AUSTRIAN LAW JOURNAL

ISSN: 2409-6911

DOI: 10.25364/1.2:2015.1.5
www.austrian-law-journal.at

Authoritarian Liberalism

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Abstract: *In light of the reforms undertaken for the sake of the Euro, the article revisits the concept authoritarian liberalism that was introduced in 1933 by the German public law scholar Hermann Heller. This notion seeks to capture the liaison between the "strong state" and economic liberalism. The article suggests that this notion can be fruitfully used to designate the new governance of economic and monetary union. It argues, particularly, that it makes sense to speak of an authoritarian style of governance even if the latter does not wear vestiges of outright repression. Two different faces of authoritarian liberalism can be distinguished: one that looks more towards authoritarianism and another one that views authoritarian rule as a managerial strategy that is good for the economy. The article then speculates whether the European Union has been, indeed, successful because it shifts between the two. Disturbingly, there may be something deeply as well as more accidentally authoritarian about European integration.*

Keywords: *European Union; authority; transnational governance; delegation; trust.*

I. Major changes

As is well known, over the last six years the Member States of the European Union have been wrestling with a banking crisis, a fiscal crisis and a real economic crisis.[1] While responses to the first crisis have now materialized in plans for a "banking union",[2] the two latter crises have occasioned to a whole series of measures, not least because they implicated the viability of Monetary Union. Various efforts at tackling the Fiscal Crisis and its implications for the financing of sovereign debt have profoundly altered the legal framework of Economic and Monetary Union. These relevant reforms concern two areas of law.

First, existing law concerning economic convergence[3] was amended, in particular with regard to the multilateral surveillance of economic performance and the prevention of excessive benefits. The core of these reforms is manifest in the strong and deep-reaching involvement of the Commission the economic and budgetary planning of the Member States. Key thereto is the "Europe-

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Earlier versions of this article were presented at the Law Department of the London School of Economics and Political Science, the Iowa Legal Studies Workshop and at the Georgetown University Law Centre. The author would like to thank all participants for their feedback.

1 I am following *Streeck's* depiction of the situation. WOLFGANG STREECK, GEKAUFTE ZEIT: DIE VERTAGTE KRISE DES DEMOKRATISCHEN KAPITALISMUS (Suhrkamp 2013). For a more complex picture that identifies five crises, see Agustin Menendez, *The Existential Crisis of the European Union*, 14 GERMAN LAW JOURNAL, 2013, at 453.

2 See http://europa.eu/rapid/press-release_IP-12-570_en.htm?locale=en.

3 It has essentially is basis in Articles 121-126 and Article 136 TFEU.

Fundstelle: *Somek*, Authoritarian Liberalism, ALJ 1/2015, 67–87 (http://alj.uni-graz.at/index.php/alj/article/view/37).

an Semester", which provides the Commission with access to the whole field of domestic policy planning.[4] What is more, not only do Member States of Euro Zone have to submit to the Commission and to the Eurogroup a draft budgetary plan for the forthcoming year[5] and are subject, under certain conditions, to visitations by "review missions",[6] sanctions can now be imposed on them on the ground of their failure to comply with recommendations[7] or corrective actions plans.[8] These are the innovations that we associate with the Reform of the Stability and Growth Pact ("Six Pack",[9] "Two Pack"[10]) and the Fiscal Compact.[11]

4 See Article 2a of Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies. It was introduced by Regulation 1175/2011 of the European Parliament and of the Council of 16 November 2011. The European Semester involves the formulation, and surveillance of the implementation, of broad economic policy guidelines; the tasks of formulation and surveillance are extended also to employment guidelines (Art 148[2] TFEU), the stability or convergence programs, national reform programs supporting the Union's strategy for growth and jobs and the prevention of correction of macroeconomic imbalances. Even the "enhanced monitoring of budgetary policies" is supposed to "complement" the European Semester. See Article 1 of Regulation (EU) 473/2013 of the European Parliament of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States of the euro area. Arguably, the European semester is the gate through which the Commission enters domestic policy planning and through which it never leaves. For a sketch of how the European semester works, see http://ec.europa.eu/economy_finance/economic_governance/the_european_semester/index_en.htm.

5 See Article 6 of Regulation (EU) No 473/2013.

6 See Article 3(5) Regulation 472/2013.

7 See Council Regulation 1177/2011 of November 2011 amending Council Regulation 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure. The new Article 7 has speeded up the imposition of sanctions.

8 See Articles 3 to 5 of Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.

9 The (reformed) Stability and Growth Pact consists of regulations concerning the prevention and correction of excessive deficits and macroeconomic imbalances. See Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances: Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area; Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. For the legal problems raised, see Martin Höpner & Florian Rödl, *Illegitim und rechtswidrig: Das neue makroökonomische Regime im Euroraum*, 92 WIRTSCHAFTSDIENST 219, 219-222 (2012); Jürgen Bast & Florian Rödl, *Jenseits der Koordinierung? Zu den Grenzen der EU-Verträge für eine Europäische Wirtschaftsregierung*, 39 EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT, 2012, at 269; Mark Dawson & Floris de Witte, *Constitutional Balance in the EU after the Euro-Crisis*, 76 MODERN LAW REVIEW, 2013, at 817.

10 Two regulations, based upon Article 136 and Article 121(6) TFEU, were adopted in order to strengthen the coordination and surveillance of budgetary policies among Member States in the Eurozone. Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area and Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. The first regulation applies to all euro area Member States, with special rules applying to those in the corrective arm of the Stability and Growth Pact, namely the Excessive Deficit Procedure. The second Regulation sets out "clear and simplified rules" for enhanced surveillance for Member States facing severe difficulties with regard to their financial stability, those receiving financial assistance, and those exiting a financial assistance program. We shall return to some of the provisions of these regulations below.

11 The official name of the Fiscal Compact is "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union".

Second, when the Member States were first confronted with the potential default of countries like as Greece, they had to answer the simple and important question whether the original treaty framework was indeed susceptible to flexible complementation.[12] As originally understood, the Treaty had made no credit available to Member States from the ECB qua lender of last resort (Article 123 TFEU) and had also seemed to have ruled out that Member States somehow assume the liability of any other (Article 125 TFEU). The exigency of rescuing the common currency, however, soon made the Member States divine ways of working around existing constraints, for example, by using the solidarity clause of Article 122(2) TFEU as a basis for adopting the regulation introducing the European Financial Stabilization Mechanism.[13] More importantly, outside the Treaty framework they quickly created institutions charged with helping debt-challenged Member States to restructure their sovereign debt, such as the European Financial Stability Facility and the European Stability Mechanism. The Euro Zone remained sustainable owing to amendments that were anchored in Public International Law.[14]

II. Obvious problems

Not surprisingly, the amendment of existing law and the creation of new institutions have been persistently trailed by two recurring challenges. They have been concomitant to European integration for decades. The first challenge questions whether or not the Union or the Member States really have the legal power to adopt the relevant measures[15] (for example, of introducing reverse qualified majority voting when it comes to imposing sanctions in the context of multilateral surveillance).[16] This *ultra vires* challenge is often complemented with the other challenge alleging that European crisis management has exacerbated the already existing "democracy deficit".[17]

Remarkably, in this context the competence challenge appears in a *dual format* that looks toward the democracy deficit. Not only is it debatable whether, for example, the Member States have the power to assign in the Fiscal Compact certain tasks to the Union institutions without the consent

12 As Scharpf points out correctly, it would have been possible to let Greece default on its debt on the basis of a strict construction of Maastricht rules. For such a "tough luck" approach, see FRITZ W. SCHARPF, NO EXIT FROM THE EURO-RESCUING TRAP? 5 MPIFG DISCUSSION PAPER at 7 (2014).

13 See Council Regulation 407/2010.

14 See Pieter-Augustijn Van Malleghem, *Pringle: A Paradigm Shift in the European Union's Monetary Constitution*, 14 GERMAN LAW JOURNAL, 2013, at 141.

15 The *Pringle* case concerned the legality of the European Stability Mechanism. See Case C-370/12, Pringle v. Ireland, [2012] ECR I-nyr. The conclusion of the Fiscal Compact generated a great deal of critical observation. See, for example, P.P Craig, *The Stability, Coordination and Governance Treaty: principle, politics, pragmatism*, 37 EUROPEAN LAW REVIEW 231, 238-239 (2012). The current saga concerning the Outright Monetary Policy (OMT) of the ECB, which allows it to buy debt from Member States that receive credits from the ESM, involves an *ultra vires* challenge by the Federal Constitutional Court, which still needs to be answered by the ECJ. For an account of the story, see Armin Steinbach, *The Legality of European Central Bank's Sovereign Bond Purchases*, 39 YALE JOURNAL OF INTERNATIONAL LAW ONLINE, 2013, at 15. This challenge seems to be a major blow to the rescue efforts not least because the OMT policy seems to have helped a lot to help the Member States concerned.

16 For a skeptical view, see Martin Höpner & Florian Rödl, *Illegitim und rechtswidrig: Das neue makroökonomische Regime im Euroraum*, 92 WIRTSCHAFTSDIENST 219, 219-222 (2012); Jürgen Bast & Florian Rödl, *Jenseits der Koordinierung? Zu den Grenzen der EU-Verträge für eine Europäische Wirtschaftsregierung*, 39 EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT, 2012, at 269.

17 See, for example, Agustin Menendez, *Editorial: A European Union in Constitutional Mutation*?, 20 EUROPEAN LAW JOURNAL, 2014, at 127; Ruth Fox, *Europe, Democracy and the Economic Crisis: Is It Time to Reconstitute the "Assise"?* 65 PARLIAMENTARY AFFAIRS, 2012, at 463. See already FRITZ W. SCHARPF, MONETARY UNION, FISCAL CRISIS AND THE PREEMPTION OF DEMOCRACY, 11 MPIFG DISCUSSION PAPER (2011).

of the Union;[18] rather, the new institutions and strategies of crisis management *in their operation* threaten to unsettle the institutional balance between the Union and the Member States.[19] Such an *indirect* subversion of the allocation of powers, which effectively absorbs powers on the part of the Member States, can be observed for both areas of reform,[20] *i.e.,* the revised Stability and Growth Pact, on the one hand, and the working of various "bailout" arrangements, on the other.

First, a permanent and systematic interference with national competence can be observed for multilateral surveillance, in particular for the European Semester.[21] Within its scope of application, this is particularly obvious for the alert mechanism concerning macroeconomic imbalances[22] and the "enhanced surveillance" of Member States, in particular if these receive financial assistance from the IMF or European institutions.[23] Within the context of the macroeconomic imbalance procedure, the Commission is empowered to use a "scoreboard" of macroeconomic indicators[24] in order to assess a Member State's situation and to initiate, possibly, an in-depth review.[25] The use of these indicators feeds into recommendations that the Member States will receive about where they have to save or where they had better improve. In the event that the Commission finds that the Member State might be confronted with an "excessive" economic imbalance the Member State is expected to come up with a corrective action plan. This plan is subject to censure and approval by the Council.[26]

The review by the Commission and the interaction with the Council cut across all areas of public policy. They concern particularly those fields for which the Union has no jurisdiction. Therefore, it is *now* finally fair to say that owing to the Union's impact on budgetary planning, there is "nucleus of sovereignty" left to the Member States.[27] What is more, national parliaments are not at all major players in this process.[28] While parliaments need to be informed and discuss budgetary planning in one or the other committee, any real opposition is likely to be told by the government that, in order to avert the imposition of severe sanctions, the government has to comply with the demands made by the Commission.[29] It also not the case that this loss of influence, which is fairly typical by standards of European integration, is matched with the growing influence of the Euro-

18 See Andreas Fischer-Lescano & Lukas Oberndorfer, *Fiskalvertrag und Unionsrecht: Unionsrechtliche Grenzen völkerrechtlicher Fiskalregulierung und Organleihe*, 66 NEUE JURISTISCHE WOCHENSCHRIFT, 2013, at 9; Lukas Oberndorfer, *Der Fiskalpakt: Umgehung der "europäischen Verfassung" und Durchbrechung demokratischer Verfahren?*, JURIDIKUM 168, 168-179 (2012).

19 See Mark Dawson & Floris de Witte, *Constitutional Balance in the EU after the Euro-Crisis*, 76 MODERN LAW REVIEW, 2013, at 817. For an in-depth analysis of this development, see Philomila Tsoukala, *Euro-Zone Management and the New Social Europe*, 20 COLUMBIA JOURNAL OF EUROPEAN LAW, 2013, at 32.

20 This important point is made by Tsoukala, note 19.

21 See Mark Hallerberg & Benedicta Marzinotto & Guntram B. Wolff, *On the Effectiveness and Legitimacy of EU Economic Policies*, 4 BRUEGELPOLICYBRIEF 1,2 (2012). With regard to the European Semester Tsoukala, note 19 at 66, observes "a carry-over of loan conditionality into the overall process of policy coordination with the euro zone". Fiscal coordination now implicates matters such as labour, social and tax policy.

22 See Article 3 of Regulation 1176/2011.

23 See Article 2(6) Regulation 472/2013.

24 See Article 4 of Regulation 1176/2011.

25 See Article 5 *leg cit.*

26 See, in particular, Article 8(3) *leg cit.*

27 See Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AMERICAN JOURNAL OF COMPARATIVE LAW, 1990, at 205, who claimed that no "nucleus of sovereignty" had been left for the Member States; in a similar vein, George A. Berman, *Taking Subsidiarity Seriously*, 94 COLUMBIA LAW REVIEW, 1994, at 331.

28 There is a great variety of different forms of involvement, mostly through committees. See DG FOR INTERNAL POLICIES, AN ASSESSMENT OF THE EUROPEAN SEMESTER at 68–76 (IP/A/ECON/ST/2010-24, 2012).

29 Of course, some political gamesmanship may be involved here too. Sometimes the recommendations by the Council do not fall on fertile ground. See Hallerberg et al, note 21 at 5.

pean Parliament.[30] The various processes precipitated in the context of the European Semester basically involve national governments and supranational executive institutions.

For example, members of the Euro Zone have to submit annually to the Commission and the Eurogroup a draft budgetary plan for the upcoming year. The Commission is to issue an opinion on this draft.[31] Only at the request of the Member State's parliament has the Commission also to present its opinion to the national parliament.[32] Nonetheless, this opinion is important, for it provides a basis for discussion within the Eurogroup.[33] Matters appear to be even more aggravated in the context of "enhanced surveillance" in which Member States, even if they are not subject to a bailout,[34] have to report to the European Central Bank and carry out various stress tests at its request.[35] What is more, a Member State concerned has to introduce mechanisms of closer monitoring of its financial situation and to submit quarterly reports.[36]

The transfer of authority over policy-making from the domestic to the supranational level becomes more pronounced once a Member State has become subject to the excessive deficit procedure. The Member State is then under an obligation to present an "economic partnership program",[37] which is supposed "to identify and select a number of specific priorities aiming to enhance competitiveness and long-term sustainable growth and addressing structural weaknesses in the Member State concerned".[38] Unsurprisingly, these priorities are expected to be "consistent with the Union's strategy for growth and jobs."[39]

Second, the refinancing of sovereign debt through the ESM is negotiated with the troika, among which the European Commission plays a most important role.[40] The terms of conditions of actual Memoranda of Understanding seem to be consistent with the mindset of the Washington consensus. They are likely to include the privatization of public services or to address certain "rigidities" of labour law or wage formation.[41] In the case of Greece the package of conditions seems to amount even to a program for reinventing the Greek state.[42] Since the Commission has over the years put greater emphasis on restoring external balance through internal devaluation (rather than reducing debt), employment relationships and employability through lower wages or lower employment costs have become a focus of concern.[43] In can be observed, in this context, that the conditionality

30 See, Menendez, note 17 at 138; Hallerberg et al, note 21 at 5.
31 See Article 6(1) and 7(1) of Regulation 473/2013.
32 See Article 7(3) of Regulation 473/2013.
33 See Article (5) of Regulation 473/2013.
34 The Commission has discretion to submit a Member State to enhanced surveillance if that Member State experiences or is threatened with experiencing "serious difficulties with respect to its financial stability which are likely to have adverse spill-over effects on other Member States in the euro area." Article 2(1) Regulation 472/2013.
35 See Article 3(3)(a) and (b) Regulation 472/2013.
36 See Article 10(2) and (3) Regulation 473/2013. Generally, such closer monitoring is supposed to be facilitated domestically through the introduction of independent bodies. See Article 5 of Regulation 473/2013.
37 See Article 9(1) of Regulation 473/2013.
38 Article 9(2) of Regulation 473/2013.
39 Ibid.
40 See Scharpf, note 12 at 12.
41 For a description, see Tsoukala, note 19 at 57–65. Article 7(1)(4) explicitly states that adjustment programs "shall take into account the practice and institutions of wage formation and the national reform programme of the Member State concerned in the context of the Union's strategy for growth and jobs." This can mean that the memorandum either is supposed to respect them or to address the problems that they pose in the context of the strategy for growth and jobs.
42 See Philomila Tsoukala, *Narratives of the European Crisis and the Future of Social Europe*, 48 TEXAS INTERNATIONAL LAW JOURNAL 241, 259 et seqq (2013).
43 See Scharpf, note 12 at 12; Tsoukala, note 19 at 61–65.

developed for GIIPS economies becomes generalized in the context of the European semester and may even amount to Europe's new—liberal and residual—social model.[44]

Evidently, also in this context, participation by parliaments really does not play a role. Rather, Member States receiving financial assistance subject to conditionality on a precautionary basis are subject to enhanced surveillance.[45] Those Member States that receive financial assistance from one or several other Member States or third countries, the EFSM, the ESM, EFSK or the IMF are required to draw up macroeconomic adjustment programs.[46] These are to be harmonized with Memoranda of Understanding concluded between the Member State the relevant financial institution.[47] The Commission (in liaison with the ECB and possibly also the IMF) is in charge of monitoring the progress[48] made by the Member State and of examining (with the Member State) whether the adjustment program needs to be "updated".[49] In the event that a state experiences "insufficient administrative capacity" or other significant problems in implementing the program it has to seek "technical assistance from the Commission, which may constitute, for that purpose, groups of experts composed of members from other Member States and other Union institutions or from relevant international institutions."[50] Such a capacity building group may actually take residence in the Member State concerned.

This emergent picture of top-down and peer group governance is complemented by the fact that, aside from lip service paid to the social partners,[51] national parliaments are merely assured their right to invite Commission members to an "exchange of views" before their relevant committee.[52] This is a rather blatant way of admitting the national parliaments do not matter.

All of these regulations have one feature in common that goes to the heart of the rule of law. For the outside observer, at any rate, they comprise a rather confusing array of procedures that are supposed to "complement"[53] their recently introduced predecessors. De facto they are just grafted upon one another. Apparently, only those "in the know" or "in charge" will know how to knit their own procedural routines from a web of ever increasing complexity. Evidently, the powerlessness on the part of the Union to adopt national budgets—in neoliberal political newspeak: its lack of "ownership" of national budgetary processes—gives rise to a nasty overregulation of the national political progress that benefits those pulling the overlapping regulations together in the course of their application.

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44 See Tsoukala, note 19 at 66, 74-75.

45 See Article 2(3) and (4) Regulation 472/2013.

46 Article 7(1) Regulation 472/2013. If the Member State is already in an economic partnership program pursuant to Article 9(1) of Regulation 473/2013 the adjustment program shall build upon it or replace it.

47 See Article 7(2)(2) Regulation 742/2013.

48 See Article 7(5) Regulation 742/2013.

49 See Article 7(5) Regulation 742/2013.

50 Article 7(8) Regulation 742/2013.

51 One provision is repeatedly to be found in the reform of the Stability and Growth Pact, which says that the applications of the relevant regulations "should be in full compliance with Article 152 TFEU", which recognizes the importance of social partners and pays respect to national systems of wage formation. Moreover, the regulations claim to take into account Article 28 of the Fundamental Rights Charter, which guarantees the integrity of systems of collective bargaining. See, for example, Article 1(2) Regulation 473/2013. This means, in practice, however, is that the Member State is left to its own devices when it comes to dealing with social partners with "a view to contributing to building consensus over its content" (Article 8 of Regulation 472/2013). In clear language, this means that the Member States governments are expected to appease the representatives of labour and to communicate the necessity of harsh "adjustments".

52 See Article 8(9) of Regulation 472/2013.

53 See Article 1(1) of Regulation 473/2013 listing five procedural contexts that enhanced monitoring of budgetary policies is supposed to complement. Evidently, potential collisions are supposed to be "harmonized" in practice. See recitals 5 and 6 of Regulation 472/2013.

III. Staying the course

Interestingly, legal scholarship, even though often depressingly brilliant in identifying legal problems in complex settings, has recently become more cautious and muted and when it comes to conceptualizing the consequences of these developments. This is to be regretted, not least because European Union scholarship has always been at its best when it linked the identification of new developments with bold speculations concerning what these developments reveal of the nature of the Union. Indeed, European Union legal scholarship would not be the wonderful genre that it is if it did not invite various efforts to explore the elusive essence of the beast.[54]

In this vein — and light of the observations concerning the demise of parliamentary control over budgetary planning — the article suggests that the current situation is strangely reminiscent of what *Hermann Heller* described in 1932/33 as "authoritarian liberalism".[55] *Heller's* original observation concerned a certain program designed to rebuild Germany from economic and political collapse. In his view it deserved this appellation because it promised (1) to introduce a "strong state", unyielding to the demands made by labour[56] (2) to solve the economic crisis in a manner that restores entrepreneurship and (3) to be informed by expertise and thus to rescue the exercise of public power from the vagaries of "politics".[57]

Having used the designator "authoritarian liberalism" recklessly before,[58] the author now takes it upon himself to move beyond polemical exploits. Of course, the fact needs to be addressed that "authoritarian liberalism" on its surface does not look authoritarian at all. European economic and monetary crisis management has not yet resorted to banning political parties or relied on marauding black shirts, aggressive storm troopers, the removal of unwanted people or the shutdown of constitutional courts. The powers that be also do not make it a point to symbolise unity

54 Honestly, it would otherwise be roughly as exciting as international trade law.

55 See HERMANN HELLER, AUTORITÄRER LIBERALISMUS? (1933), reprinted in GESAMMELTE SCHRIFTEN, VOL 2. 643–653 (A.W. Sijthoff 1971).

56 From a historical perspective, at any rate, a more fascinating story can be told about the economists who will come to be known as "ordoliberals" (Eucken, Rüstow, Röpke) or as active supporters of the "social market economy" (Müller-Armack). They were thrilled about the "strong state", for it promised to restore the authority of the state vis-à-vis social forces. Quite remarkably, some (Röpke) believed that the strong state could only take hold if it was supported by an activating "myth". See DIETER HASELBACH, AUTORITÄRER LIBERALISMUS UND SOZIALE MARKTWIRTSCHAFT: GESELLSCHAFT UND POLITIK IM ORDOLIBERALISMUS 40, 60 et seq. (Nomos, 1991). On the ordoliberals and European integration, see DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 334 (Oxford University Press, 1998).

57 Heller's phenomenology of "authoritarian liberalism" is straightforward and simple. The core principle is that of authority instead of majority (Heller, note 55 at 645). Yet, the authoritarian support of economic liberalism was not at all about some quasi-religious redemption (646) to be precipitated by some fascist *duce* or *Führer*. Rather, authoritarian liberalism casts itself as a matter of *rational insight* into economic necessity. It bases itself not on libidinous identification with the leader but on syllogisms and inferences saying that there is no alternative to the depoliticization of the economy and cut-downs on social programs (652-653). Authoritarian liberalism purports to be based on *knowledge*. It is, put in currently fashionable vocabulary, the extension of the "knowledge-based" economy to the sphere of politics. The market is taken to be the ultimate template of social improvement. Heller cites Papen as saying that work is the happiness of a people (652). The authoritarian liberal state withdraws from economic production and distribution (652). It favours austerity without, however, reducing subsidies for large banks and large industries (652). It thereby indirectly supports inequality. Such a program, Heller contends, can be sustained only against the will of the people, "for the German people would not long tolerate this neoliberal state in democratic forms" (653).

58 See, for example, *Engineering Equality: An Essay on European Anti-Discrimination Law*, at 45 (Oxford University Press, 2011). Others have used it not recklessly at all. See Lukas Oberndorfer, *Die Renaissance des autoritären Liberalismus? Carl Schmitt und der deutsche Neoliberalismus vor dem Hintergrund des Eintritts der "Massen" in die europäische Politik*, 42 PROKLA, 2012, at 413; Michael A. Wilkinson, *The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, 14 GERMAN LAW JOURNAL 527, 547–440 (2013).

by appearing in uniform or by posting outsized blue banners bearing the golden imprint "More Europe". Rather, they present their actions as an outgrowth of *necessity*. They claim merely to do what would have to be done by anyone whose mind is amenable to rational insight. But precisely therein resides the authoritarian element.

It is submitted that the significance and adequacy of the concept can be proven by departing form the facile perspective on democratic legitimacy that one encounters not least in the jurisprudence of the German Federal Constitutional court. It puts delegation at its centre.[59] All actions by the Union are based upon the delegation of sovereign powers of the Member States. Against this background, the emergence of an authoritarian form of rule needs to be explained from within a relationship of delegation, more precisely, a reversal in the relationship of power between the delegator and the delegate. Most interestingly, however, the reversal is always and already built into the relationship. This can be seen, at least, if one recognizes that delegation is not only a legal relationship, but also encompassed by a broader relationship of trust. Authoritarian rule emerges, dialectically, from trust.

The article tries to show that the origin of authoritarian rule lies partly in the *modal indifference* of trust—which explains the reluctance of Courts to "bite" when they are confronted with potential *ultra vires*—and partly in what can be called the *trust trap*. Then the article suggests that authoritarian liberalism is an expression of the administrative face of the cosmopolitan constitutions of the Member States. Finally, it concludes by speculating that the only antidote to the consolidation of authoritarian liberalism in Europe might be national governments joining their people in their protest. Admittedly, the Euro Zone seems to be "saved" for now. But the rescue does *not* produce output legitimacy across the European Union. While Germans, Austrians and Dutch may be quite content the Greeks or Spaniards are paying a heavy prize for it. We can advance towards a reform of monetary union only through sustained democratic opposition.

IV. Reversing the cycle of power

Any suggestion that *Heller's* polemical intervention can be developed into a concept that sheds light on our current situation needs to address a significant difference. In contrast to the 1930s, parliaments stay in place or at least not repeatedly sent home and re-elected. What happens, instead, is that national representative institutions find themselves in a position disturbingly similar to outright receivership.[60] This can be observed for Member States benefiting from European bailouts. But even aside from this special constellation, representative institutions do definitely not expand their authority at a rate that would allow them to keep up with the growing powers of supranational executive institutions. This is true, in particular, of the European Parliament.[61] The overall situation therefore roughly matches what Colin Crouch so famously and controversially described as "Post-Democracy." Core democratic institutions, such as parliaments or recurring elections, stay *formally* in place while the *substance* of political decision-making is no

59 At has done so at least since *Solange I*. See Internationale HandelsGesellschaft mBH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I) [1974], 2 *Common Market Law Reports* 540. For a historical account, see BILL DAVIES, RESISTING THE EUROPEAN COURT OF JUSTICE: WEST GERMANY'S CONFRONTATION WITH EUROPEAN LAW, 1949–1979, 78–88 (Cambridge University Press, 2012).

60 For a highly perceptive case study concerning Greece, see Tsoukala, note 42 at 266.

61 See, with regard to the European Parliament, the very apt observations by Agustin Menendez, *Editorial: A European Union in Constitutional Mutation?*, 20 EUROPEAN LAW JOURNAL, 2014, at 138.

longer determined by active citizens and their representatives. Rather, the political process is controlled by administrative and economic elites, in particular in the context of transnational governance structures.[62] Putting the matter starkly, representative institutions appear to have become soft and conciliatory. They do not take risks or leave toying with hazardous ideas, such as leaving the Union, to the parties on the right end of the political spectrum.[63] They behave as though they had understood that it is their task to lend *symbolic* "mass support" to the demands of administrative and economic rationality.[64]

In the terms of *Habermas'* legal philosophy, such a development implies a disturbing reversal of the democratically legitimate *cycle of power*. According to Habermas, democratic politics is in good shape so long as it originates from the "communicative power" that is being built up in the public sphere.[65] This power, which is based on mutual understandings arrived at in the course of communicative action, is supposed to determine, by means of law, the exercise of administrative power.[66] In light of *Habermas' Theory of Communicative Action*,[67] such power must always appear to be a *countervailing* force offsetting the "functional imperatives" originating from the systemic reproduction of the economy and the administrative system of the state. It can prevail over such functional imperatives by constraining or directing administrative action through laws. It is through legislation that the defiant momentum of communicative power resists the demands of functional imperatives.

When, however, a lively and energetic public disappears and the people become apathetic[68] the functional imperatives of the economic and the political system no longer encounter resistance. They begin to "colonise" the political process. The focus of politics comes to rest on system-stabilisation, which is then pursued with great indifference towards the institutional or moral background rights of the people.

Assuming that notions such as "post-democracy" and the image of a "reversal of the cycle of power" are helpful in capturing current developments[69] they should nonetheless not be mistaken

62 See COLIN CROUCH, POST-DEMOCRACY 4, 19 et seq (Polity Press, 2004).

63 Britain, to be sure, is a special case.

64 Such a reduction of democracy to the function of lending mass support to economic and administrative imperatives has been a topic of critical social theory in the 1970s. See CLAUS OFFE, CONTRADICTIONS OF THE WELFARE STATE 53 (J. Keane ed, MIT Press, 1984). and JÜRGEN HABERMAS, LEGITIMATIONSPROBLEME IM SPÄTKAPITALISMUS 17 (Suhrkamp, 1973).

65 This is a more attractive view of democratic legitimacy compared with the dreary talk of "input legitimacy". The latter does not recognize the role of civil society and the type of power that originates from the public sphere.

66 See JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 187, 209 (Suhrkamp, 1992).

67 See JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS, VOL. 2: ZUR KRITIK DER FUNKTIONALISTISCHEN VERNUNFT (Suhrkamp, 1981).

68 Popular apathy may be occasioned by a variety of factors, for example, a widespread sense of disempowerment of the impression that, at the end of the day, there are not really any alternatives to what the elite consensus presents to be the reasonable way.

69 Arguably, they are particularly helpful when one is confronted with a case like Greece. The European Commission is not only quite outspoken about what it perceives necessary to remedy Greece fiscal crisis (*e.g.*, combatting tax evasion, privatizations and, of course, flexible labour markets) it also expects Greece to adopt its liberal model of social policy. See Tsoukala, note 60 at 266: "[...] [D]espite the continuing lack of formal exclusive competence on social policy, the substance of the measures required by the MoU is such that in reality they are dictating social policy to the finest detail for the countries subjected to them under the guise of fiscal emergency." It seems, hence, that supranational institutions tap the opportunity to recreate democratic polities in the image of a model competitive solidarity that endorses entrepreneurship, flexible labour markets and a minimal social safety net. See, generally, WOLFGANG STREECK, COMPETITIVE SOLIDARITY—RETHINKING THE "EUROPEAN SOCIAL MODEL", available at http://www.mpifg.de/pu/workpap/wp99-8/wp99-8.html (accessed 14 March 2014).

for contemporary authoritarian liberalism. The latter arises *within* a post-democratic situation and it is not co-extensive with it. Triangulating the phenomenon requires focussing on a certain aspect of *Habermas'* cycle of power, which generally suggests that the propulsion of administrative and economic "self-programming" can be halted through legislative norms. Many of these norms, however, need to make room for systemic operations, lest they run the risk of remaining ineffectual.[70] Constraining and directing while giving room is, however, the task of delegation. What comes into perspective, then, are *chains of delegation*.

It is submitted, therefore, that a concept of authoritarian rule that is faithful to *Heller's* intuitions[71] can be developed—*sit venia verbo*: dialectically—from the concept of delegation.

V. Karlsruhe's view of democratic legitimacy

When it comes to this, it is helpful to begin with a Panglossian view of delegation. From this angle, the Union is perceived through the lens of multilevel constitutionalism. Every move that is made by Union institutions is deemed to be backed up by delegations.[72] The people delegate power to an international organisation pursuant to their constitution. International agreements, such as the Union Treaties, provide the organisation with the power to adopt legislative acts, which in turn normatively underpin implementing acts. This process is democratic throughout because democratic legitimacy is transferred from one level to the next. Just like *Nozick's* notorious "justice in transfer" is allegedly "justice-preserving",[73] delegation is supposed to transmit democratic legitimacy without a loss.[74]

In a similar vein, a straightforward defence of the democratic legitimacy of the Union in its current form would point out that the institutions of both lopsided intergovernmentalism and supranational fiscal discipline avail of a democratic pedigree, however "indirect" it might be.[75] The Commission is appointed with the consent of the European Parliament to which it also remains accountable (Article 17[8] EU Treaty, Article 234 FEU Treaty). The IMF is accountable to the governments of its member countries. Governments, at the end of the day, are created in the wake of elections and remain responsible to their folks. The ECB, even though independent, is based upon an international agreement to which the Member States of the EU consented pursuant to their own constitutional procedures. International agreements are not written in stone. They can be altered.

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70 This is an old staple of the debate over "juridification". See GUNTHER TEUBNER, 'VERRECHTLICHUNG' IN VERRECHTLICHUNG VON WIRTSCHAFT, ARBEIT UND SOZIALER SOLIDARITÄT 289–343 (F. Kübler ed, Suhrkamp 1986).

71 The author has made a similar argument before. See his 'Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and Its Legacy' In THE DARKER LEGACIES OF LAW IN EUROPE. THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 361, 383 (C. Joerges & Navraj Singh Ghaleigh eds, Hart, 2003).

72 See Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 COMMON MARKET LAW REVIEW, 1999, at 703.

73 See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (Basic Books, 1973).

74 The text below cannot be as nuanced as the more sophisticated apology of the Union provided by Andrew Moravcsik, *Is there a "Democratic Deficit" in World Politics? A Framework for Analysis*, 39 GOVERNMENT AND OPPOSITION, 2004, at 336.

75 It should be noted that this perspective on delegation is different from the paradigm of functionalist agency theory. Functionalist agency theory takes it for granted that principals have preferences and that they delegate powers to agents in order to see this preferences satisfied under conditions of high transaction costs and epistemic uncertainty. See, generally, ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 80 (2nd ed, Princeton University Press, 2005).

What these observations suggest is that at a most elementary level democratic legitimacy flows from acts delegating authority to the authority's exercise. Delegation is believed to be, borrowing *Nozick's* parlance, "democracy-preserving",[76] no matter how long the chain of delegations might be. How easy or difficult it would be to revoke the delegation—and it is not all too easy in the case of the ECB—is a secondary matter.

VI. Obedience is good

This view of democratic legitimacy is charmingly simple.[77] It is presented here only for heuristic purposes in order to highlight how the means of safeguarding democratic legitimacy open the door for authoritarian liberalism.

To delegate means to grant others the power to use their own judgement when they are acting on behalf of one's interest in unforeseen situations. Whoever chooses to delegate relinquishes the right, at any rate *prima facie*, to meddle with how the delegate exercises a given power, at least as long as this power is not used excessively. Chains of delegations create powers in order to bring about chains of judgement substitutions.[78] National parliaments delegate powers to the European legislature; the European legislature delegates powers to the European Commission. Hence, the Commission can use its own judgement in order to regulate because the European legislature has surrendered its own. This surrender is, in turn, facilitated by the surrender on the part of national legislatures.

There are good reasons to have judgement substituted. Chief among them are lack of time, interest, knowledge, special expertise, or—in a supranational context—lack of problem-solving ability.[79] Evidently, delegation is supposed to fix some incapacity on the part of the delegator. There is good reason to delegate when there is reason to believe that the delegate knows better than we could what we have reason to do. The good reasons also explain why delegation is not merely a legal relationship but more broadly a relationship of trust. We shall return to this matter below.

What this comes down to, in other words, is that one ought to delegate if *obedience* is good for oneself. Whoever exercises delegated authority over some people is in the position to command

76 See Moravcsik, note 74.

77 I do not, of course, suggest that the liberal intergovernmentalism reflected in the sophisticated works of Andrew Moravcsik or Robert Keohane espouses such a simple view of the legitimacy of international institutions. These authors suggest, rather, that the values of *liberal* democracy are better served in a setting where the influence of local interest groups is neutralized.

78 Obviously, how I think about delegation is deeply influenced by Joseph Raz's ideas concerning practical authority. The language of the exposition does not, however, slavishly follow Raz's lead. I mention this merely in order to appease those who might expect elaborate references to the "normal justification" or the "preemptive" thesis. See JOSEPH RAZ, THE MORALITY OF FREEDOM 53, 61, 71, 78, 80 (Clarendon Press, 1986). I do not offer exercises in "Raz scholasticism" in the text. Yet, American readers may want to ask: Why Raz and not a rational choice-based principal-agent theory, which is a more established theoretical vernacular? The answer is straightforward. Principal-agent theory does not focus *directly* on the problem of judgment substitution. It begins with preferences and how delegation might be necessary to overcome obstacles towards their satisfaction. Only a direct focus on judgment substitution allows one to encounter the authoritarian moment that emerges from the relation between a delegator (principal) and a delegate (agent). It is be feared, indeed, that liberal intergovernmentalism is incapable of capturing this moment owing to its emphasis that delegation of power are a function of signalling the credibility of long-term commitments. For a highly useful discussion, see MARK A. POLLACK, THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY, AND AGENDA SETTING IN THE EU 31 (Oxford University Press, 2003) at 31.

79 Of course, principal-agent theories are very perceptive in analysing these reasons. See Pollack, note 78 at 21.

obedience by pointing out that obeying is in their interest. What matters, more precisely, is that obeying rather than using one's own judgement is what counts as rational behaviour. If delegation is warranted, obedience is good for the obedient. They abstain from asking stupid questions. This is what they are supposed to do.

VII. The modal openness of trust and the importance of democracy

Evidently, it is entirely unreasonable to delegate authority unless the delegate is worthy of trust.

Trust is a remarkable facilitator of action. It helps the trusting institution or person to avoid facing the complexity of incalculable consequences. Under conditions of uncertainty, trust makes action possible by replacing external predictability with internal confidence.[80] One can board an airplane so long as one is confident that it is piloted by someone who knows how to fly and to communicate with air traffic control. Trust makes boarding possible.

Trusting confidence must not be completely unfounded. It has to be informed by a variety of clues and conditions. Nevertheless, in contrast to law, trust leaves open whether the adequate reaction to disappointment is either the *normative* reassertion of an expectation ("you should have") or the *cognitive* adjustment to a new situation ("so, this is what you had to do"). Trust *defers* the decision whether one had better expect normatively or cognitively to the point at which one is confronted with action. One can either reprimand the delegate for overstepping his mandate or realise that a requisite power should have been explicitly granted to her in the first place (which is a learning process). Indeed, in the latter case trust is reconfirmed by an amendment made by the delegate so long as it is to the benefit of the delegator.

This modal openness of trust is part of the explanation why the control of delegated powers, even if they are legally constituted, is delicate and, indeed, intractable. Delegations presuppose trust. The relation of trust *overdetermines* legal constraints. Consequently, knowing that they have to be trusted, delegates can always expect confirmation after the fact, *i.e.*, they can expect *learning* on the part of the delegating body or person. Remarkably, the reversal in the direction of control is built into the relationship. Precisely because delegates know that they *have* to be trusted they may expect *normatively* that delegators expect *cognitively* and concede them rights to self-amendment. Owing to the relationship of trust the choice of the normative mode of expectation becomes *suspended*. Puzzlingly, the reversal insinuates even that the delegator ought to respect the delegator's right to amend the mandate flexibly in light of unforeseen situations.

The modal indifference of trust is not troublesome if the control of the delegate eventually returns to a political body. The judiciary would be bound to sustain the normative mode, which is, however, inadequate to the relationship in question. Judges realise this and are reluctant to "bite". Political bodies, by contrast, are free to redefine their relationship to the delegate in the face of prior experience. Hence, the effective way of dealing with delegation is democratic control. Among the mildest forms are oversight by a legislative body and rights of interpellation. Revocations of delegation or legislative vetoes sustain trust by rescinding it selectively.

Indeed, the point of modern parliamentary democracy can be understood from this angle. Governments can be cast in the role delegates of the people. They are monitored and overseen by

80 See NIKLAS LUHMANN, VERTRAUEN: EIN MECHANISMUS ZUR REDUKTION VON KOMPLEXITÄT 28, 33 (3rd ed. Emke, 1983).

representative assemblies that retain the right to question, to demand justifications, to remove officers, to dismiss governments and to give instructions in the form of laws. From this perspective, democracy is the *suspension* of judgement substitution. The delegate retains the full power to revoke obedience in one or the other instance. Authoritarian pretensions can be undone in processes of public debate as soon as the delegate is drawn into the forum of politics.

VIII. Output legitimacy

Generally, trusting is not unreasonable if it is complemented with a modicum of distrust. The infusion of misgivings, however, must not lead to permanent interference with the delegate's judgment. This would undermine the very purpose of delegation. In other words, the delegator must never behave as a meddlesome busybody.[81] She may only retain, for example, the power to change the team periodically depending on how well or how badly it has served her interests during a period of stewardship. The basic justification of delegation is, then, accomplishments or, in the words of Scharpf, "output legitimacy".[82] Patrons fill out the customer satisfaction form after having received the service.

There is nothing political about the exercise of delegated authority. It is not the type of authority that accrues from acting together under conditions of plurality.[83] Delegation is an essentially "private" affair. The legitimacy of delegated acts depends upon accomplishments. It is immaterial whether what is accomplished benefits a monarch, a priesthood, a democratic polity or a private person.

It is not entirely accurate, therefore, to speak, as Scharpf does, of *democratic* "output legitimacy". In the context of delegation, there is only "output legitimacy", from which a variety of entities can benefit, be these theocracies or pagan princes.

When it comes to delegations, democratic legitimacy extends only to the recognition of defectiveness and to the choice to fix it. It is not "conferred", as if it were a title, to the organ acting as the delegate. The source of legitimacy of bodies with delegated powers is that obedience is good for those choosing to obey them. But the sheer fact that the obedient are a democratic polity does not invest the delegates with democratic legitimacy.

In the literature, to be sure, one frequently encounters the claim that bodies such as central banks or even courts *enhance* democracy because they help to represent and to protect the diffuse interests of consumers against the influence of special interest groups.[84] If accepted, this claim would have us believe that with regard to their limited task the democratic credentials of these bodies are superior to those of elected assemblies. What is insinuated, thereby, is that democratic representation is tantamount to aggregating preferences in order to guarantee their satisfaction.[85] Of course, if such an aggregative function could be performed by one exceptionally sympathetic individual—the president, for example—then delegating this task to this one indi-

81 This explains why the usual principal-agents models of delegation do not fit our framework.

82 See, for example, FRITZ SCHARPF, GOVERNING EUROPE: EFFECTIVE AND DEMOCRATIC? (Oxford University Press, 1999).

83 Yes, Hannah Arendt sends her greetings here.

84 For a prominent example, see Robert Keohane, Steven Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INTERNATIONAL ORGANIZATION 1, 6, 10, 24 (2009).

85 In the article cited in note 84, at 10, the basic assumption appears to be that democracy ought to maximize economic rationality for the greater good.

vidual would make his choices "democratic". But saying that the president (or, for that matter, the Central Bank) is the voice of the people would stretch our understanding of democracy considerably since the president (or the Central Bank) could then legitimately aggregate preferences in an *authoritarian* manner. That is, he could claim vis-à-vis all individuals concerned to be blessed with greater insight. Exempting oneself from challenges by claiming greater insight is, however, not a move that is available to participants in democratic debates.

Bodies invested with delegated authority can at best be conceived of as extensions of democratic institutions. But, similar to crutches, they are not part of the body.

IX. The trust trap

In the manner in which the Union presents itself in everyday life it is about accomplishments. It is supposed to be good for peace among European nations and to benefit "the consumer." Delegations of authority to the Union would be democratic only if the Union's doings could be debated, contested and undone within one larger constituency. Yet, we do not avail of it, at least not in the *full-fledged form* in which public contestation feeds directly into constitutional reform. In exceptional cases, European voters express their critical voice—such as in the notorious French and Dutch referenda—but only in order to be told by political elites that they had been too stupid to understand the question. It is on these occasions that the European Union reveals its authoritarian face.

If there is a lack of opportunity to undo delegations in democratic *fora* the people remain locked into what might be called the *trust trap*. If they are not given an outlet to assert their expectations normatively ("This is what we want and you ought to deliver") they shift, automatically, into the cognitive mode ("Okay, we can't have it"). They begin to "learn." They adapt to what appears to them to be the way of the world. High unemployment, rising inequalities, eroding social standards, broken lives, meaningless biographies—apparently, this is as good as it gets in a post-utopian world. Europeans surrender their judgement: "*Es ist so bequem, unmündig zu sein*"[86] (it is so convenient to receive guidance from others).

To be sure, the democratic defectiveness of the Union is not caused by the absence of political rights or the widespread repression of political opinion. Rather, it is a by-product of its structure. While resistance against European Union policies is pointless at home, it is largely homeless in the Union. European voters have no party system to connect to and there is no electoral process that would allow for real choices concerning the course of European public policy.[87] This is not so say that this cannot change in the future.[88]

Today, however, those Europeans who learn and adapt are perceived to be "reasonable." They demonstrate to have understood that obedience is good for them, at least when they have been told to be obedient. There is no alternative.

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86 Immanuel Kant, *Beantwortung der Frage: Was ist Aufklärung? in* 11 WERKE IN ZWÖLF BÄNDEN 53, 53 (W. Weischedel ed., Insel 1968).

87 See Mattias Kumm, *Why Europeans will not embrace constitutional patriotism*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 2008, at 117.

88 It must not be ignored, however, that the European Union is so overconstitutionalised, in particular as regards its economic constitution, that there is not much room left for political choices.

X. Authoritarian rule: From paternalism to blind faith

Obedience is good for the obedient. This is the basic principle of delegated authority. This principle becomes *authoritarian* if it is extended to assessing the soundness of delegations. More precisely, while delegation creates authority by virtue of surrendering judgment, the expectation of yielding and deference becomes *authoritarian* if the delegate vicariously surrenders on behalf of the delegator. The former then confers power on himself in the name of the latter.

The idea underlying the move from delegation to authoritarianism is, however, distressingly plausible. The delegator delegates to the delegate because she perceives in herself a certain incapacity. But why should the delegator, given that she is burdened with an incapacity, be capable of recognizing the circumstances under which it is imperative to delegate? Doesn't it take a delegate for that? As is well known, intoxicated persons are not only severely impaired in their driving skills, but also incapable of recognizing their impairment. Authoritarian solutions make the relevant call for those lacking the capacity to do so themselves.

The authoritarian principle according to which the delegate must delegate on behalf of the delegator can be encountered in at least three different contexts.

First, authority becomes authoritarian when a further extension of delegation is taken for granted, that is, whenever the delegate acts on the basis of the supposition that the delegators would have given him more power had they only known in advance about newly arisen circumstances.[89] This explains why executive powers expand. Their self-amendment is an outgrowth of trust. Indeed, it is perfectly legitimate for the delegate to presume that in tricky situations the delegators *should* resolve the question of trust *cognitively* ("well, of course that's what she has to do") and provide the delegate *post factum* with a clean bill of health. Thus understood, the delegate can attribute to herself, paradoxically, a *right* to self-amendment. I mentioned already above that authoritarianism is distressingly plausible.

Second, authority becomes authoritarian when democratic scrutiny of the reasonableness of delegation is at least strongly presumed to be ill-founded. The language of modern political science, such as liberal intergovernmentalism, bespeaks the relevant perspective.[90] Where the democratic pursuit of interests is contrasted with the supposedly impartial judgement of executive bodies, any well-organized group with a visible agenda must, by virtue of its very existence, raise the suspicion of overriding the voice of the silent majority. Authoritarianism would then counsel in favour of putting groups into their place.

Third, authority is clearly authoritarian if the choice of people on whether to delegate is considered to be an *obstacle* towards something *greater*. This obstacle may be attributed to the influence of myopia, lack of class-consciousness or other factors. The will of the people counts as an obstacle that has to be overcome by the authoritarian leader.

Here is, then, the core of authoritarianism: Obedience is good for the obedient *even if they do not understand why*. Precisely because they do not understand that obedience is good for them they need to obey.

89 Principal-agent models of delegation would at this point say that delegation facilitates the amendment of incomplete bargains. See Pollack, note 78 at 23. This bespeaks the bias of the theory in favour of stronger international integration, for it thereby ignores the operation of the trust trap.

90 See, for example, the work cited in note 84.

Since authoritarianism is basically about obedience it is consistently applied only if the exercise of authority is itself presented as obedience to something greater. Moreover, given that obedience is owed, in its authoritarian form, *precisely* because one does not understand the reason for obedience, truly authoritarian rule is based upon *blind faith or unconditional devotion* to a cause.

- With that in mind we can return to *Heller's* little piece and tease out two complementary understandings of authoritarian liberalism.

XI. The ambivalence of authoritarian liberalism

In retrospect, *Heller's* tentative exploration of "authoritarian liberalism" must appear to be so plausible that it almost looks trivial. Drastic historic examples such as Chile may come to mind. At a theoretical level, the writings by *Friedrich August von Hayek* have made it quite plain that economic liberalism is not too easily reconciled with democratic majorities. *Hayek* believed that the ideal legislature would not be numerous and composed of persons of mature age, elected for a long period, such as fifteen years. Also, he wanted the election of representatives to be reduced to a once in a lifetime opportunity for citizens who belong to a certain age group. This would increase the incentive for choosing wisely.[91]

The concept, however, loses its trivial ring if one moves beyond *Heller* and explores its deep ambivalence.

"Authoritarian liberalism" can signify, *first*, a preservation strategy of economic liberalism to which the bourgeoisie shifts in times of crisis. This would be fully consistent with the prevalence of capitalism over democracy with which this article began. Economic liberalism would come first, authoritarianism second and play only an ancillary role. Owing to the prevalence of liberalism the authoritarianism would be rather *mild* and merely manifest, for example, in the indignation with which parliamentary opposition to austerity measures is met: they "do not get it," they "act irresponsibly," they "have no idea what is at stake."

Yet, particularly in the context of the European Union we have to reckon with a *second version* of authoritarian liberalism. It would actually put authoritarianism at the centre and view liberalism as a means to pursue it. Again, liberalism would definitely exercise a tempering influence.

In order to gain a better perspective on this second version, we again need to return to the 1930s, in this case, to a first major work by the political scientist *Eric(h) Voegelin*. In his 1936 book *The Authoritarian State*,[92] which appears to offer an apology of the Austrian *Ständestaat*,[93] he reconstructed the foundations of authoritarian governments under conditions where these conceive of themselves as charged with a founding mission.

91 See FRIEDRICH AUGUST VON HAYEK, LAW, LEGISLATION AND LIBERTY, VOL. 3, 113 (Chicago University Press, 1979). See the highly instructive analysis by William E. Scheuerman, *The Unholy Alliance of Carl Schmitt and Friedrich A. Hayek*, 4 CONSTELLATIONS, 1997, at 172.

92 See ERICH VOEGELIN, DER AUTORITÄRE STAAT: EIN VERSUCH ÜBER DAS ÖSTERREICHISCHE STAATSPROBLEM (G. Winkler ed., Springer, 1997). The English translation is: THE AUTHORITARIAN STATE: AN ESSAY ON THE PROBLEM OF THE AUSTRIAN STATE (R. Hein trans., University of Missouri Press, 1989).

93 See ERIKA WEINZIERL, *Historical Commentary on the Period* (F. Lawrence trans.) *in* THE AUTHORITARIAN STATE 10, 27 (note 92).

Drawing on the constitutional theory of *Maurice Hauriou*,[94] *Voegelin* explains that the legitimacy of a government or of a ruler is derivative of their role in realising an institution—which was, in the case explored by *Voegelin*, the state. A government possesses authority to the extent that it succeeds at *presenting* itself as *representative* of the leading idea of an institution.[95] A government has authority inasmuch as it actively and creatively works towards the realisation of this idea. What accounts for the legitimacy of an authoritarian government is this creative task.[96] A government of this type is not bound by norms. The equivalence to legality is the impersonal idea of the institution.[97] The deposit of authoritarian rule is the institution to which it gives birth as soon as it finds customary consent on the part of those who are subject to it (*Consentement coutumier*).

These elementary ideas were reformulated—paradoxically, *both* more darkly and more starkly—in what was to become *Voegelin's* perhaps most famous work, namely, *The New Science of Politics*.[98] In this book, the authoritarian ruler reappears in the guise of the "representative" that "articulates" society. The "articulation" of society is characterised as the process by which human beings form themselves "into society for action".[99] This cannot be done without a representative. The implicit authoritarian element of representation is revealed in the two senses in which such representation is supposedly "existential". First, the representative brings society into existence by virtue of having his acts imputed to something that would not be there if it were not for this imputation. Second, the representative *de facto* succeeds in the eyes of a multitude to have his or her acts count as acts of society. This is not a matter of formal legal procedures ("elemental representation") but of *effectively* generating obedience and cohesion vis-à-vis an idea.[100]

Voegelin underscores that a representative is not an agent. The latter receives instructions, the former not:

> By an agent [...] shall be understood a person who is empowered by his principal to transact a specific business under instructions, while by a representative shall be understood a person who has power to act for a society by virtue of his position in the structure of the community, without specific instructions for a specified business and whose acts will not be effectively repudiated by the members of society.

Evidently, the creator of the governing institutions who assigns to himself the role of the representative of society precedes all constitutional arrangements. He exercises the constituent power on behalf, not of a subject, but of an *idea*. *Voegelin* elaborates this connection between the authority of the representative and the idea by adding *another* concept of representation, namely, "transcendental representation".[101] The idea is that a society itself is "representative of something beyond itself, of a transcendent reality."[102] Not by accident, *Voegelin* establishes a link between the two concepts of representation by seeing the existential representative in charge of representing the truth that society is supposed to live up to.[103]

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94 Carl Schmitt presents Hauriou's constitutional theory with great fondness in his notorious 1934 pamphlet on three types of legal thought. See CARL SCHMITT, ON THE THREE TYPES OF JURISTIC THOUGHT (J. Bendersky trans., Praeger 2004).
95 See Voegelin, note 92 at 48. (99 Eng. trans.)
96 See ibid. at 182 (249-250 Eng. trans.).
97 The source of authority remains anonymous. See ibid. at 185 (252 Eng. trans.).
98 See ERIC VOEGELIN, THE NEW SCIENCE OF POLITICS: AN INTRODUCTION (2nd ed., Chicago University Press, 1987).
99 See ibid. at 37.
100 See ibid. at 49–50.
101 See ibid. at 76.
102 Ibid. 54.
103 Ibid. at 75.

XII. Executive summary (as it behoves the topic)

The analytical exercise is therewith completed. We have explored the close relationship between authority and delegations. The authority of a delegate becomes authoritarian if the delegate delegates on behalf of the delegator. The reason for a judgement substitution is a perceived incapacity on the part of the delegator to realise that delegation is rationally warranted. The two mechanisms for the reversal of authorisation are the modal openness of trust and the trust trap. They move a relationship into an authoritarian direction, which indicates a lack of democratic control and contestation.

Authoritarian rule claims to be legitimate. It is supposed to be good for those who are subject to it. But since they, by definition, can neither assess the circumstances of rational delegation nor understand why they are better off on account of the delegate, they need to obey *blindly*. They have to be gullible. Of course, their gullibility is supposed to pay a dividend.[104] The delegate may therefore rightly expect them to trust cognitively and to adjust their behaviour to whatever the delegate regards as an exercise of his power.

It may be objected that the authoritarianism sketched here appears to be far too epistemic in its orientation and too benign in practice. Where are outright acts of oppression? Where is discrimination against minorities or the use of political justice[105] in order to take care of political opponents? Without a doubt, these become part of authoritarian rule if people do not sheepishly succumb to the supposition that they are too dim-witted to decide whom to obey and for what reason. Authoritarianism begins to look ugly when confronted with an unruly people. Nevertheless, repression is not one of its necessary components. If folks are sufficiently trusting, authoritarian rule can come with a much more friendly face. Think of Singapore.

Authoritarian liberalism represents a commitment to the administration of free markets. It refuses to have delegations deconstructed in processes of public contestation and votes. Institutionally, it is visible in the constitutional entrenchment of economic liberties vis-à-vis legislatures or trade unions and in institutions that shift control of economic or monetary governance from the people to expert bodies and to the executive branch.

Authoritarian liberalism is, however, ambivalent. If the emphasis rests on economic *liberalism* then authoritarian modes of policy definition and policy implementation are subservient to—using old-fashioned parlance—the interests of private property. If, by contrast, the authoritarian realisation of a founding mission is at stake, economic *liberalism* may be a means of mitigating its impact by making it more palatable to the pursuit of the individual self-interest.

XIII. Liberal and authoritarian authoritarian liberalism

In the case of the European Union, the identifications of elements of authoritarian liberalism can be left to the discerning power of judgement. It is submitted here, however, that the European Union owes its appeal in no small part to the ambivalence of authoritarian liberalism. Authoritarianism reinforces economic liberalism, which itself reinforces the authoritarian construction of

104 See my *Accidental Cosmopolitanism*, 4 TRANSNATIONAL LEGAL THEORY, 2012, at 371.

105 See OTTO KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS (Princeton University Press, 1969).

Europe. Governance from above can be justified with regard to the economy. Fixing the economy, in turn, benefits the European project. The people do not revolt. Supposedly, they are swayed by the "Idea" of Europe.

More precisely, the *liberal* face of authoritarian liberalism is most clearly revealed—aside from the *Lochner* style jurisprudence on fundamental freedoms[106]—in the legal twists and turns underlying the introduction of fiscal and monetary crisis management. No longer is the law of the Treaty limited to preventing irresponsible fiscal Member State policies and their balance of payment problems. They have been *reread* into a framework that can accommodate various strategies of crisis management. To that end, certain "clarifications" had to be made, in particular by the European Court of Justice,[107] in order to cast into new light a Treaty that had not been designed with crisis management in mind. The necessity thereto arose for the purpose of reinforcing the lending power of Member States on financial markets. Had the Union done nothing for them, the interest for their debts would have skyrocketed for at least those states that could not but pump money into their collapsing banking system. Any default of one Member State would have had potentially disastrous consequences for the Euro Zone as a whole. The article has referred to these matters in the introduction.

European crisis management is an example for how action taken under unforeseen adverse circumstances invites cognitive adaptation. The confrontation with what needs to be done in an unprecedented situation easily overrides what one would have previously imagined to be normative constraints on delegation. Such cognitive adaptations occur not least because delegations are based upon trust. The resulting fait accompli is often trailed by much erudite commentaries on the part of legal scholars. But commentaries have no power to change the world.

The stretching of powers in order to stabilise the European economy is consistent with the liberal face of authoritarian liberalism. But what about its authoritarian counterpart? Arguably, one encounters the authoritarian face in the overall ethos of integration, in particular, in its often-recognised absence of a final direction.

According to *Voegelin*, an authoritarian ruler is in charge of creating institutions, thereby inviting loyalty to these creations. Eventually, institutions have to elicit customary consent to their existence. This authoritarian mode of "articulating society" is obviously reminiscent of the "neofunctional" hypothesis according to which sectoral integration gives rise to political integration. The latter, according to Haas, is the "process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities to a new centre, whose institutions possess or demand jurisdiction over pre-existing national states."[108] Such a shift concerns, however, mostly elites, that is, members of the public service and interested persons from the private sector.[109] Initially, Europe was to be made without Europeans, indeed, it

106 See my *Idealization, De-Politicization and Economic Due Process: System Transition in the European Union in* THE LAW/POLITICS DISTINCTION IN CONTEMPORARY PUBLIC LAW ADJUDICATION 137 (B. Iancu ed., Eleven International Publishing 2009).

107 See, notably, Case C-370/12, Pringle v. Ireland, [2012] ECR I-nyr.

108 See ERNST B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES 1950-1957, 16 (Stanford University Press, 1958).

109 See Philip Schmitter, *Ernst B. Haas and the Legacy of Neofunctionalism*, 12 JOURNAL OF EUROPEAN PUBLIC POLICY 255, 260 (2005).

has been established with the aim of creating Europeans. This goes to the heart of what Voegelin perceives authoritarian rule to accomplish: "authorship".[110]

The authoritarian spirit of European integration is ever more clearly revealed in the practice that Majone calls either "cryptofederalism" or "integration by stealth". This is the method of integration that he attributes to *Jean Monnet*.[111] Cryptofederalism is federalism short of a plan for a federal constitution. The forces and players driving the integration process do not work openly towards a federal constitution—a goal that neofunctionalism still had in mind—but pursue a strategy of "minor steps and grand effects" (*Monnet*).[112] This strategy lacks, however, a final orientation. The movement towards "more Europe" takes the place of the goal. It becomes everything. Again, translating this mindset into *Voegelin's* categories, it can be said that the repeated choice for "more Europe", regardless of where it may arise, reveals an authoritarian faith that we are, if only we remain faithful enough, moving into the right direction. Not by accident, *Majone* diagnoses a lack of serious interest in what Europe is supposed to be and more "fascination with the process of institution-building."[113] The fait accompli, the creation of "more Europe" ad hoc, by taking little steps, is consistent with the faithful dedication to a cause whose ultimate justification no one understands. Europe rendered as "more Europe" is an authoritarian project that uses liberalism as its means.

XIV. Conclusion

The current governance of Economic and Monetary Union shows us the administrative face of the cosmopolitan constitution of its Member States.[114] Generally, a constitution of this type commits states to submit their performance to processes of peer review. Its administrative dimension concerns the growing importance of transnational problem-solving processes, such as the surveillance and compliance mechanisms that were mentioned in the introduction to this article. In this context, the principle that powers be exercised proportionately is replaced with the principle that powers be proportionate to unpredictable challenges. Not surprisingly, executive powers grow. While parliaments no longer are the central locus of political authority, citizens retreat into the private sphere and allow themselves to be governed by those who claim to be in the know.

But Europe is not doomed to stay the authoritarian liberal project that it currently is. The key to a change may well be that governments of the Member States pass on to the Union the democratic resistance that they encounter at home.[115] This is perfectly legitimate for the reason that the current situation does in no manner generate "output legitimacy." More precisely, the output legitimacy exists only for the lending Northern Member States.[116] The Euro has not collapsed and the budgetary expenses for rescue measures have been minimal so far. They enjoy the benefits of the Euro Zone. It allows them to operate with what is effectively an undervalued currency.

110 See Voegelin, note 92 at 101 (Engl. trans.).
111 GIANDOMENICO MAJONE, EUROPE AS THE WOULD-BE WORLD POWER: THE EU AT FIFTY 72 (Cambridge University Press, 2009).
112 Cited in Schmitter, note 109 at 257.
113 Majone, note 111 at 73.
114 On the following see my THE COSMOPOLITAN CONSTITUTION (Oxford University Press, 2014).
115 The concluding remarks are indebted to Scharpf, note 12 at 16–18.
116 See Scharpf, note 12 at 12–13.

Some Southern Member States get the raw end of the deal. They do not benefit from Europe's arrogation of delegated authority. Under such unequal conditions it makes sense for them to act in a manner as though the public power that rules them were illegal and illegitimate.

There is no other alternative left for the Southern Member States than to alter an equilibrium in which they have no bargaining power. They can only affect it still by threatening to leave the Euro Zone. While this would make an end to all rescue credits from ESM and all OMT support from the ECB it would also reintroduce the specter of the collapse of the Euro. While such a scenario is quite regrettable, it is to be feared that defection is the only leverage left to these states to motivate Northern States to rethink and to renegotiate the project of Economic and Monetary Union.