁴. Whether it be compromise or layer, what Maastricht established was an incoherent edifice. There is nothing unusual or inherently problematical with compromises. What is specific about the Treaty and what distinguishes the European order from constitutional democracies is the lack of a political infrastructure and institutional framework in which democratic political contestation could occur and legitimate a completion or improvement of the unfinished edifice. According to a widely shared – and, in the proceedings before the German Constitutional Court quite intensively considered view – constitutional coherence would have required the move towards political union – a move which Helmut Kohl, then Germany’s chancellor, was ready to undertake, in contrast to other European leaders³⁵. Would such a move have saved the EMU? This is what many commentators argue and recommend as a response to the present crisis. Section V will return to this *problématique*. With regard to the EMU as it was actually established, speculations about what could have been done and what might then have happened do not help us with the characterisation of what we actually ended up with.

³¹ “Council Regulation (EC) 1467/97: On speeding up and clarifying the implementation of the excessive deficit procedure”, OJ L 209, 2.8.1997, 1.

³² For more detail on the following, see C. JOERGES, “What is left of the European Economic Constitution? A Melancholic Eulogy”, (2005) 30 *European Law Review*, 461-489, at 476-478.

³³ S. FABBRINI, “The Euro Crisis and its Constitutional Implications”, in S. CHAMPEAU, C. CLOSA, D. INNERARITY and M. POIARES MADURO (eds), *The Future of Europe. Democracy, Legitimacy and Justice After the Euro Crisis*, London-New York, Rowman and Littlefield, 2015, 19-36.

³⁴ KAARLO TUORI and KLAUS TUORI, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge, Cambridge University Press, 2014, 13-60.

³⁵ See K. DYSON, *States, Debts and Power. Saints and Sinners in European History and Integration*, Oxford, Oxford University Press, 2014, 609 ff.

My suggestion is that the Treaty of Maastricht *institutionalised* was *de facto* a “diagonal” conflict constellation. This notion requires an explanatory remark.

Monetary policy has become an exclusive competence of the Union (Article 3(1) c TFEU). With this provision, the Union claims supremacy in the policy area conferred to it, a conferral which did not include economic and fiscal policies. The exercise of these policies can have external effects and lead to “horizontal” conflicts. As experienced immediately after the establishment of the EMU, monetary policy and the national policies could still come into conflict. This, however, is not a vertical conflict for which supremacy would provide a response. It is a “diagonal conflict”: both the Union and the Member States are certainly interested in the functioning of their economies. But the powers needed to accomplish this objective are attributed to two distinct levels of governance. The type of conflict resolution foreseen in Article 119 TFEU is “the adoption of an economic policy which is based on the close coordination of Member States’ economic policies” as substantiated in Article 121 TFEU³⁶. As already mentioned, this instrument was legally imperfect.

At this point, it is illuminating to consider the insights of the non-legal disciplines cited in the first section. Not only does the diversity of socio-economic conditions even within the Eurozone generate a variety of interests, but the differences in the institutional configurations and economic cultures and in the social norms practiced also explain why European governance could no longer follow common rules. These observations also militate against the complaint about the imperfection of the Stability and Growth Pact of 1997. Its enforcement would have done more damage than the toleration of extra-legal practices.

4. Destructing the Alleged Culprit: Emergency Europe

In a widely noticed lecture on “*Macht-Recht-Wirtschaftsverfassung*” (Power-Law-Economic Constitution), given at the annual conference of the *Verein für Socialpolitik* in 1972, Ernst-Joachim Mestmäcker, the intellectual mastermind of the second generation of the Freiburg School, had expressed the expectation that the pressure to harmonise, stemming from integration, would become stronger and even irresistible under a common currency. A Common Monetary Policy would mean “ultimately giving up” the opportunity to maintain far-reaching differences between the economic orders³⁷. The Community to which Mestmäcker referred looks quite idyllic; it was much smaller and more homogeneous than the current Union, and his expectations and claims may have had a better *fundamentum in re* under such conditions. But, by now, we know more and can explain a lot. The Union became ever more diverse. The varieties of Europe capitalism persisted and conditioned national policy-making³⁸. Taking this ever-

³⁶ What kind of power this “co-ordination” mandate confers is thoroughly discussed by B. BRAAMS, *Koordinierung als Kompetenzkategorie*, Tübingen, Mohr Siebeck, 2013. As she underlines, at 228 ff., even the soft powers of recommendations and co-ordination are subject to the rule of law and that their exercise must be legalised by an amendment of the TFEU.

³⁷ E.-J. MESTMÄCKER, “*Macht-Recht-Wirtschaftsverfassung*”, (1973) 137 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 97-118, at 109 [“Power, law and economic constitution”, (1973) 11 *The German Economic Review*, 177-192 (1973)].

³⁸ P.A. HALL, “The Political Origins of our Economic Discontents. Contemporary Adjustment Problems in Historical Perspective”, in M. KAHLER and D.A. LAKE (eds), *Politics in the New Hard Times*, Ithaca NY,

increasing diversity into account, it is anything but surprising that the diagonal-conflict constellation which Maastricht has established became unmanageable. It is, *hélas*, equally unsurprising that the pressure of the financial crisis generated hectic activities.

4.1. Conflict “Resolution” through Authoritarian Managerialism

The fragility of the Maastricht arrangement and the erosion of legal ordering were not readily apparent for a long while. This has changed dramatically in the course of the crisis³⁹. Within a time-span of half a decade, we have been witnessing the establishment of new modes of economic governance and regulatory mechanisms such as the “Europe 2020 Strategy” (March 2010), the “European Semester” (May 2010), the “EFSF Framework Agreement” (June 2010), the “Euro Plus Pact” (March 2011), and the “Six Pack” (December 2011), the “European Stability Mechanism” (ESM, February 2012), the “Treaty on Stability, Coordination and Governance” (TSCG, March 2012), the banking union (on the road since September 2012), the “Two Pack” submitted back in 2011 and adopted with parliamentary blessing in March 2013⁴⁰. With regard to the compatibility of these measures with the Treaty, in particular, its bailout ban (Article 125 TFEU), an *ex-post* revision procedure amending Article 136 TFEU has been undertaken in order to legalise financial assistance as of 1 January 2013⁴¹.

A particular intriguing characteristic of Europe’s new modes of economic governance is the form of its crisis management. This “managerialism” is delicate for three inter-dependent reasons. First, through the supervision and control of macro-economic imbalances, it disregards the principle of enumerated powers, and, by the same token, cannot respect the democratic legitimacy of national institutions, in particular, the budgetary powers of the parliaments of the states receiving assistance. Second, in its departure from the one-size-fits-all philosophy that orients European integration in general and monetary policy in particular, it nonetheless fails to achieve a variation, which might be founded in democratically-legitimated choices; quite to the contrary, the individualised scrutiny of all Member States is geared to the objective of budgetary balances and seeks to impose the necessary accompanying discipline. Under the conditions of monetary unity, the Member States can only respond to pertinent requests through austerity measures: reductions of wage levels and of social entitlements⁴². Third, the machinery of the new regime with its individualised measures which are oriented only by necessarily indeterminate general clauses is regulatory in its

Cornell University Press, 2013, 129-149. For a summary of the argument, see P.A. HALL, “Brother, Can You Paradigm?”, (2013) 26 *Governance: An International Journal of Policy, Administration, and Institutions*, 189-192.

³⁹ The short story has been retold *ad nauseam*. For an instructive, if euphemistic, recent summary, see S. FERNANDES, “Who Calls the Shots in the Euro Area: ‘Brussels’ or the Member States?”, *Notre Europe*, Policy Paper 111, 15 MAY 2014, available at: <http://www.notre-europe.eu/media/emugovernance-fernandes-ne-jdi-may14.pdf?pdf=ok>. In more detail, see C. JOERGES, “Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation”, (2014) 15 *German Law Journal*, 985-1028, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179595.

⁴⁰ All of these acts can be found at a Commission website which is constantly being updated: http://ec.europa.eu/economy_finance/publications/legal_texts/compendium2014_en.htm.

⁴¹ As is well known, the objections raised by Mr Thomas Pringle, Member of the Irish Parliament, against the legality of this amendment were rejected by the CJEU in Case C-370/12 *Pringle v Ireland*, n.yr.

⁴² Cf., the listing of pertinent requests in M. DAWSON and F. DE WITTE, “Constitutional Balance in the EU after the Euro-Crisis”, (2013) 76 *Modern Law Review*, 817-844, at 825-7, notes 33-37.

nature, establishing transnational executive machinery outside both the realm of democratic politics *and* the form of accountability which the rule of law used to guarantee. Core concepts used by new economic governance cannot be defined with any precision, either by lawyers or by economists, and are therefore not justiciable. This implies that rule-of-law and legal protection requirements are being suspended⁴³. This type of de-legalisation is accompanied by assessments of Member State performance, which cannot be but highly discretionary⁴⁴. All of this is anathema to legal scholars committed to the legacy of the Freiburg School. It is therefore difficult to understand why Germany's ordo-liberalism is so widely identified as the ideational background of Europe's crisis politics, which the German government is orchestrating⁴⁵.

All of these measures were taken to compensate for the failure the original EMU and the Pact to prevent a downfall of the financial system of the Eurozone and to provide for rescue measures. This is why Ernst-Wolfgang Böckenförde, a renowned scholar and former judge of the German Constitutional Court, started to talk of a state of emergency⁴⁶. We will return to this notion below⁴⁷. For now, it should suffice to list the characterisation of the responses to the crisis which seek to capture their exceptionalism or specifics: executive federalism (Habermas)⁴⁸, new sovereignty with largely unfettered power of rule (Chalmers)⁴⁹, consolidating state (Streeck)⁵⁰, authoritarian managerialism (Joerges/Weimer)⁵¹, legally- and politically-unconstrained expertocracy (Scharpf)⁵², executive powers beyond the reach of national and European democracies (Curtin)⁵³, and, the transformation of the EU's democratic deficit into a

⁴³ See the intriguing and concerned analysis by M. EVERSON, "The Fault of (European) Law in (Political and Social) Economic Crisis," (2013) 24 *Law and Critique*, 107-129.

⁴⁴ See, e.g., A. WATT, "Commission Makes a Mockery of Imbalance Procedure", *Social Europe Journal* of 19 April 2013, available at: <http://www.social-europe.eu/author/andrew-watt>.

⁴⁵ See, e.g., the much cited essay on "The long shadow of ordo-liberalism" is the title of a much-cited paper by U. GUÉROT and S. DULLIEN, available at: http://www.ecfr.eu/page/-/ECFR49_GERMANY_BRIEF_AW.pdf, the symposium "Critical Exchange on Neoliberalism and Europe. Europe and the political philosophy of neoliberalism", (2013) *Contemporary Political Theory* (advance online publication, 6 August 2013), with contributions by T. BIEBRICHER, J. HIEN, N. JABKO and A. CHARI and from Italy S. CESARATTO and A. STIRATI, "Germany and the European and Global Crises", 39 (2010) *International Journal of Political Economy*, 56-86. Unfortunately, all of these contributions treat the legal philosophy of ordo-liberalism with benign neglect and fail to mention the harsh critique European crisis politics by leading proponents of the ordoliberal legacy; see, in particular, E.-J. Mestmäcker's worried interventions "Der Schamfleck ist die Geldverachtung" (the shaming flaw is the disdainfulness of money), in: *Frankfurter Allgemeine Zeitung*, 18 November 2011, 33; and "Ordnungspolitische Grundlagen einer politischen Union" (foundational principles for the ordering of a political union), in *Frankfurter Allgemeine Zeitung*, 12 November 2012, 12.

⁴⁶ Böckenförde, note 25 above.

⁴⁷ Section IV.2.

⁴⁸ J. HABERMAS, "A Pact for or against Europe?", in U. GUÉROT and J. HÉNARD (eds), *What does Germany Think about Europe?*, European Council on Foreign Relations, Berlin, 83-89.

⁴⁹ D. CHALMERS, "European Restatements of Sovereignty", LSE Working Paper 10/2013.

⁵⁰ W. STREECK, *Gekaufte Zeit. Die verlängerte Krise des demokratischen Kapitalismus*, Berlin, Suhrkamp Verlag, 2013, Chapter III.

⁵¹ C. JOERGES and M. WEIMER, "A Crisis of Executive Managerialism in the EU: No Alternative?", in G. DE BURCA, C. KILPATRICK and J. SCOTT (eds), *Liber Amicorum for David M Trubek*, Oxford, Hart Publishing, 2014, 295-322, available at <http://ssrn.com/abstract=2190362>.

⁵² F.W. SCHARPF, "Political Legitimacy in a Non-optimal Currency Area", MPIfG Discussion Paper 12/15, Cologne, 2013.

⁵³ D.M. CURTIN, "Challenging Executive Dominance in European Democracy", Chorley Lecture, London 2013, (2014) 77 *Modern Law Review*, 1-32.

democratic default (Majone)⁵⁴. None of these characterisations sounds flattering. Concerns as to their compatibility with Europe's commitments to democracy and the established understandings of the rule of law are widespread. So are concerns about the erosion of the legitimacy of the integration project as such. Equally disquieting is an emerging consensus about the features which underline the lack of any theoretical/conceptual paradigm. As the most famous (and most thoughtful) proponent of the integration-through-law project summarised it recently: while democracy had neither been on the foundational agenda or credibly accomplished later, an Ersatz-legitimation through the output which the project delivered has become equally fictitious at least for the Member States in Europe's new periphery. What is left is "messianism", the release of the peoples of Europe from their bellicose past into a common future which the former aggressor was invited to share⁵⁵. This grand legacy, however, does not render the present economic, social and political hardships sustainable.

4.2. Normalisation v. Political Contestation

The new modes of economic governance seem, by now, to be firmly established, and their legality has been so strongly confirmed that their critique has become practically pointless⁵⁶. We will even have to concede that the measures taken cannot simply be called a wilful and unwarranted abuse of power. The critical evaluations listed do not even insinuate a return to the *status quo ante* and even uncompromising critics of the political choices taken do not suggest that the short decade of Europe's crisis management can be undone⁵⁷. Two types of responses prevail at present. One strand in the debate pleads for "normalisation". This term has been coined in debates on the state of exception⁵⁸. It indicates the readiness to take the transformation which we are witnessing as *factum* (more or less) *brutum*. The attitude is particularly widespread in legal literature. The new framework is meticulously documented, while queries regarding its legitimacy are treated with benign neglect. A functional equivalent can be found in the re-statement of the position of the Maastricht Court: financial policy is to be treated as a non-political matter which can be delegated to experts. At the outer end of this spectrum is the position defended by political theorist Kenneth Dyson, who does not shy away from flirting with Schmitt – albeit in a rhetorically softened manner and with references to John Rawls and H.L.A. Hart. To quote him at some length:

"...all polities face the basic existential question of whether, in supreme emergency, there are limits on what they can do, and how. This question of the limits of normal moral reasoning arises when polities are faced by clear and imminent danger to their integrity and survival and to the understandings that were

⁵⁴ G. MAJONE, *Rethinking the Union of Europe Post-crisis*, note 8 above, 179-207.

⁵⁵ J.H.H. WEILER, "Europe in Crisis - On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'", (2012) *Singapore Law Journal*, 248-268.

⁵⁶ M. RUFFERT, "Annotation to Pringle", (2013) 69 *Juristenzeitung*, 257-259.

⁵⁷ C. OFFE, *Europe Entrapped*, Cambridge: Polity Press, 2015.

⁵⁸ M.-S. KUO, "The Moment of Schmittian Truth: Conceiving of the State of Exception in the Wake of the Financial Crisis", in C. JOERGES and C. GLINSKI (eds), *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance*, Oxford-Portland OR, Hart Publishing, 2014, 83-100.

at the heart of their constitution-making process. In the case of the EU and EMU, such understandings might relate to treaty provisions on irreversibility and solidarity. On this basis, it can be argued that the Euro Area is a matter of existential national interest for its member states. They are politically committed to ‘making the euro work’ and to ensuring its survival as ‘irrevocable’, as a ‘community of destiny’. Making credible this commitment means ‘doing what has to be done’ so that intertwined banking collapses and disorderly sovereign defaults do not trigger the collapse of the Euro Area and place the survival of the wider EU, including the single market, at risk. Politically, this kind of argument involves a commitment to ‘consequentialism’: namely, that the costs of not acting in this way would be too awful to contemplate. In legal theory, it finds expression in the notion of establishing legal validity by reference to sources of authoritative criteria outside specific constitutional or treaty provisions”⁵⁹.

Are Europe’s new modes of economic governance well established? All, by now, really firmly established? Assuming that the experts and technocrats in the DG Economy and Finance in the European Commission and the European technocratic networks will not deliver what their political masters keep promising; will such failures generate ever more unrest and protest among disempowered citizens who are exposed to austerity measures which are experienced as hopeless, if not unnecessary, suffering? What if they recall that the technocrat is an emperor without clothes?⁶⁰ Will they increasingly provoke the political public, national parliaments and even factions in the EP? Will it become ever more apparent that it is simply impossible for the great majority of signatories to comply with the requirements imposed upon them? Will national constitutional courts provide protection against the erosion of political rights and social entitlements?⁶¹

If these conjectures prove to be warranted, the room for political manoeuvre will widen. The epistemic communities organising Europe’s crisis management may be forced to re-consider their recipes. Conflicts of interests cannot be camouflaged and the European technocracy cannot be shielded either against the European public or against politicians who are accountable to their constituencies. Is it conceivable that the new policy co-ordination within the annually repeating European Semester, the reporting and multilateral surveillance obligations, the macroeconomic imbalance procedures, the responses to country-specific recommendations will lead to new assessments of the weight of socio-economic diversity, insights into the social embeddedness of markets, acknowledgement of the different regulatory, social and economic cultures in the Member States, a search for innovative responses to complex conflict constellations, and, sooner or later, even to the development of standards and criteria which can discipline authoritarian managerialism?

⁵⁹ K. DYSON, “Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency”, (2013) 35 *Journal of European Integration*, 207-222, at 211.

⁶⁰ See F.A. VON HAYEK, “The Pretence of Knowledge”, (1989) 79 *The American Economic Review*, 3-7.

⁶¹ Acórdão No 187/2013, Processo no 2/2013, 5/2013, 8/2013 e 11/2013, Plenário, English translation available at: <http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html>; A Fischer-Lescano has summarised the broad spectre of human rights violations through austerity measures in a pertinent study: “Human Rights in Times of Austerity Policy The EU institutions and the conclusion of Memoranda of Understanding”, available at: <http://www.jura.uni-bremen.de/institute/zentrum-fuer-europaeische-rechtspolitik/aktuelles>.

All of these considerations and conjectures are far from providing a substantiated alternative *programmatique*. They only assume that Europe's present post-constitutional constellation is far from stable, and that its precarious legitimacy will provoke political conflict and contestation. To put this slightly differently: legal scholarship is well advised to refrain from presumptuous promises; faced with profound uncertainties, it has to content itself with tentative deliberation. One not-so-tentative assumption is the expectation that the type of normalisation which is currently *en vogue* will not do away with the conflict configurations which it seeks to control. What lawyers can accomplish is to re-construct the claims raised in these conflicts and evaluate the arguments supporting them. Co-operative problem-solving, rather than authoritarian conditionality, is the constitutional assumption and hope implicit in this diagnosis⁶².

5. “Wo Gefahr ist, wächst das Rettende auch”?⁶³ An Epilogue

Contestation is bound to intensify in Europe, both within national societies and between them. We can hope for productive innovations which such conflicts and debates may generate. But we also have to consider and explore socio-economic conditions, chances of deliberative social and legal change. And we should listen to outside observers who take an intense and emphatic interest in the future of Europe. One particularly stimulating commentator is Dani Rodrik, an economist by education and passionate publicist at the Princeton Institute for Advanced Study. In a famous book⁶⁴, Rodrik has submitted his “trilemma thesis”. He asserts the impossibility of the simultaneous pursuit of economic globalisation, democratic politics and national determination (autonomy), highlighting that only two goals can be paired: either economic globalisation and democratic politics, or democracy and national autonomy. Rodrik has recently underlined that the EU furnishes dramatic illustration of this trilemma⁶⁵. The EU could transnationalise democracy through federalisation and thereby defend the advantages of the common market. Federalisation would imply that it would, at the same time, be forced to establish common European politics to legitimise the necessary assumption of fiscal and social policy, with negative consequences for national sovereignty. In the absence of such a de-nationalising will, he asserts, the EU will have to give up the common currency and accept economic disintegration.

Is federalisation the way out of the crisis? Rodrik's diagnosis is *de facto* deeply pessimistic, because, in his view, the federalisation vision is an abstract utopia. Political Democratic Union would have to be defined and accomplished in democratic processes. The same holds true for the institutional configurations of the economy. All this would have to happen very soon, but is inconceivable in the foreseeable future. He concludes:

⁶² Conflicts-Law Constitutionalism's “second dimension” as elaborated, for example, in the contribution cited in note 15 above.

⁶³ (But where danger threatens, that which saves from it also grows) F. HÖLDERLIN, *Patmos. Dem Landgrafen von Homburg überreichte Handschrift*, 1802 (quoted from F. HÖLDERLIN, *Werke*, Salzburg-Stuttgart, Bergland, 1954, 379; English translation by M. HAMBURGER, in F. HÖLDERLIN, *Selected Poems and Fragments*, London, Penguin Books, 1994, 243).

⁶⁴ D. RODRIK, *The Globalization Paradox: Democracy and the Future of the World Economy*, New York-London, W.W. Norton, 2011.

⁶⁵ *The Future of European Democracy*, Princeton, available at:
<https://www.sss.ias.edu/files/pdfs/Rodrik/Commentary/Future-of-Democracy-in-Europe.pdf>.

“Instead of deepening integration, policy makers must look for ways of undoing it selectively, opening up policy space for national governments in money, finance, and regulation. Under the scenario, the future of monetary union looks particularly bleak, as it is hard to see a single currency can be reconciled with multiple (democratic) polities”⁶⁶.

To take outside observers seriously does not mean that we have to subscribe to their argument. In defiance of Dani Rodrik’s Trilemma thesis, I am not persuaded that state- or federation-building is the only conceivable response to the tensions between transnational economic integration and democratic legitimacy. As indicated in the first section, there is a democratic alternative, namely, the “unity in diversity vision” of the 2003 draft constitutional Treaty for European Union. Rodrik would agree, but he would also argue that then we would forego the economic benefits of the common market. But would we really? Werner Abelshauser, in his *unitas in pluralitate* manifesto, disagrees on empirical and normative grounds. His empirical evidence is the resistance of the varieties of capitalism against economic integration⁶⁷. This phenomenon is anything but deplorable if the institutional diversity is economically beneficial, rather than detrimental⁶⁸.

The lawyer is not in a position to reject or to subscribe to the findings of economic historians. What he is competent to explore is the legal framing of the kind of variety that the historian has in mind. To my delight, Abelshauser refers, in note 30 of his manifesto, to the re-conceptualisation of European law as a new type of conflicts law. Conflicts-law constitutionalism is, indeed, a project which conceptualises unity in diversity as Europe’s constitutional form⁶⁹. What I, sadly, have to add is that the crisis has affected this project strongly. It was designed as an exercise in critical theory with normative perspectives which would not confront the state of the integration project with merely normatively attractive ideas, but which, in the tradition of the Frankfurt School, would identify aspects of the integration process which had a potential for institutional innovations, and might, thanks to the ingenuity of committed actors, be transformed in a constructive way. As it seemed in less troubled times, conflicts-law constitutionalism could eventually be elaborated further and proceed as a *re-constructive* project, *i.e.*, a re-conceptualisation of European law, which would, to a considerable degree, be compatible with European law as it stood, and be able to orient its further development. The re-constructive status was based upon its sociological premises which reflect the conflict-laden European constellation more adequately than the orthodoxy of European law. All that seemed necessary, and, indeed, overdue, was to re-consider the integration project in the light of Europe’s ever growing diversity, to take the conflicts which this diversity generated into account, and to re-orient Europe’s agenda from harmonisation and unity to the management of complex conflict constellations. The analytics of this approach retain their potential, and the normative commitments have

⁶⁶ D. RODRIK, *ibid.*, 6.

⁶⁷ Italy, united for so long, provides a challenging example; see G. MAJONE, “Strength through Union? Not Always: The Case of Italian Unification, 1861 to the present. Ms. Florence 2014 (on file with author).

⁶⁸ See the works of W. ABELSHAUSER cited in note 10 above, and his *The Dynamics of German Industry: The German Road toward the New Economy and the American Challenge*, Providence-Oxford, Berghahn Books, 2005.

⁶⁹ See C. JOERGES, “Unity in Diversity”, note 12 above.

not been invalidated. As outlined in Section IV.2, the crisis requires re-conceptualisation under high uncertainties and with uncertain prospects⁷⁰.

⁷⁰ See C. JOERGES and C. GLINSKI (eds), *The European Crisis and the Transformation of Transnational Governance. Authoritarian Managerialism versus Democratic Governance*, Oxford-Portland OR, Hart Publishing, 2014.