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# A Genealogy of Crisis: Europe's Legal Legacy and Ordoliberalism

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## Law as legacy and Europe's genealogy of crisis

This book is about the role of the legacy of Roman law in the transformation from fascism to the European integration project after 1945. The aim of this chapter is to extend the focus on Roman law to another connected legal foundation: ordoliberalism. The chapter will also extend the inquiry in time covering the crises in the 1970s and since 2008.

Ordoliberalism was an alternative point of reference to that of Roman law in order to mark the shift from fascism to European integration. Ordoliberalism provided a legal framework for a peaceful Europe with the aim of merging capitalism and democracy. Wilhelm Röpke, a protagonist in the elaboration of ordoliberalism, commented on the connection between Roman law and ordoliberalism, as we shall see. The key focus of this chapter is the ordoliberal and Roman legacy during the two crises of the 1970s and since 2008.

The point of departure of this book is that, during the war, exiled German scholars in Britain discovered Roman law as a European historical heritage on which one could build a new and peaceful post-war Europe. Simultaneously, Mussolini exploited the same Roman heritage in order to legitimize his fascist regime. *Romanitas*, the key concept of his outline of the Roman legacy, dealt with law, justice and order.

Hitler and the Nazis rejected the legacy of Roman law, instead hailing the myth of old Germanic law and proto-Germanic societies of free equals under a chieftain – supported by race biology, the geopolitical *Großraum* theory, and the search for the original Aryan home in a mythical North through philology, archaeology and anthropology.

This fascist-Nazi difference increases the complexity of ideological debates and the search for origin and roots, stability and continuity in a chaotic time. A general search was under way for historical points of reference and authority as an instrument to master the future. However, the decisive point was not whether the normative roots were Roman or Germanic, because both filled similar functions, but the fact that the

search led to the derivation of very different origins among those who were looking for, for example, the Roman legacy.

Few outlined the Roman law basis of dreams of a future peaceful Europe in reaction to the horrors of the Second World War more emphatically than Paul Koschaker. In 1947, he published his most famous work, *Europa und das römische Recht*, and, before his death in 1951, he experienced the beginning of the debate on the connection between Roman law and a peaceful post-war Europe. After 1945, both Roman law and Europe were in a state of deep crisis and Koschaker's project dealt with the restoration of both in the construction of a common European legal culture. In his search for solutions to the crisis of both Roman law and Europe, Koschaker went backwards and ended in Savigny's historical school. He depicted European history and European legal culture as a teleological continuity from the Roman Empire via the Holy Roman Empire to the twentieth century. He thereby conflated pre-Christian Rome and Catholic Rome (Koschaker 1938; Koschaker 1947). His approach fitted well with the fact that the founding fathers of the European post-war integration project were Christian Democrats and Catholics. The doctrine of the Catholic Church acknowledged Roman law in its connection to natural law theory, which linked up with ideas of universalism and divinity as a legal origin as opposed to man-made positive law. The contours of a foundation myth emerged.

A problem exists with imageries of legal heritages and legacies. The search for the roots of the legal system is in vain. Centuries and millenia of political-legal entanglements constitute a powerful genealogy and a filter that sieves the search for the original, for the authentic roots of the present. In the past, not one original and undisputed original point of departure is available for our observations in the present. Many controversial layers of interpretations and reinterpretations of origin have constantly changed views on it and our attempt is only another contribution in that long chain. This fulfils the purpose of providing a better understanding of our own chaotic present. The search for legacies and roots is more about the present than the past.

In his article 'Foundations of European Legal Culture' (1990), Franz Wieacker shows the complexity of the millenary genealogy of Roman law, beginning with the replacement in the empire of the former individual freedom of the urban resident (*civis Romanus*) with diverse corporate freedoms. He shows how, after the fall of the Roman Empire, the heirs of Rome as well as the Romanized Iberians, Celts, Illyrians and the Germans, who had entered the empire, abandoned the high classical culture of Roman law. He shows how the transformation continued in the Middle Ages under the influence of the Catholic Church and by the creation of an autonomous legal science at the universities. In the early modern period up to the French Revolution, the conceptualization and systematization of law was built upon these foundations by means of the methodological tools of a new age, dedicated to mathematics and the natural sciences. The fragmentation of Christianity and the emergence of centralized states reflected the legal transformation in other ways. The modern age after the French Revolution, in the framework of the Industrial Revolution, where time seemed to accelerate, brought the definite collapse of Western legal metaphysics and the emergence of the *Rechtsstaat* for the protection of private property and the *Sozialstaat* for public welfare (Wieacker 1990). It is no easy task to discern what is Roman and

original in this genealogy and to retrieve this argued legacy in today's European legal cultures marked by diversity.

Roman law was, as Wieacker has demonstrated, not a stable reference for all times. The crises in the 1970s and since 2008 have brought an intensification of the search for new legal points of reference in times when the Roman (and ordoliberal) legal foundations of integration had lost the capacity to convince. The search still continues.

The derivation of a Roman origin is not a matter of definition because there is no definition, as Nietzsche noted with his statement that what can be defined has no history.<sup>1</sup> The task is rather to retrieve the contentious meanings of Roman law in various historical situations. The term is full of contested meanings, which have emerged in political struggles for discursive power (Brunner, Conze and Koselleck 1979–1997). The discursive struggle about the meaning of key concepts is particularly intense in times of crisis, when old vocabularies break down and lose the capacity to convince, and the search for new legitimizing conceptualizations speeds up (Koselleck 1959).

Therefore, the European genealogy of crisis is important. The (West) European unification project after 1945 was built on the experiences of the crisis in the 1930s (and, of course, of the two world wars). An argument in the post-war work on unification was that integration in legal terms was based on Roman law. The aim was evidently to derive a different Roman past for Europe's future than Mussolini's. But what, more precisely, was this Roman heritage? How stable was it as legitimizing cement? How did later crises and challenges influence the connection to Roman law?

## The value crisis of the 1930s

The implication of the value crisis of the 1930s was a loss of orientation at a time when various versions of democracy, authoritarianism and totalitarianism were competing intensely over providing a key to the future. The subsequent world war re-established values in terms of good and evil in Western and Eastern European versions. However, the question remained of how evil could acquire the power of persuasion that it actually did obtain. That question permeated the post-war search for meaning and for the final repression of evil.

In the conventional teleological understanding of Europe, democracy broke through slowly but inexorably during the nineteenth century, from the stabilizing restoration in Vienna after revolutionary and Napoleonic chaos, via the binding of monarchical power through constitutions.

A more realistic view on the nineteenth century discerns general constitutionalization after Vienna as a successful instrument of restoration through necessary monarchical concessions to ward off social protest and revolutionary threats rather than as an expression of a breakthrough of popular power. Europe in 1914 was mainly conservative and authoritarian. State-based paternalist social politics of stick and carrot integrated social protest in an approach where warfare and welfare went hand in hand through mutual reinforcement.<sup>2</sup>

Democracy arrived in Europe only after the two world wars between 1914 and 1945. After 1919, in reaction to the First World War, democracy broke through in parallel

with totalitarian regimes of a new kind: communism, fascism, Nazism. The First World War brought the breakthrough of the masses into politics. After their hardships and sacrifices on the battlefield and on the home front, there was now no stopping the masses. Politics became more difficult to orchestrate than in the former society, with dreams of a European concert directed by a benevolent but more or less authoritarian state paternalism. The masses protested and rioted. The Russian Revolution was a direct consequence of the war. The breakthrough of the influence of the masses did not necessarily result in democracy, as we might want to believe, but could also easily end in fascism. A mass society presented as much a threat as a promise. The masses not only expressed their political preferences in bottom-up processes but could also be manipulated in populist and authoritarian top-down politics. This was the backdrop to the value crisis of the 1930s.

The value crisis began as an economic crisis after the collapse of the financial markets in October 1929. Mass unemployment haunted Europe, and political leaders seemed paralyzed before they began to act. They abandoned the gold standard and reacted to social protest with protectionism. Their concern was the economic crisis, which became a political crisis and a value crisis. They discerned a tension between economic liberalism and political liberalism, between capitalism and parliamentary democracy with the social question as the catalyst that turned the economic crisis into a political crisis and finally a general value crisis about the cohesion of industrial capitalist societies.

In his book *La rebelión de las masas* in 1930, Ortega y Gasset outlined how the advent of the masses contributed to the value crisis of the interwar period. Oswald Spengler, author of volumes about the decline of the Occident after the First World War, warned in *Man and Technics* (1931) against the destructive force of technology and industrial capitalism, while his bestseller *The Hour of Decision* (1933) – banned by the Nazi regime – criticized liberalism for its political and economic shortcomings and predicted a coming war that would destroy Western civilization. Other intellectual comments on the value crisis against the backdrop of economic depression and political turbulence were Dutch historian Johan Huizinga's *In the Shadow of Tomorrow* and the dystopian future vision of *Brave New World* by Aldous Huxley (Ortega y Gasset 1930; Spengler 1918–1922; Spengler 1931; Spengler 1933; Huizinga 1935; Huxley 1932). One aspect of the value crisis of the 1930s was the difficulty in distinguishing between democracy by the masses and totalitarianism for the masses in the wake of the failure of global capitalism.

The differences became visible only in retrospect, as Wolfgang Schivelbusch demonstrated in his book *Entfernte Verwandtschaft* ('Distant Relationship'). The value crisis of the 1930s began as an economic crisis after the collapse of the capitalist economic order in 1929, which became a general global political crisis. In the search for a solution to mass unemployment and social protest, a value crisis arose where democracy, fascism, Nazism and communism/Stalinism competed for solutions under relations of entanglement as much as demarcation. For example, US President Franklin Roosevelt was very interested in Mussolini's corporatism and Hitler's public employment politics in the design of his New Deal programme. Only after 1935, when Hitler and Mussolini began more systematically to connect the solution of the social

crisis with expansive warfare for social integration, did the distinction between the democratic and totalitarian orders become clear (Schivelbusch 2005). Roosevelt was not only interested in solutions by what would later be seen as totalitarian regimes but also took to heart the book *Sweden: The Middle Way*, published by Marquis Child in 1936, which soon became a global bestseller. Child's argument was that Sweden had adopted an effective third-way compromise between the two political poles of the day: the United States and the Soviet Union, between wild, unruly and unmanageable capitalism, on the one hand, and coercive socialism, on the other (Childs 1936). In the same vein, the ordoliberal protagonist Wilhelm Röpke saw Switzerland as the model of a *dritter Weg* between laissez-faire liberalism and socialist collectivism (Röpke 1942: 43). No doubt connections existed between his search for origins in Swiss peasant community culture, which merged the ideals of individual and collective freedom, and the Nazi-Nordic myth, but Röpke nevertheless emphasized a distinctive Swiss character as clearly dissociative from the distorted Nazi fancies of the past.

Between the world wars, in economic and cultural terms, Germany was the European hub where crystallization of the crisis occurred. Economic development there between crisis and despair on the one side and expansion and reckless expectations of the future on the other, between depression and mania, exerted a great impact on Europe. The same goes for the cultural tensions in the Weimar Republic between futuristic cosmopolitan feelings of forward-thrusting pioneers and a xenophobic, narrow nationalism as a tool for revenge and new German greatness. The period was a general European oscillation between gloom and hubris; but in Germany this was amplified. After 1929, feelings of depression and crisis prevailed, with sentiments of economic, political and value crisis and lack of orientation and political control reinforcing each other. Germany was the centre of a storm brewing over Europe. Coudenhove-Kalergi's pan-European narrative broke down, as did the League of Nations as a kind of world government making the world safe for democracy after the First World War.

The philosophical debate at the end of the 1920s and in the early 1930s between Martin Heidegger, Ernst Cassirer and Edmund Husserl over what Husserl called 'the crisis of European sciences' was symptomatic of the search for orientation and a good illustration of the *Zeitgeist*. It was a moment when full social and political recognition seemed finally to be given to German Jews, who constituted a significant dimension of cultural life and intellectual debate in Germany. Cassirer became the first Jewish rector of a German university, in Hamburg. The moment was full of ambiguity and contradictions, however. It also contained a new turn in German nationalism, with anti-Semitism as a core dimension.

Heidegger had attracted attention with his book *Sein und Zeit* (Being and Time) in 1927 (Heidegger 1927). The book took issue with rationalism and emphasized authenticity from an existentialist perspective. Humans were not only thinking but in particular acting under conditions of being between life and death. The echo of Ernst Jünger's literary expression of his experiences of life at the front line during the First World War as a purifying 'storm of steel' is difficult to overhear (Jünger 1929; Jünger 1930). Heidegger was critical of the philosophical conception of truth and confronted the instrumental tradition of technology, with its treatment of nature as a 'standing

reserve' on call for human purposes. The book was a radical existentialist-hermeneutic version of Husserl's phenomenology. However, as opposed to Husserl, it celebrated the 'will to power' and appealed to the prevailing mood of the time. The book quickly became a point of reference in the public debate.

Husserl had developed phenomenology at a time when the traumatic experiences of the First World War imposed doubts on reason and technology based on instrumental rationality. In particular, the doubts dealt with the scientific claim and conceptualization of truth. Husserl tried to open up the absolute closure of the term towards the *perception* of objects rather than objects as such. Perceptions offered not only one but many possibilities of interpretation. In his phenomenology Husserl focused on the issue of inter-subjectivity from this point of departure.

Husserl's *Crisis of European Sciences* was a last despairing appeal in a debate which was closing down and had begun as a much more open confrontation about clear alternatives in the wake of Heidegger's *Sein und Zeit*. Cassirer was the main opponent and the debate between him and Heidegger in Davos in 1929 was a catalyst. Cassirer mediated between natural and cultural sciences from a reason-based neo-Kantian perspective. He argued that Kant's critique of pure reason, 150 years before Heidegger, emphasized human temporality and finitude but also located human cognition and the capacity to use reason within a broader conception of humanity. With this reference, Cassirer challenged the relativism of Heidegger, arguing for the universal validity of truths discovered by the 'exact and moral sciences'. In the 1920s he developed his philosophy of symbolic forms, where he saw man as a symbolic animal. However, whereas animals perceive their worlds by instinct and direct sensory perception, humans create a reason-based universe of symbolic meaning with inter-subjective objective validity.

Husserl was a professor in Freiburg, where the young Heidegger was his assistant. Heidegger dedicated *Being and Time* to Husserl, who had retired in 1928, with Heidegger succeeding him. In 1933 the converted Lutheran Jew Husserl was suspended from the university and excluded from the library as well as other emeritus facilities. A few weeks after revocation of Husserl's emeritus status, Heidegger became rector of the university and joined the Nazi party. Husserl taught in 1935-6 in Prague and Vienna and in 1936 published *Die Krisis*, which described and analysed the crisis of European sciences around concepts such as truth, objectivity, reason and rationality (Husserl 1936). Two years later, Husserl died in Freiburg, intellectually isolated and abandoned. Only Gerhard Ritter, the nationalist-conservative historian, the biographer of Luther and the hagiographic portrayer of Prussia, went to his funeral. In his nostalgia for the German Reich as it had been before 1914, rather than as it had begun to take shape in a new version at this time, Ritter probably felt as alienated as Husserl. After less than a year as rector, Heidegger resigned after conflicts with colleagues from the political leadership of the university. The question of how much of a Nazi he really had been was one of the most contested issues after 1945.

Cassirer left Germany in 1933 for a few years in Oxford and from there to a chair at Gothenburg. After the German occupation of Denmark and Norway in 1940, he feared that Sweden might be Hitler's next target and left the following year for the

United States, where he died a month before the end of the war in 1945 (Cassirer 1936; Jeenicke 2012).

The value debate of the 1920s and the 1930s – against the backdrop of the experiences of the First World War, the Great Depression and the breakthrough of mass societies – dealt with the question of truth and objectivity. It also dealt with the question of sovereignty. Who was the sovereign that controlled and influenced the situation? The democracies had a clear answer: the parliamentary assemblies ruling and ruled by the constitutions. However, ever more people doubted that solutions to problems would be found there.

Politicians in the Weimar Republic began to circumvent domestic social problems in search of solutions via military expansion for new economic power. The geographer Karl Haushofer and the jurist Carl Schmitt laid the ground with the *Großraum* theory. The Nazi ideologue Alfred Rosenberg (1893–1946) used *Lebensraum* as a key concept in his book *Der Mythos des 20. Jahrhunderts* (1930). It must here be added that the view of a German mission of eastward expansion was conventional in Weimar. Gustav Stresemann was keen to keep Poland out of Locarno, for instance.<sup>3</sup>

The Catholic Schmitt was looking for community and identity at a time that felt lacking in both. In *Political Theology* (1922), Schmitt launched a Catholic-right revolutionary critique of the prevailing order. He focused on the power of the sovereign to declare a state of emergency, to explain that the law was no longer applicable. He rejected the layers of philosophical-political exegeses on the exercise of power that had been established over the centuries. What really mattered was control of the exceptional case, the moment when somebody has the power to stand up and declare that there is no alternative irrespective of what legal rules might apply. Schmitt's argument eventually came to rest on the issue of control of the exceptional situation in the political and legal arena. The agent who wields the power to proclaim the exceptional situation emancipates himself or herself from norms. Five years later, in *The Concept of the Political* (1927), Schmitt added a definition of what he considered to be the deepest essence of the political: the distinction between friend and foe (Schmitt 1922; Schmitt 1927).

Schmitt identified an obscure legitimacy in mere force of action. In so doing, he revealed a blind spot in liberal understandings of law as a universal order framing politics. However, although critically astute, Schmitt was unable to conceive of legislation by politics as a potentially progressive force and the possible source of positive normative developments through criticism of existing institutions. This was his blind spot. Politics does not stand above the law, and the law does not stand above politics. Rather, law is made and remade by politics; it deals with continuous political adjustment to and reformulation of legal checks. Proclaiming a state of exception is not the only response to a normative crisis.

The crisis of the 1930s, and reflections on it in philosophical and legal debates, and in fiction literature, constituted the framework of experiences when the search emerged, during and after the Second World War, for the origin in the past of a better European future. This was the framework of experience which made exiled German scholars of law and Paul Koschaker to seek firm ground for Europe in their imagery of Roman law. No doubt a dimension of escapism existed in the location of their intellectual asylum in such a distant past.



## The search for stabilization through law: The ordoliberalists against Schmitt and against the neo-liberals

Economists also reflected on the crisis of liberalism and capitalism. During the Second World War, Wilhelm Röpke became one of the champions in the outline of ordoliberalism as a response to the crisis of economic liberalism. Ordoliberalism was not so much about economic theory as about the legal and political framing of the economy. The Latin word *ordo*, 'order' in English, in its connection to liberalism can be translated as legal or law-based liberalism. In this enterprise Röpke also referred to Roman law. The German economist wrote in Swiss exile in the second volume of his trilogy on the crisis of his time (1944) that 'we owe to Roman and not to German law for a clear distinction between public and private law and are thus indebted to the former for the recognition of the individual as opposed to state rights'. On the other hand, he continued, 'The highly developed formal structure of Roman law may lend itself to the claims of a centralized absolutism.'<sup>4</sup> Röpke thus drew attention to the ambiguity of Roman law as a European point of reference.

In this respect, Röpke condensed what Wieacker would later say when discussing the legacy of Roman law, which in Röpke's view could be used to derive both fascism and private ownership in a liberal society. In order to bypass this ambiguity, Röpke developed a legal-political framework for the economy in a liberal capitalist order based on private ownership, a social-liberal version of the *Rechtstaat*, which had emerged in the nineteenth century to protect the new kinds of private contract in the industrial capitalist economy. The law-based ordoliberalism mediated between the *Rechtstaat* imagery and the growing claims by the labour movement since the end of the nineteenth century for a *Sozialstaat*, a welfare state.

Röpke did so in the framework of a debate among liberal intellectuals trying to come to terms with the crisis of liberalism. In August 1938 some twenty-five people, among them the philosophers Raymond Aron and Louis Rougier, along with the economists Röpke, Ludwig von Mises, Friedrich von Hayek, Jacques Rueff and Alexander Rüstow, met for a colloquium on the crisis of economic and political liberalism. Their discussions dealt with the likelihood and preconditions of a liberal renaissance, markets and crises, as well as the liberal state and an agenda of liberalism. They struggled for a new mobilizing concept for the intellectual movement they planned and which they defined as liberal, although demarcated from conventional liberalism, which had fallen into ever greater disrepute since the 1870s in a development that had accelerated during the Great Depression. The meeting discussed several concepts, among them neo-capitalism and constructive liberalism. In the final event it seems participants decided that neo-liberalism was the most attractive term, although no formal agreement or recorded unanimity was reached (Denord 2001; Denord 2008; Valpen 2004; Mirowski and Plehwe 2009; Jackson 2010).

From this point onwards, mainstream liberalism split into at least two tendencies. The German economists Röpke and Rüstow, and with them Walther Eucken (1891–1950), who was not among the participants at the Paris meeting, became the *Vordenker*, the 'pre-thinkers' of the German *soziale Marktwirtschaft*, based on a belief in a legal (ordoliberal) rather than political regulation of the economy. They turned Schmitt's

argument upside down and set law, not politics, as the point of departure for social life and economic management.

In *Die Gesellschaftskrisis der Gegenwart* (1942) Röpke developed the ordoliberal programme on the basis of the argument about a pathological degeneration of occidental societies expressed in two dimensions: the intellectual moral and the political social economic. Mass societies driven by a borderless relativism called positivism and the technical- or technological-organizational orgy of big industry, big cities, mass production, proletarianization and extreme division of labour had deserted rural community life around free farmers, artisans and small entrepreneurs. The rootless masses had brought the crisis of democracy while big industry, oligopolies, cartels and monopolies had brought the crisis of capitalism. The crisis of socialist collectivism went hand in hand with the crisis of liberalism. Röpke argued for a third way, with Switzerland as the model, through a struggle on two fronts: against collectivism and against liberalism as it had developed, in need of fundamental revision towards competition but with a key role for the state in order to prevent both capital concentration and proletarianization. It did not make sense to reject collectivism politically without at the same time solving economic and social reform tasks. It was a catastrophic failure to regard the market as something autonomous, as a state of nature separated from the institutions of the state. Like pure democracy, the rule of the masses, undiluted capitalism is also unbearable and indigestible, so Röpke argued. It was wrong to ignore the deficiencies of the pure market economy translated into rationalistic doctrinism. He concluded,

It in no way contradicts the market economy if the state with the coercive instruments at its disposal (in particular by means of taxation) with the purpose of more equal distribution undertakes a redistribution of property conditions, and as little, if it, let us say from taxation income pays allowances for worker housing or for water pipes in mountain villages. ... It in no way contradicts an economic policy standard that respects our economic constitution if the state on its own manages individual enterprises or whole production branches and itself performs as producer or trader in the market. The same goes for public work which the state undertakes in order to bridge or overcome a depression. (Röpke 1948: 306)

The ordoliberal version in response to the Paris meeting in 1938 – the term *neo-liberal* disappeared from their agenda after a while – sought distinction from *laissez-faire* liberalism, which Rüstow rejected as palaeo-liberalism.

Ordoliberal ideas had been developed even before the Paris meeting in 1938. Two manifestos were published in 1932 at the peak of the economic crisis: Eucken's *Staatliche Strukturwandlungen und die Krise des Kapitalismus* ('State Structure Transformation and the Crisis of Capitalism') and Rüstow's *Interessenpolitik oder Staatspolitik* ('Interest Politics and State Politics'). Franz Böhm's *Wettbewerb und Monopolkampf* ('Competition and Struggle against Monopoly') followed a year later (Eucken 1932; Rüstow 1932; Böhm 1933).

The ordoliberals confronted not only *laissez-faire* but also the conservative historicist school and the social democratic imagery of economic democracy founded in the era of

Bismarck, when organized modernity emerged in the 1870s. Ideas of corporate interest representation and conflict resolution continued to blossom in Weimar reinforced by the experiences of the planned war economy as well as by utopian ideas of organic community (Str ath 2016: 370). These ideas promoting big business and large-scale capital concentration were the target of the ordoliberal as much as laissez-faire liberalism. They saw it as their task to provide a legal framing, *ordo*, of the economy, an economic constitution that would safeguard it both from market self-destruction and from political conflicts. There was a critique of economic concentration and a commitment to strong antitrust law and the imagery of an impartial state monitoring the economy and preventing the political conflict spreading there.

The imagery of an economic constitution demarcated from politics was, of course, utopian. It nevertheless played an important role not only in Weimar but also in particular during the foundation of European integration in the 1950s. A clear social dimension was integral to the ordoliberal approach in the shape of the *soziale Marktwirtschaft*, the social market economy as it was to be called after 1945, based on the belief in legal (ordoliberal) regulation of the economy determining the scope for political intervention. The (West) German approach after 1945 should be seen against the backdrop of the experiences of the Weimar Republic as a democracy with strong anti-democratic opponents on both the radical right and the radical left. The ordoliberal social market-economic post-war order was a rupture in a German history of authoritarianism. Rule-governed technocratic monitoring of the economy would bring general welfare that would provide political allegiance.

Hayek, on the other hand, developed an alternative view and a theory for the liberalization and deregulation of the world economy, where regulation of social life would emerge through the market without the mediation of the state. In Hayek's view, regulation meant an inflexible doctrinaire legal framework for the economy, rejecting state mediation between social interests. The state should not intervene in the market in order to correct shortcomings and failures but should only guarantee strict application of market rules. After the German ordoliberals had abandoned the term *neo-liberal* suggested in Paris in 1938, Hayek became the protagonist in defining it in economic market-radical terms. In an essay in 1939, Hayek argued for neo-liberal market discipline through interstate federalism. In his brief article he drafted an economic and monetary federation that would function as a tool to do away with impediments on free movement of 'men, goods, and capital between the states', enabling creation of common rules of law, a uniform monetary system and common control of communications. All monetary policy would have to be a federal matter, as opposed to a state matter. The imposition of market rigidity was a matter of monetary policy as well as commodity and labour standards:

While the states could, of course, exercise control of the qualities of goods and the methods of production employed, it must not be overlooked that, provided the state could not exclude commodities produced in other parts of the Union, any burden placed on a particular industry by state legislation would put it at a serious disadvantage as opposed to similar industries in other parts of the Union. As has been shown by experience in existing federations, even such legislation as

the restriction of child labour or of working hours becomes difficult to carry out for the individual state. (von Hayek 1980 [1939])

Methods of 'raising revenue' (i.e. collecting taxes) would be 'somewhat restricted' for individual states. Greater mobility between states would necessitate avoiding all sorts of taxes 'which would drive capital or labour elsewhere', but there would also be considerable difficulties with many kinds of indirect taxation. In order to prevent evasion of guarantees of free movement of 'men, goods, and capital', the federation must have great power to impose restrictions on political intervention in the economies of the Member States. Limitations had to be placed not only on government policies but also on economic policies conducted by trade unions, cartels and professional associations. Once frontiers between the Member States were opened and free movement was secured, the monopolies of those organizations, and their power to control supply of their services or products, would cease.

Hayek provided a model of international capital against international labour. He did not, however, discuss why market union could not have a social dimension or a relatively high tax regime shared by all Member States. He did not discuss why unions could not cooperate across Member State borders instead of competing in a race to the bottom. Prevention of trade distortions could in his view only be a matter of keeping standards down. In religious metaphorical terms, Hayek indicated that a federal market could serve as a kind of cleansing purgative designed to make economies fit for competition. Purification in the name of 'progress' presupposed downward pressure on wages and social standards. Coercion and discipline were the key in Hayek's dream of liberty.

In *Der Gesellschaftskrisis der Gegenwart*, which Röpke published in Swiss exile in 1942, he argued for the third way between socialism and laissez-faire capitalism, although in a different way from Child in his book on Sweden, emphasizing legal rather than political primacy. Ordoliberalism was Christian in its design. The masters of the narrative were all Protestants but their appeal was trans-confessional and also attracted Catholics in Germany. In *Civitas humana* (1944), Röpke argued that Pius XI's papal encyclical *Quadragesimo Anno* in 1931 on the ethical implications of the social and economic order, issued against the backdrop of the Great Depression and mass unemployment, forty years after Leo XIII's encyclical *Rerum Novarum* addressing the conditions of workers around 1890, at heart came to the same conclusion as Röpke's own liberal-conservative socio-economic philosophy (Röpke 1948: xvii). The legal-political constructs of Röpke and Hayek, ordoliberalism and neo-liberalism respectively, were clearly quite different in their views on the connections between law and politics and in their search for meaning in the past: politics as a continuous correction of liberal economies, on the one side, and, on the other side, the rejection of politics in forms other than monitoring the rule of the market.

Since the 1980s, Röpke had, in the neo-liberal rhetoric, been linked to the protagonists of neo-liberalism, Mises and Hayek, as if they were all three thinkers of the same school. Röpke was co-opted into neo-liberalism despite the fact that he abandoned the term and argued for ordoliberalism with a social face. When ordoliberalism has been recognized in academic literature since the 1980s as the legal foundation of the

European integration project, the reference has been exclusively to competition rules. The fact that both ordoliberalism and the early phases of European integration involved a social component hand in hand with the competition rules in mutually reinforcing dynamics does not appear in the derivation of an ordoliberal European heritage.<sup>5</sup> The next section will comment further on the connection between social commitments and competition rules in both ordoliberalism and European integration.

The connection between Röpke, on the one side, and Mises and Hayek, on the other, is marked by differences rather than similarities. Röpke referred in the *Social Crisis* to the historical blindness of liberalism that created a false choice between socialism and capitalism. The choice was clear to Mises and Hayek, but Röpke was looking for a third way between the two theoretical approaches to the economy. This hijacking of ordoliberalism by the neo-liberals, and its later acceptance by ignorant critics of neo-liberalism, was an expression of the ideological force of neo-liberalism in its second wave between the 1980s and 2008.

One might argue that ordoliberalism inverts the relationship between the political and the economic in its plea for an economic constitution as a free-standing foundation of the polity, neglecting the concept of popular sovereignty. It is then important to emphasize that in early ordoliberal thought the economy involved a clear social dimension and an elaborated link to the social tasks of the state. It was neo-liberalism in the design of Hayek that radicalized the economic constitution and cut the social link. From neo-liberalism, a link emerged to liberal authoritarianism through economic fundamentalism with austerity as an instrument. But it is historically wrong to connect ordoliberalism to this development.<sup>6</sup>

Ordoliberal ideas were to influence the post-1945 European integration project in its early phases but not in the sense that the neo-liberals would argue in their post-Maastricht outline of the past.

## Recreation of values: The European integration project, the modernization narrative, ordoliberalism and Keynesianism

The historical experiences that drove the reconstruction of European values after 1945 rejected the arguments of Schmitt. At the same time, though, the architects of the new Europe also had doubts about the capacity of the liberal alternative. They were looking for a legal rather than a liberal political alternative to Schmitt, a normative framework to prevent a reiteration of the liberal collapse. In Western Europe after 1945, Weimar served as a warning example, reinforced by the other warning example of the revolution that led to the Stalinist regime in the Soviet Union and its satellite regimes in Central and Eastern Europe. The insight in Western Europe was that democracy could be dangerous and therefore had to be controlled. The rule of the people could be the point of departure for politics in very different directions. Moreover, it could be manipulated. Memories were still fresh of how close to each other the various responses to the crisis in the 1930s had been before the differences became obvious.

The fragility of democracy was what the fathers of the European integration project wanted to change. They wanted to establish a stable and predictable political

order. They wanted democracy based on rational rule instead of the charismatic and traditional leadership during the era of the world wars to stay with Weber's categories. Technocrats were expected to guarantee rational democracy. Their instrument was welfare for the allegiance of the masses, but differently from the Third Reich. From the beginning, the European integration project was designed as a rule-governed technocracy, not a democracy, with the aim of guaranteeing democracy in the Member States through the prospects of social citizenship. This was the policy of European rescue of nation states (Milward 1992).

Ordoliberalism in the design of Röpke, Rüstow, Eucken and other economists along with like-minded lawyers fitted well with this (West) European integration approach. In the early drafts of Jean Monnet, competition law to prevent cartels and capital concentration and to provide a legal framework for the market was linked to the issue of social standards. Although competition was considered to be the key to cheaper and better production, it would not occur through lowering labour standards. The plan was intended to appeal beyond narrow business interests and, to that end, it addressed the question of wages. Monnet's original idea was to give the High Authority, which in the Rome Treaty in 1957 became the Commission, wide-ranging powers in the area of wages but remained somewhat ambiguous as to the substance. Wage dumping was obviously to be prohibited, but Monnet also envisaged wages as an instrument for promoting better standards of living. The Dutch negotiators, supported by the Germans, rejected any such powers for the High Authority, whereas the Belgians, whose wages were the highest, solidly supported the social definition of the wage issue since, in practice, it would mean that the other Member States would have to promote higher wages. The French were split. The Italian position was more complicated because its steel industry, which was a low-wage sector with high unit-labour costs, was overmanned. In the end, Monnet's vision was narrowed down to a prohibition of wage dumping (Griffith 1986).

A European rule-governed technocracy defining the legal borders of the economy in terms of competition rules and securing democracy through provision of welfare by the Member States required the legitimacy of a convincing narrative. After 1945, US American historians and social scientists wrote the history of the victors around the theme of modernization. The functionalist narrative on modernization by the American social sciences described how superstition became reason, how backwardness became progress, how absolutism became democracy and how poverty became welfare. They established a development norm from which everybody could benefit in and beyond Europe. The United States was at the top of the development scale, constituting both the norm and the goal of economic and political development. Barrington Moore epitomized this narrative with his classic on the origin of dictatorship and democracy (Moore 1966). In his analysis, the key was treatment of the social question and class differences by the political system. Moore initiated a research trend under the buzzword of modernization. A narrative emerged where the final goal of modernization was democracy and welfare. It was now that democracy as a consequence of Enlightenment philosophy, not the world wars, became a core dimension of (West) European self-understanding. The modernization researchers built one bridge to the Enlightenment over the gap of the world wars and another between capitalism and democracy, political and economic reason and progress over the gap of the Great Depression and

social destitution. This was the master narrative under which the European integration project evolved from fascism to (West) European unification.

The post-war necessity to re-establish a new Europe on its own ruins automatically created an expansive demand situation, in the shape of the reconstruction boom of the 1950s and 1960s. The emerging economies of growth and welfare, with full employment and a reasonable distribution of incomes and fortunes, created a basis for mutually reinforcing dynamics between mass consumption and mass production, demand and supply, in contrast to the people's democracies of Eastern Europe. The first priority and lesson from the experiences of the Great Depression in the 1930s, when the beginning of the (West) European integration project was negotiated in Paris in 1950 against the backdrop of the Korean War, was the connection between a strong welfare economy and democracy. The experiences of the economic crisis in the 1930s told how easily democracy could lose its way without a strong social commitment. These experiences were only some fifteen years old. Welfare was the currency for buying political allegiance, at least in the view that emerged in Paris. An economy based on a common market would provide resources for welfare. Through a general distribution of welfare, the European leaders created a contrast to the hardships in the Soviet system. General welfare generated by a rule-governed European market economy with a social face fitted very well with the ordoliberal imagery of Röpke, Rüstow and others. Economic growth through ordoliberal competition rules would provide the scope for an economically efficient social Europe.

John Maynard Keynes, too, contributed to the legitimizing economic theory that gave an interpretative frame for development in Western Europe. *The General Theory of Employment, Interest and Money* (1936), written in response to the Great Depression, was a theory for full employment policies in the industrial economies with a social psychological component emphasizing the importance of confidence in the future. Keynes argued that a new Great Depression could be avoided through political management of the economy, where a key political task was to infuse social feelings of certainty and security as a corrective to the experiences of precariousness and uncertainty that the capitalist system brought.<sup>7</sup> He argued that the economy was a polity, not the other way round, as would be strongly argued half a century later.<sup>8</sup> The technocratic application of his theory (*Keynesianism*) after the Second World War made him a mechanic provider of a toolkit for the maintenance of economic growth, where growth became permanent through political techniques and Keynes's insistence on uncertainty as the basic precondition of capitalism disappeared behind the imagery of permanent growth. In the political practices of Keynesianism, economic theory became like ordoliberalism: a kind of economic constitution, or at least convention, which provided the rules for political intervention in the economy.

This macroeconomic Keynesianism of political management and *dirigisme* (state control of economic and social matters) was clearly at odds with the ordoliberal imaginary which envisaged market competition with a microeconomic and legal focus. However, their attention to the social issue connected them, while the booming reconstruction economy hid the differences. The success of the West European economies, with growth and full employment, confirmed the Keynesian theory of full employment and belief in ordoliberal competition rules. A permanent solution

to economic growth and full employment appeared to be a possibility. With a focus on social cohesion, ordoliberalism and Keynesianism emphasized legal and political primacy respectively under awareness of the fact that the two dimensions of social life are entangled. Overlapping interpretative frameworks linked the political, the social, the economic and the legal in a stable relationship, outlining a post-war (West) European utopia of political and social stability as well as progress through continuous economic growth.

The (West) European nation states were defined in civic and social rather than in ethnic terms, in close cooperation with other nation states, as national communities of destiny on the basis of welfare and (West) European cooperation ('integration'), and cohesion imposed by the Cold War.

### The crisis of the 1970s

The crisis of the 1970s destroyed this (West) European political-legal-economic-social dynamic equilibrium of growth legitimized by and confirming the modernization narrative and the European heritage of Enlightenment rationalism. This dynamic equilibrium probably came rather close to the dreams of the exiled German scholars in Britain during the Second World War who mobilized Roman law for historical legitimacy. The arrangement was experienced as stable. The legal and political framing of the European economies promoted social peace through economic growth and redistribution of yields. This legal and political framing employed ever less Roman law à la Koschaker and Catholic religion as points of reference. The modernization narrative and belief in teleological progress moved the attention forwards rather than backwards.

The end of the 1960s brought strains to European full employment economies as workers radicalized their language in a struggle for a bigger share of the economic yield, better working conditions and a reduction in job-related stress. The conflict level grew and claims for economic democracy accompanied strikes, sits-ins and lockouts. Claims went beyond the mere issue of wages and developed into a struggle about the workplace more generally, centring on concepts such as economic democracy, co-determination, *autogestion*, *Mitbestimmung* and state ownership. This struggle, in turn, was intertwined with a larger generational revolt, which in Europe began in France and spread throughout Western Europe, but went beyond Europe as a worldwide escalation of social conflicts and peoples' rebellions against militarism and capitalism, bourgeoisie and bureaucracy. The Prague Spring was its East European version. The year 1968 also saw the birth of the environmental and anti-nuclear movements.

Against the backdrop of general internal radicalization, external factors began to undermine Europe's welfare economies during the first half of the 1970s. The post-war Bretton Woods order based on the dollar, agreed on in 1944, collapsed in 1971. The next blow came in the autumn of 1973 with the oil price shock, which initiated the beginning of a new international world order, a decrease in the power of the old European industrial economies and a growing scope of action for those third world countries producing raw materials.



Key industries such as coal, steel and shipbuilding broke down and mass unemployment occurred for the first time since the 1930s. The ordoliberal social market economy – based on competition rules and distribution of labour between the European market for economic growth and Member State responsibility for the distribution of social welfare – did not function. The same is true of the Keynesian toolkit. The development was generally considered impossible within the Keynesian interpretative framework which provided the toolkit for the management of full employment economies. Memories of the impact on the political system of social protests in the 1930s came back and alarmed European governments. They intervened with massive subsidy packages to stop or slow down industrial decline. Lobbyism and the corporatism of organized interests took on a new magnitude, bypassing the ordoliberal distinction between conform and non-conform state intervention in the economy. The accumulation of massive state debts accelerated inflation under conditions of economic stagnation, a development which ran counter to the theoretical economic wisdom of Keynesianism. The new phenomenon acquired a new name: stagflation.

Ordoliberal and Keynesian ideas progressively lost credibility in the wake of accelerating unemployment, growing public budget deficits and increasing inflation. The imagery of proactive management of the economy shifted to the imagery of political helplessness with only a *reactive* capacity. The development bypassed the ordoliberal framework, in particular the competition rules. A new economic orthodoxy emerged with deep roots in liberal philosophy, prescribing a lesser role for the state and promoting greater market freedom. The market would heal economies from corporatist sclerosis through state management. A new magic word – *flexibility* – promised a panacea. The neo-liberal turn occurred within a larger framework of ideological reorientation where many of the ideas of 1968 around the theme of de-hierarchization and co-determination were redefined by the political right and employers, who appropriated the priority of interpretation. They took over the 1968 language against hierarchies and channelled it in new directions where not least the trade unions became a target of attack.

The 1970s and 1980s saw a huge conceptual confrontation about the redefinition of key concepts such as freedom, equality, solidarity, economic distribution, welfare, state and market. A new semantic field emerged where government, which used to connote state hierarchy with legal and political guarantees of welfare and social standards, shifted to the softer and more market-oriented governance accompanied by terms such as *network* and *coordination*, signalling a retreat from ordoliberal legal prescriptions as well as political ambitions to steer and rule. The reform concept had come to mean social reform since the emergence of the social question as a political problem in the 1830s in particular. Now a redefinition began with the aim of cleansing the term of any social content. The Keynesian honorary term *full employment* disappeared from the political vocabulary like the concept of *welfare state*. Previously, the concept of *employment* was closely connected to rules of certain standards. This connection disappeared in the new vocabulary and the connection to social security eroded. New critical concepts, such as the two-thirds society, emerged in order to describe the development from the left. Social marginalization was the instrument to create political stability in a turbulent time.

A new labour market organization reflected the conceptual transformation. The labour force was increasingly divided between a core of company-loyal employees with fixed employment, on the one hand, and temporary employees, on the other. Around the core, new strata of temporary employment emerged in various forms through outsourcing or hiring and firing with far more precarious employment conditions and future prospects. The reserve army of labour that Marx and Engels had identified in the 1860s re-emerged.

The seeming breakthrough of working-class ideals about work in the late 1960s and early 1970s, with key terms such as *economic democracy*, *co-determination* and *state ownership*, coupled with the apparent step towards realization of the Marxist view of industrial society that it signalled, contained the germs of the dissolution of the working class in its historically established form. The end of industrial society in its centenary existence, where work provided social inclusion and existential meaning, shifted to social exclusion and loss of meaning for many without a workplace identification. State-guaranteed universal social citizenship rights split up in company-specific welfare arrangements and benefits for core employees and emergency relief for the marginalized part of the labour force with occasional work and pay. Employees doing the same job and having the same qualifications, working next to each other at machines and conveyor belts or in offices, could have very different wages and salaries. It is not difficult to imagine the long-term impact of this development on social cohesion and political allegiance.

The breakdown of national patterns of solidarity meant that mass unemployment did not represent the same political problem and threat to social stability as was first anticipated in the 1970s. Instead of social revolution, the period witnessed stabilization through social marginalization and a cultural retreat to old Darwinian metaphors, according to which it became generally accepted that only the stronger could expect to survive in the fight for survival in hardening markets (Str ath 2000; Wagner 2000). Economic liberalism sped up and political liberalism lagged behind in the wake of the growing tension between the national institutional framework of economies and the global performance of economies based on global component flows from regions with cheap labour to the labour-saving assembly of components in regions with higher labour costs. In the wake of this development, the question of social standards and employment security obtained a new dimension beyond the political control of national governments.

The 1970s and 1980s were a great divide in the history of modern Europe. After initial attempts to save collapsing industries, the fundamental transformation of rule-governed and politically managed welfare economies and labour markets went hand in hand with political exit from the guarantee of certain social standards and the decline of Keynesian welfare states and the ordoliberal imageries of social market economies. Keynes's emphasis on confidence in the future changed to experience of the opposite: general uncertainty about the future. This was a fundamental change.<sup>9</sup>

Propagation of a powerful neo-liberal economic vocabulary went hand in hand with a major ideological shift to neo-liberalism. Economic theory stood as the core of the new ideology. Hayek replaced Keynes and the German *soziale Marktwirtschaft*. Flexibility replaced welfare as the key socio-economic concept. The welfare state was

put off as the tax-and-debt state. In the academic underpinning of the conceptual transformation, public choice replaced public finance as a field of investigation. This shift in academic-political perspective had four protagonists: Hayek, Milton Friedman, Margaret Thatcher and Ronald Reagan.

In the 1980s, Hayek and Friedman appeared with evermore convincing prescriptions for getting the economy on track again. The new neo-liberal language mixed Friedman's monetarist approach and Hayek's belief in the market process and the central role of prices rather than the state as regulator of the economy. Their argument was that if there was unemployment it was because wages were too high, and if there was inflation it was because governments spent too much. They contradicted Keynes's demand orientation where government spending was the right prescription in order to boost consumer purchasing power and consumer demand. To answer why Hayek's and Milton's neo-liberal narrative gained credibility, we must look at the great transformation that took place from the 1970s onwards. The new labour markets and the appropriation of the radical language of the 1968 movement by employers under the motto of 'small is beautiful' and 'flexibility' reinforced each other.

Even in 1939, Hayek's neo-liberalism, with his outline of the race-to-the-bottom customs union, was diametrically different from Eucken's, Rüstow's and Röpke's ordoliberal social market economy which, however, as we saw, did not prevent later neo-liberal thinkers as well as their critics from unhistorically incorporating the concept of ordoliberal in the neo-liberal vocabulary, which is an affront against Eucken, Rüstow and Röpke and their fellows (Röpke 1948: xvii). The Roman legacy and the ordoliberal imagery of a legal-political framing of the economy disappeared behind the neo-liberal hegemonic economic view of self-regulating markets beyond political control.

## The value crisis of the 2010s

The Lehman Brothers bankruptcy in September 2008 hit the financial world like a bolt from the blue. The collapse developed into a banking crisis which provoked massive state intervention under the motto of 'too big to fail'. This led to a state debt crisis and a new wave of speculation on the financial markets against state debts, which in turn hit the weak Southern Euro economies, Greece in particular. New state guarantees were mobilized to bail out speculating banks, German and French in particular, from their Greek commitments.

The awakening from the neo-liberal market dream in 2008 was abrupt. The experiences from the 1930s that the European leaders wanted to remember told that it was disastrous to let big banks fail. The experiences they forgot told that austerity politics breaks down political legitimacy and increases xenophobic nationalism. The belief of Merkel's Europe in austerity became a religious dogma with a strong moral message that defied empirical observations. The decline of Greek GNP by 25 per cent over a five-year period from 2010, with over half of its youth unemployed, did not alter this belief. Greece became a test case for political fundamentalism in the centre of Europe. The subtext of religious moralism around the concept of *debt*, which in German (*Schuld*) integrates the double meanings of debt and guilt, triggered a

civilizing and disciplining education campaign against attempts to open up alternative approaches to political management of the economy. Hayek's theoretical construct had collapsed, but it nevertheless remained the central point of reference in the debate. The austerity campaign echoed his 1939 outline of the customs union with the goal of imposing financial discipline among the Member States, an economic constitution without flexibility, an economic iron regime (von Hayek 1980 [1939]). The austerity approach extended the economic crisis to a political crisis and a value crisis.

Perhaps the most obvious parallel to Weimar is the crisis as mutually reinforcing dynamics between economic failure, political incapacity to manage what is ideologically imagined as a global economy without borders and the social crisis driven by the loss of existential orientation around work. Of course, the full employment societies of the 1950s and 1960s did not belong to the historical experience of Weimar. However, recurring feelings of uncertainty, precariousness, segmentation and divisions in the labour markets since the 1970s very much belonged to the Weimar experience. These dynamics have brought the breakdown of European core values with their origin in the Enlightenment project: breakdown in the sense of incapacity to communicate about their contentious meanings.

There is one difference. The value crisis in the 1930s dealt with the possibility of truth and objectivity. The solution to that value crisis was found through relativizing the imageries of truth and objectivity, the decline of positivism, and dissolution of the strong distinction between science and fiction. The present epistemological value crisis is deeper since it questions our imagery of human autonomy, the human as the gauge of everything, human responsibility for creation of the future and the capacity to shape it. In other words, the core message of human sciences is at stake against the backdrop of a powerful ideological language proclaiming that economic processes are driven by natural forces beyond human control. This was the belief that triggered austerity politics both in the 1930s and today.

Parliamentary representative democracy was an ideal but far from a European standard since Enlightenment philosophy and the American and French revolutions. The question is what the economic crisis since 2008 and, more generally, the rapid digital development of global financial capitalism has meant for the preconditions of representative democracy centred on legislative assemblies.

In his dictum 'the sovereign is the one who declares a state of emergency', Schmitt redefined 'sovereignty' from its original locus in theories of democracy in the legislature as representation of the people to the executive, which, after proclaiming a state of exception, used it to eliminate or restrict the ability of the legislative assembly to control the executive. The parliament-circumventing proclamation of a state of exception has become normal practice in contemporary democratic orders, not least in the framework of the politics of Euro rescue (Höreth 2008). The European legal order has lost the power of orientation and guidance with the consequence, in a strong argument by Dieter Grimm, that the Commission and the European Court of Justice have retreated to market activism in the only field where they still have interpretative power: competition rules (Grimm 2016; Grimm 2014; Grimm 2013). This Commission and ECJ market activism without a social dimension, coordinating and monitoring capital concentration and inviting lobby influence by big corporate

business, is far from the ordoliberal market vision of competition rules for a social Europe in the formulation almost seventy years ago. And the imagery of a Roman law legacy is even more remote.

The reference by Angela Merkel to a decision of the Council in response to bank rescues and the Euro crisis as *alternativlos* is a case in point for the view that markets are beyond human control. In a contradictory but consistent way this argument goes hand in hand with the legal market activism that Grimm refers to. Even before the collapse of the financial markets in 2008, Giorgio Agamben had seen the development coming and argued that the distinction between democracy and dictatorship has disappeared.<sup>10</sup> This is a strong formulation without nuances, but authoritarianism is undoubtedly gaining ground in Europe and elsewhere. In Schmitt's view, the proclaimer of a state of exception appropriates the rights of the legislature generally, which is too strong a description of the present situation (Maus 2011: 7-8). However, the question is whether in practice, in the present parliamentary orders, the executive does not exert legislative functions. Of course, there is always the possibility of electing a new legislature and executive, but what difference would it make in attempts to react to global financial capitalism as in the Euro crisis? And is the execution of financial and monetary policies by the president of the European Central Bank, Mario Draghi, against the backdrop of the lack of a European fiscal regime, not an illustration of what Marx before Schmitt in the *Eighteenth Brumaire* described as *die Verselbständigung des Exekutivgewalts*, the emancipation of the executive authority? Or is it a silent delegation of power beyond constitutional cover due to a failure to agree on a common fiscal policy in the European Council?

Roman law as a legal legacy of Europe is no longer a relevant issue. European law – under ever fewer references to Roman law – has lost legitimacy under conditions of legal market activism. The same goes for ordoliberalism, after its incorporation into neo-liberalism. Röpke's second, negative interpretation of the Roman legal heritage as legitimacy of centralized absolutism fits with the present development of authoritarianism, although this development is occurring at the Member State rather than the European level. The alternative legacy binary in Röpke's interpretation, legitimization of individual private ownership rights, has shifted to legitimization of private corporate power and capital concentration, and mutated into his second Roman binary in the shape of 'centralized absolutism'. However, the imagery of a centralized Europe is rapidly losing contours, too. Europe is no longer a threat. The threat is the collapse of Europe itself.

The ongoing search for national identities is guided, not by a belief in progress and a wide horizon of expectations but by the narrow identification of enemies. Interest-based inclusive solidarity is no longer the key in the search for identity, but rather emotional exclusion. Accumulated experience since the 1830s of the need for interest-based social solidarity for the successful construction of community culminated in Röpke's ordoliberal social market-economic imagery and in post-Keynesian Keynesianism, which were abandoned in the 1970s. Hayek's neo-liberal market Europe has failed to develop an alternative framework for identification. Moreover, a narrow and exclusive ethnic nationalism is replacing the dissolution of the horizons of the 1990s after the end of the Cold War. Civic and socially inclusive national solidarity and feelings of

community, constructed during the Cold War period before 1971, are declining. The crisis of the 1970s was a watershed in European history. And we are still living in the shadow of that crisis. Our ongoing crisis since 2008 can be seen as the second half of one long crisis. After the decline of the modernization and globalization narratives, no convincing, mobilizing and legitimizing European narrative has emerged to replace them.

Roman law, in a thick genealogy full of nuances, might – together with social market-economic ordoliberalism – have been a founding stone of the European integration project after 1945, a foundation myth that demarcated Europe from its Nazi and fascist heritage. However, this view of the Roman legacy is problematic and ambiguous in its oscillation between individual autonomy and centralized absolutism, as Röpke argued. Few today believe in the individual autonomy of European Union (EU) citizens. The EU as the incarnation of centralized absolutism was a horrifying picture earlier in the 1990s, when some critics feared a federalization of Europe, and occasionally linked their concern to Schmitt's *Großraum* theory as a warning example for the internal market (Joerges and Ghaleigh 2003). Recent developments towards de-Europeanization and renationalization indicate a general erosion of the legal foundation of the EU, so that questions of the Roman legacy seem less relevant. The EU is losing legitimacy both as a political and as a normative legal order (Tuori and Tuori 2014). In the present state of confusion and political paralysis, not only is the future unclear but also the past. Earlier crises triggered the search for roots and origins but only in connection with a search for new futures. The ongoing European muddling-through politics of presentism has little bearing on the future and little interest in the past. The search for new futures and pasts is taking place in nation states under a growing connection to authoritarianism.

## Notes

- 1 'Definierbar ist nur das was keine Geschichte hat.' Nietzsche 1980 [1887]: 820.
- 2 Grotke and Prutsch 2014; Sellin 2014; Stråth 2016. For a problematization and historicization of teleological views, see Trüper, Chakrabarty and Subrahmanyam 2015.
- 3 Schmitt 1926; Schmitt 1928; Schmitt 1939. Concerning Stresemann, Locarno and Poland, see Stråth 2016: 276.
- 4 Röpke 1944. Quotation is from the English translation, Röpke 1948: xvii.
- 5 For a survey of this debate, see Solchany 2015: 11–33. Patel and Schweitzer 2013: 10 argue that ordoliberal ideas indeed influenced the evolution of European Union competition law during the foundational period following the Treaty of Rome in 1957, but that it was no simple transposition of ordoliberalism from the German setting to the Community. Only specific features of ordoliberal thinking such as individual rights and the rule of law provided a good fit. They are thus aware of the existence of other dimensions of ordoliberalism without naming them, but they do not mention the social political aim in Jean Monnet's design of the European Coal and Steel Community. Ramirez Pérez and van de Scheur 2013 connects ordoliberalism to the neo-liberal orbit: 'Competition law had thus become a goal in itself, and competition law became more Ordo liberal.' The merger of the two concepts is complete in Dale and El-Enany

- 2013: 614, ‘The EU has displayed familiar characteristics: A lack of democratic method and a commitment to a neoliberal (or ordoliberal) doctrine.’ Cf. also Wilkinson 2013: 543, ‘Closely related to what is commonly now referred to as neo-liberalism, ordoliberalism is, one might say, simply more honest and straightforward about the role of the strong state in guaranteeing the “free economy”, which is hardly free and ensuring “the rules of the game,” which are bent when necessary.’
- 6 Cf. Wilkinson 2013: 554, who tends to discern a link between ordoliberalism and liberal authoritarianism.
  - 7 An immense literature is available on Keynes and Keynesianism. See, for instance, Backhouse and Bateman 2011 and Skidelsky 2009. Cf. Magnusson and Stråth 2016: chapter 2.
  - 8 Joerges, Stråth and Wagner 2005. See for Keynesianism Clarke 1998: chapter 10 and Magnusson and Stråth 2016: chapter 2.
  - 9 For the great transformation in the 1970s, see Stråth and Wagner 2017: chapter 9. See also Stråth 2000; Wagner 2000.
  - 10 Agamben 2005. For a critical comment on Agamben, see Maus 2011: 7–8.

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