NATIONAL SOCIAL LAW AND THE NEO-LIBERAL ECONOMIC CONSTITUTION OF EUROPE

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European Integration was constructed as a political project relying for its realizations primarily on economic processes. In its founding phase ordoliberal scholars began to promote the ensemble of European economic freedoms and a system of undistorted competition as the legal framework and normative core of the EEC. Economic and Monetary Union as accomplished by the Maastricht Treaty was expected to consummate this project. However, the whole edifice started to erode immediately after its establishment. Following financial and sovereign debt crises, EMU with its commitments to price stability and monetary politics is perceived as a failed construction precisely because of its reliance on inflexible rules. European crisis management seeks to compensate for these failures establishing regulatory machinery which disregards the European order of competences, dis-empowers national institutions, dis-embeds the "economic" from the "social", and burdens in particular Southern Europe with austerity measures. It establishes pan-European commitments to budgetary discipline and macroeconomic balancing undermining the very social sovereignty of Member States. The ideal of a constitutional ordering of the European economy is thereby disregarded while the economic and social prospects of these efforts seem gloomy and the Union's political legitimacy becomes precarious. Recovery is conceivable only through a reconfiguration of the law-politics relationship including a politically more modest redefinition of the *finalité* of European integration.

INTEGRATION THROUGH LAW AND THE ORIGINAL EMBEDDED LIBERALISM BARGAIN

Europe is essentially a "Community of law". This characterization, which is ascribed to the first President of the Commission, has become an uncontested and unquestionable hallmark of the European project. From the outset, much was entrusted to law, and the law was considered capable of governing a broad range of issues. "Integration through law" became the motto of European policy in the highly influential conceptualization of its formative phase, which was dominated by jurists.

The special feature of the European system, as Joseph Weiler had conceptualized it, was the simultaneity and the balance of supranational law and inter-governmental policy. The law had not replaced political processes entirely; the equilibrium in the Community system remained dependent on continuous balancing efforts. The monetary union agreed upon in the Treaty of Maastricht in 1992 was meant to overcome that dependency. It was a political project, but one that was constituted and sustained by law as a legal project, a more stringent version and vision of "integration through law" as advocated by German Ordoliberalism: The new common currency was not to be entrusted to a political union, but to be bound to legal rules. Only an economic policy "that could be bound by constitutional law aligned with actionable criteria" was to be practiced in Europe – that was the creed of German Ordoliberalism. The legal constitution of monetary policy fulfilled this demand. It took on a form that was to immunize Europe against Keynesian impulses and macroeconomic policies, which required a continuous assessment of economic and social parameters, an in the last instance political determinations of priorities and which could therefore could not be legally programmed according to actionable criteria which the judiciary would supervise. As is widely recognized today, this strategy was anything but successful.

The unification process was limited to the construction of a common market, geographically co-extended to the territory of the founding member States of the Community and based on the free movement of factors of production (in particular on the freedom of movement of workers and enterprises) and on the guarantee of a competition not distorted by unfair practices engaged by private economic actors or unlawful interference by public authorities. The idea of the Rome Treaty was that the unification process, under the aegis of the fundamental principles of the Community economic constitution, was to be limited to the market sphere, without the involvement of the social systems of the founding States, which were supposed to maintain their functional separation within the national borders. Geographical fusion of the common market and functional separation of the national Welfare State systems constituted the EEC as a "dual" system (Scharpf), where the full effectiveness of the principles enshrined in the Community economic constitution should have been rooted in an equally accomplished guarantee of social rights at the national level, without affecting social and redistribution policies democratically undertaken by the several member States.

Social systems autonomously structured according to the different preferences of the democratic processes taking place in single member States were seen as a necessary prerequisite of legitimacy of the same Community economic constitution, in so far as they allowed it to perform its function of legal constriction of the common market, according to criteria of efficient allocation of factors of production and guarantee of fair competition between economic agents, without trespassing in areas characterized by discretion lying in redistributive policies based on social justice. The common market's legal order was being embedded – and therefore legitimized – within the systems of national social protection that were able to absorb any negative social effects deriving from the economic integration process. The main idea, expressed in the Ohlin Report and also in the one drawn by Paul Henri Spaak for the Messina Conference, was that, if implemented with the necessary gradualism, economic integration would have automatically promoted a harmonization in the progress of national social systems (Art. 117 of the EEC Treaty). In principle, such a spontaneous levelling up of national social systems did not require supranational measures of social policy, which were only provided for in exceptional cases where social *dumping* had prevented the unfolding of the dynamics of convergence towards higher standards of protection.

THE OVERTURNING OF THE EMBEDDING LIBERAL BARGAIN: THE INFILTRATION OF INTERNAL MARKET LAW INTO THE DOMESTIC SOCIAL SPHERES

As originally conceived, the autonomy of the social systems of the member States is a prerequisite for the establishment of the common market, as it is capable of providing the necessary social counterbalance to the phenomena of economic dislocation induced by the European market integration at national level. In this context, accepted in the Treaty of 1957 on the basis of the theoretical-political infrastructure contained in the Ohlin and Spaak Reports, a European labour code is neither necessary nor desirable, since the diversity of the national regulatory models in itself is not a factor of distortion of competition and of free movement of resources of production within the common market. Within this concept, a Community selective harmonising intervention – in an upward logic of harmonization of national systems – may be rather appropriate in exceptional cases in which the different labour law standards of protection do not reflect a real difference in the levels of work productivity nor can they be neutralized by adjusting the exchange rates, therefore being able to determine an actual distortion of competition in the form of social dumping.

This idea is simply overturned by the neo-liberal or neoclassical judicial turn undertaken by the Court of Justice. "The common idea underpinning *Viking*, *Laval* and the subsequent case law in the same line is that national-level labour law rules are capable of constituting a distortion of competition within the internal market and, as such, must be justified by reference to a strict test of proportionality" (Deakin). In particular, the strict application of the so-called *market access test* also to the obstacles to the free provision of services deriving from the higher standards of labour protection in force in the country in which the service is supposed to be carried out, puts the system of labour law of that State under a justified pressure which is completely inconceivable in the constitutional design originally taken up by the Rome Treaty. In the system laid down by the EEC Treaty, as promptly implemented by Regulation n. 1612/68, in fact, no exception was made to the full territorial application of national labour law of the host country according to the principle of equal treatment on grounds of nationality, also in cases of temporary mobility of posted workers within a transnational provision of services. On the contrary, the new *Laval* ideology not only bars the full application of the whole labour law (legal and collective) rules of the host country to the worker temporarily posted within a provision of services, but, according to the Court's interpretation of Art. 3.7 of Directive 96/71/EC, it even prohibits raising the standard of protection above the threshold set by the rules on minimum protection of that State. These rules, therefore, also determine the maximum level of protection within the very broad context of a transnational posting of workers as defined by Art. 3.1 of the Directive. In this way, "in *Laval* and in its later judgement *Rüffert*, the Court overturned the presumption in favour of the territorial effect of labour legislation, at least in the context of freedom to provide services" (Barnard and Deakin). Therefore, with the only exception of the core of mandatory rules of minimum protection, labour law was attracted within the regulatory competition in the internal market of services at the time when, with the great EU enlargement, the Eastern countries with weaker standards of protection and industrial relation systems entered the Union. The possibility of, at least partially, applying to posted workers the less-protective rules of labour law and the lower collective standards of the service-provider's country of origin has been considered co-essential to a proper functioning of the enlarged internal market, as a legitimate option of exploitation of the competitive advantage gained by eastern Europe's companies.

The overturning of the original idea of the founding Treaties produced by the affirmation of this neoclassical – or "ultra-liberal" (Supiot) – conception of internal market law has important, and only apparently indirect, consequences on the idea of a European citizenship as a status of social integration. The first obvious consequence is the rupture of the universalistic and unifying claims of that idea, which actually requires the founding character of a European *status civitatis* in the new constitutional order of the Union, according to the same fundamental rights language of the Court's case law. With the sole exception of the minimum rules of mandatory protection in the host State, the worker posted within a transnational provision of services is not entitled to benefit from this fundamental status entrusted to him by European Union law but is, rather, attracted towards the protective status of the economic freedom of the enterprise that is employing him in the cross-border provision of the service. We are in the presence of a subtle attempt of re-commodification of the (posted) worker, whose labour-force tends to be assimilated to the other productive factors organized by the employer provider of the service and indeed considered an important element of the competitive advantage enjoyed by the company in the internal market for its lower cost.

JURIDIFICATION OF MONETARY UNION AND EUROPE'S THE NEW MODES OF ECONOMIC GOVERNANCE

Since the spring of 2010, Europe has been taking action rapidly, and by now at breakneck speed, introducing audacious regulatory mechanisms: 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). And much more is ready to complement these steps or in the pipeline: the "Two Pack" (November 2011), the "European Stability Mechanism" (February 2012), the "Treaty on Stability, Coordination and Governance" (TSCG, March 2012), and the banking union (September 2012). Since all this is difficult to reconcile with the Treaties, in particular with the bailout ban of Article 125 TFEU, an audacious ex post revision procedure amending Article 136 TFEU so as to legalize financial assistance as of 1 January 2013.

From a legal point of view, there is quite a lot here which can and needs to be discussed, and not surprisingly, the debates on the extent to which the legal scope can, preferably without Treaty amendments, be widened are highly intense. The deeper threat, however, does not stem from this or that acrobatic feat of interpretation, but from the fact that legally structured action is replaced by bundles of measures that are characterized by a given situation and take effect in particular concerning "multilateral surveillance". A transnational functional bureaucracy is being established here whose forms of action are oriented towards the models of independent agencies in which there are no genuinely European competencies. To be sure, all constitutional democracies are familiar with the delegation of decision-making powers to institutions that possess particular expert knowledge, develop long-term orientations, and are to be protected from the rhythms and vicissitudes of politics. But such delegations are usually limited to well-defined fields and are monitored through control mechanisms of their own. Giandomenico Majone, the staunchest proponent of European governance through independent agencies, has always argued for reserving all distributive policies for the nation-states because only they can be democratically legitimated to a sufficient degree. This is not possible, he claims, with the type of macroeconomic management now practiced in European crisis management, and which is to be perpetuated institutionally. This would establish European distribution machinery that could only change the European democratic deficit into "democratic default".

WHAT IS LEFT OF EUROPEAN CONSTITUTIONALISM AFTER THE FINANCIAL CRISIS?

We are not going into the new legal discipline of "crisis law" in any detail here, but focus in our discussion on the reactions of the judiciary, first those of Germany's Federal Constitutional Court (FCC), then that in the recent judgment of the ECJ, now Court of Justice of the European Union (CJEU), in the case of Thomas Pringle.

Just 20 years ago, in its judgment on the Maastricht Treaty the FCC has established the right of German citizens to ask for judicial examination of the compatibility of legislative acts promoting European integration with Germany's Basic Law on the grounds that the right to vote guaranteed by Article 38 of the Constitution is to ensure their "participation in the democratic process." The question submitted to the Court was whether that right to democratic governance excluded the transfer of the functions and powers of the Bundesbank to the European Central Bank. The answer of the FCC: The political rights of German citizens are not affected as long as the EU Treaty ensures a de-politicized essentially legal architecture of the monetary union. This was a statement which made sense only on the basis of Germany's ordo-liberal legacy. It implied that the continuous governance of monetary policy by the rule of law and the commitment to prize stability were a *sine qua non* for Germany's participation in monetary union. This, of all things, was not deemed worthy of mention in the public-law division of European law scholarship both in Germany and elsewhere.

Two further decisions on in involvement of Germany in European rescue measures deserve particular mention. The first is the judgment of 7 September 2011 on aid for Greece. The plaintiffs in this litigation were a group of professorial economists and Dr. Gauweiler, a member of the *Bundestag*, as representing the Bavarian branch of the Christian Democratic party (CSU). They challenged both German and European legal instruments as well as further measures which are related to attempts to solve the current financial and sovereign debt crisis in the area of the European monetary union. Again, the messages of the Court are strong in principle, but not so constraining in practice. The principle: budgetary powers are a core responsibility of the parliament and a central element of democratic self-rule; this is why the *Bundestag* must remain "the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments". This, however, is the point where the law ends: parliament enjoys wide latitude in the exercise of its responsibilities – and this is a *political* prerogative which the Court will respect; it will hence not examine the quality or plausibility of parliamentary decision-making. The responses to the further two complaints were similarly evasive: The Court confirmed its infamous Maastricht *dictum* that European legal instruments which disregard the competence provisions of the treaties do not apply in Germany; but that risk, the Court continued, was contained by the fact that the economic and monetary union had, after all, been formulated to be consistent with the Basic Law. Last but not least: While in principle it is true that the government cannot elude its legal obligations with the help of international institutions, it remained unclear, whether or not legal protection has to be granted when European law is circumvented or transformed where the integration program of the Union is "complemented" by an intergovernmental treaty.

The by far most spectacular litigation so far concerned the "European Stability Mechanism" (ESM Treaty) and the "Treaty on Stability, Coordination and Governance on the Economic and Monetary Union" (Fiscal Compact). Not only the well-known professorial plaintiffs and Dr. Gauweiler but also the parliamentary group of *Die Linke* and no less than 37,000 citizens, among them very prominent figures, had filed complaint requested primarily a temporary injunction, which would inhibit the entering into force of the statutes passed by the *Bundestag* and the *Bundesrat* on 29 June 2012 as measures to deal with the sovereign debt until the final decision of the FCC would be handed down. The anxieties of the many publics in the EU and elsewhere awaiting that judgment are easy to explain. Even though hardly anybody had any doubts about the outcome, it matters how the highest judicial authority of the economically most powerful Member State of the Union would evaluate Germany's crisis activities whose government underlines again and again how seriously it takes every judicial pronouncement. The outcome was as expected. The plaintiffs were disappointed, the government, "Brussels" and "the markets" were relieved. The resonance in academic quarters was unusually positive. On closer inspection, however, the judgment seems highly problematical. Its ambivalence stems, seemingly paradoxically, from the Court's renewed defence of the budgetary power of the German *Bundestag* as a democratic essential. Indeed para. 274 of the judgment reads: "By virtue of its approval of stability aids, the Bundestag exercises the influence demanded by the Constitution and is a participant in decisions on the amount, conditionality and length of stability aids. It therefore determines the most important conditions for future successful demands for capital disbursements under Article 9 (2) ESM Treaty". All this, the Court ensures us, will protect the democratic rights of German citizens. Non-German citizens of the Union, however, should not be amused at all. Why is budgetary autonomy not understood as a *common* European constitutional legacy, respect for which is demanded by Article 4(2) TEU? The one-sidedness of this argument is not the only democratic failure of this judgment. With its disregard of "foreign" constitutional rights the Court gave implicitly its blessing to the "strict conditionality" of financial aids. The conditionality, which the European Central Bank, too, would like to see guaranteed, is anything but democratic. How is the approval of conditionality reconcilable with a previous passage of the judgment in which the Court argues that the so-called eternity clause of the Basic Law(Art. 79 Para. 3) is to guarantee "structures and procedures which keep the democratic process open"? This makes only sense, if the Court feels committed to Germany and no one else. And precisely that self-understanding seems to be the crux of the matter. The FCC cannot and must not presume the authority to act as the guardian of European constitutionalism in its entirety.

The CJEU came into the position to act as the guardian of European constitutionalism thanks to the complaints of Thomas Pringle, Member of the Irish Parliament against the involvement of his government in the establishment of the ESM – and the readiness of the Irish Supreme Court to do that the FCC has so far anxiously avoided, namely to submit a reference for a preliminary ruling to the CJEU. Pringle had commenced this litigation in April 2013; the CJEU (sitting as Full Court, with all 27 judges) handed down its judgment on 27 December 2012.

Pringle had argued in his complaint that the ESM-Regime constituted an usurpation of competences which were not conferred to the Union. This argument concerned hence the substitution of EMU as established by the Maastricht Treaty. The substantive and methodological core problem which the Court had to resolve stems from the bailout prohibition of Article 125 TFEU, and the emergency exception in Article 122 (2) TFEU. The Court restates the conceptual background of the former provision: "The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes, at Union level, to the attainment of a higher objective, namely, maintaining the financial stability of the monetary union." How can that philosophy be reconciled with the collective rescue messages which the ESM-Treaty legalises? The answer of the Court is straight forward: "Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who [sic] are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council."

The answer approves the transformation of the European Economic Constitution by a new regime."[T]he ESM Treaty does not provide that stability support will be granted as soon as a Member State whose currency is the euro is experiencing difficulties in obtaining financing on the market. … [S]upport may be granted to ESM Members … only when such support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States and the grant of that support is subject to strict conditionality appropriate to the financial assistance instrument chosen."

UNITY IN DIVERSITY: AN ALTERNATIVE VISION FOR THE EUROPEAN UNION

Normatively speaking, deciding between authoritarian "post-democratic executive federalism" and a Union furnished with new competencies and democratically legitimated is unproblematic. The question is only whether that alternative is on the agenda. The challenges which Europe faces and European scholars and politicians must address are twofold. We have to understand the design failure of the European institutional architecture and on that basis reconsider Europe's future. With the law-politics relationship this essay has focused on one characteristic of the integration project which ensured or contributed to its very remarkably successful beginning in the formative phase. The law provided a civilizing link among formerly embroiled nations. The constitutionalisation of European law with its empowerment of the judicial branch fostered economic integration and defined by the same token a politically restricted *finalité* below federal ambitions. These limitations turned, ironically and tragically, into failures with the dynamics of the integration process and its deepening. Our analyses of this seemingly progressive but in hindsight destructive moves have focused on monetary union (the "economic constitution") and on industrial relations (the "social constitution"). In both fields Europe's once so successful toolbox proved to be deficient. In both fields the law was (ab)used as an *ersatz* of politics. Europe must acknowledge the failure of it "one-size-fits-all" philosophy which it has pursued in its reliance on law as the "agent and the object of integration." It must acknowledge that the financial crisis and the inability to institutionalize a European social model signal political failure which cannot be cured within the present institutional configuration.

But do not Habermas with his plea for a Political Union and Europe's political elites with their quest for "more Europe" respond to precisely that impasse? The problematic of these responses should have become sufficiently apparent. The praxis of Europe's crisis management has so far not delivered the promised output and is about to deepened Europe's democratic deficit and to destruct its legitimacy while Habermas cannot plausibly explain how a democratic turn of these developments might come about.

The alternative to which the Latin notion in the title of this section points was the motto of the ill-fated 2003 Constitutional Treaty about Europe being "united in diversity," To recall this formula is by no means to advocate some regressive return to the nation state. It is instead meant to reorient European studies sociologically and normatively. The socio-economic, sociological and political development of the EU is characterized, the common currency of 17 member states notwithstanding, by ever more diversity even among the 17 Euro-zone countries. This development has surprised the advocates of the "ever closer Union" proclaimed by the Maastricht Treaty. Its acceleration, however, is anything but surprising in particular after the Eastern enlargement of the Union. Due to this increasing diversity the interests and conflict configurations in the Union are ever more diverging. This is neither good nor bad in itself but it necessitates a move from "integration through uniformization" to integration through conflict resolution."

"Conflicts-law as Europe's constitutional form" is the notion which Christian Joerges has coined for such a constitutional change. The approach was designed as a counter-move to the orthodoxy of European legal doctrines and an alternative to the mainstream of European constitutionalism, on the one hand, and a defense of the integration project against both the gradual destruction of Europe's welfarist legacy and its clandestine de-legalization, on the other – with the constructive ambition to defend the European commitments to democratic governance and the rule of law. This implies a new balance between EU economic-governance and national social policies, re-gaining the lost equilibrium even under the new constraints of the financial crisis. A necessary step in this direction is re-opening a space for re-politicizing the politics solidarity at national and supranational level.

A re-politicization of the social question capable of counterbalancing these new powerful external constrains to the benefit of Union's democratic legitimacy, first of all, requires the rediscovery of the positive-integration function of European labour law, beyond the open method of coordination. We need to imagine it under the new guise of framework-directives and legislation by general principles open to flexible national implementation even in the context of principled-differentiation through the enhanced cooperation route envisaged by the Lisbon Treaty. A complementary route would be rediscovering at EU level the forgotten virtues of auxiliary legislation, fostering a process of minimum-standard-setting through European collective bargaining of sectoral or transnational nature in the shadow of EU law.

Moreover, the re-politicization of the European social question passes through the retrieval of a true sphere of autonomy of national social regulators (States and social partners) against the excessive intrusiveness of the EU fundamental freedoms and the tinged logic of negative integration. At least in theory, the Lisbon Treaty provides the judges in Luxembourg with a wide range of conceptual tools and new hermeneutic opportunities to reconsider the constitutional doctrines of the internal market in order to assure a broader "margin of appreciation" for the member States in relation to sensitive choices regarding social policy and distributive justice within their welfare systems. In connection with the meta-principle of the inviolability of human dignity as enshrined in Art. 1 of the EU Charter of fundamental rights, a well-crafted interpretative use of the provisions of chapter IV of the Nice Charter would enable the Court of Justice – at least in theory – to effectively recast its way of understanding the "balancing" between social rights and economic freedoms. Even a proper reference (and due deference) to the new advanced case law of the Strasbourg Court on the right to strike and the right of collective bargaining could offer the judges in Luxembourg a fresh constitutional starting point under Art. 6 TUE to overcome, or at least mitigate, the interpretative *aporia* of the *Viking* and *Laval* cases in line with the standards of international protection of collective rights. A dialogue between the two Courts, renewed on these grounds, would allow to overcome the "crisis of trust" on the "social" jurisprudence of the European Court of justice triggered by the *Viking* and *Laval* cases.