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## Unity in diversity as Europe's vocation and conflicts law as Europe's constitutional form

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# TranState Working Papers

UNITY IN DIVERSITY AS EUROPE'S  
VOCATION AND CONFLICTS LAW  
AS EUROPE'S CONSTITUTIONAL FORM

CHRISTIAN JOERGES

No. 148

Universität Bremen • University of Bremen  
Jacobs Universität Bremen • Jacobs University Bremen  
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Staatlichkeit im Wandel • Transformations of the State  
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*Christian Joerges*

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as Europe's Constitutional Form***

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## ***Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form***

### **ABSTRACT**

“Unity in Diversity” was the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty. The motto did not make it into the Treaty of Lisbon. This essay argues that it deserves to be kept alive albeit in a new constitutional perspective, namely the reconceptualisation of European law as “new type of conflicts law”. The new type of conflicts law which the paper advocates is not concerned with selecting the proper legal system in cases with connections to various jurisdictions. It is instead meant to respond to the increasing interdependence of formerly more autonomous legal orders and to the democracy failure of constitutional states which result from the external effects of their laws and legal decisions on non-nationals. Europe has many means to compensate these shortcomings. It can derive its legitimacy from that compensatory potential without developing federal aspirations.

The paper illustrates this approach with the help of two topical examples. The first is the conflict between European economic freedoms and national industrial relations (collective labour) law. The recent jurisprudence of the ECJ in *Viking*, *Laval*, and *Rüffert* in which the Court established the supremacy of the freedoms over national labour law is criticised as a counter-productive deepening of Europe's constitutional asymmetry and its social deficit.

The second example from environmental law concerns the conflict between Austria and the Czech Republic over the Temelín nuclear power plant. The paper criticises the reasoning of the ECJ which supports the Czech pro-nuclear policy. It does not suggest an alternative legal outcome but questions the legitimacy of legal rather than political decision-making.

The introductory and the concluding sections generalise the perspectives of the conflicts-law approach. The introductory section takes issue with Max Weber's national state. The concluding section suggests a three-dimensional differentiation of the approach which seeks to respond to the need for transnational regulation and governance.

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## ***Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form***\*

### **PRELIMINARY REMARKS**

“Unity in Diversity” was the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty.<sup>1</sup> This motto deserves to be kept alive despite, or even because of this failure and the retreat of European politics from overt constitutional ambitions. It is even safe to say that, precisely through these failures, the need to come to grips with the challenges that it articulates have become more obvious. The core problem from which this essay departs can be simply stated: the Member States of the European Union are no longer autonomous. They are, in many ways, inter-dependent, and, hence, depend upon co-operation. However, Europe has not transformed into a federation and it *cannot* become a federation as long as its constituent actors do not agree to the federal vision. Should we, nevertheless, keep the federal perspective alive? The reaction to this question cannot be uniform. In view of the histories of European democracies, their uneven potential and/or willingness to pursue the objectives of distributional justice, to respond to economic and financial instabilities, and to cope with environmental challenges, differentiating answers suggest themselves. “Social Europe” is probably the most delicate among these challenges, as long as it remains, at best, unclear whether, and, if so, how, a European federation might respect and re-construct the embeddedness of Europe’s welfare state traditions. This example is by no means exceptional. The sustainability of the whole European project seems to depend upon the construction and institutionalisation of a “third way” between or beyond the defence of the nation state, on the one hand, and federalist ambitions, on the other. This chapter will explore the potential of the conflicts-law approach to provide perspectives within which this challenge can be met.

This is not only an immodest, if not overly ambitious, suggestion, but also one which must not be misunderstood as a sceptic retreat from the European project. As a precau-

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\* Core arguments in this chapter were first presented on the Workshop “The changing role of law in the age of supra- and transnational governance” on 18-19 November 2009 at the Universidad Carlos III de Madrid; they were developed further in the Opening Lecture of the Summer School of the “New International Constitutional Law and Administrative Studies” Summer School on 5 July 2010 at the Central European University in Budapest. I would like to express my gratitude to my commentators in Madrid (Patricia Mindus, Turin, Agustín José Menéndez, Leon, and Andrea Greppi, Madrid, Carlos III and the discussants on the Summer School in Budapest. They all have inspired very significantly the elaboration of the present text.

<sup>1</sup> Article I-8 Draft European Constitutional Treaty (ABl. C 310/1, 16/12/2004).

tionary move, the chapter will, in its first section, recall a classical address of Max Weber. It will use this reference to re-construct the lasting merits and accomplishments of the integration project. It will also, in the same Section II, address the legitimacy *problématique* of this project's institutional design and discuss three significant theoretical efforts of the foundational period in order to cope with this challenge. The following section (Section III) will analyse the responses of these three theories to the post-foundational dynamics of the integration project. Arguing that all three of these traditions realise an exhaustion of their potential to cope with Europe's present challenges, Section IV will present the conflicts-law approach as an alternative response to Europe's legitimacy *problématique*. Two follow-up sections, one on the recent labour law jurisprudence of the ECJ (Section V), the other on its response to the conflict between the Czech Republic and Austria on atomic energy (Section VI), will illustrate the operation of the conflicts-law approach. The concluding Section VII will summarise its problems and perspectives.

## **I. MAX WEBER'S NATION STATE**

Back in 1895, Max Weber gave an inaugural address in the University of Freiburg, then situated in Bismarck's *Kaiserreich* of 1871. His lecture was published in an enlarged version under the title "The National State and Economic Policy".<sup>2</sup> It became a real classic and has now regained a fascinating topicality for two reasons. The first concerns the object of the field study which Weber used to explain some of his more abstract theoretical positions and provocative political views. The field study dealt with the reasons for, and the implications of, the migration of workers. It is of stunning topicality – and the analysis which Weber delivered excels through a precision and subtlety which is difficult to find in the current debates, at least in legal quarters. However, Weber also used this case to explain and defend a vision of the political and economic commitments of the nation state, which is, at best, a contrast to the European vocation – but is, nevertheless, at least negatively instructive, because it helps us to realise to what degree this vision is still alive in contemporary debates and legal arguments.<sup>3</sup>

*Weber drew upon the empirical work which he had undertaken in 1892, while still a Privatdozent in Berlin, in the context of a major Enquête of the Verein für Sozialpolitik (Association for Social Reform) on the situation of the agrarian work-force in the German Reich. He had focused there on "the posting of workers" from Poland to the Prus-*

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<sup>2</sup> *Der Nationalstaat und die Volkswirtschaftspolitik*, (Freiburg i.Br.: C.A. Wagner, 1895) [citations here are from Ben Fowkes' translation in (1980) 9 *Economy and Society*, pp. 420-449].

<sup>3</sup> See the stunning example of the Austrian *Oberster Gerichtshof* discussed in Section VI.2.1 *infra*.

sian Province of West-Prussia. His multi-faceted analysis addressed the transformation of pre-modern of patriarchal structures into a capitalist agrarian economy, identified the pressures which this processes exerted on the landowners, described the incentive structure which fostered the import of “cheap labour” from the neighbouring regions of Poland and from the deeper East Galicia.<sup>4</sup> The capability of the Poles to endure the poor working conditions and the social situation in the new agrarian economy, so Weber observed, was fostering the gradual increase of the Polish and the decrease of the German share. The great theorist of occidental rationalism felt deeply irritated. Weber expressed his concern about the decline of “German-ness” (Deutschtum) in West Prussia, and, equally irritating in EU-perspectives, he called for corrective state measures: a closure of the borders to migrating workers, and the purchase of land by the state.

Even more irritating, however, is what he submits as his “subjective” position - the value judgements nurturing his political advice.

*“And the nation State is for us not an indefinite something that one feels one can place all the higher the more its essence is shrouded in mystical gloom, but the worldly power organisation of the nation, and in this nation State is raison d’état for us, the ultimate value criterion on economic considerations too. It does not mean to us, as a strange misunderstanding believes: ‘state assistance’ instead of ‘self-help’, national regulation of economic life instead of the free play of economic forces, but we want through this slogan to raise the demand that for questions of German national economic policy - including the question whether and how far the State should interfere in economic life or whether and when it ought instead to set the nation’s economic forces free to develop themselves and tear down restraints on them - in the individual case the last and decisive vote ought to go to the economic and political power interests of our nation, and its bearer, the German State.”<sup>5</sup>*

Strong words, indeed. Even Weber’s audience in Freiburg was apparently upset, and Weber distanced himself later from this strong language.<sup>6</sup> What motivated his polemic? Rita Aldenhoff, in her very instructive comments on the address, starts her analysis with a quotation from Weber’s contribution to the *Verhandlungen des 5. Evangelisch-*

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<sup>4</sup> See the fascinating reconstruction of Weber’s analysis of the underlying transformation processes by Ola Ageval, “Science, Values, and the Empirical Argument in Max Weber’s Inaugural Address”, (2004) 4 *Max Weber Studies*, pp. 157-177.

<sup>5</sup> The translation is not taken from the source in note 2 but was done by Iain F. Fraser, Florence.

<sup>6</sup> See Max Weber’s letter to his brother Alfred, cited in Rita Aldenhoff-Hübinger, “Max Weber’s Inaugural Address of 1895 in the Context of the Contemporary Debates in Political Economy”, (2004) 4 *Max Weber Studies*, pp. 143-156, at 146, note 8.

sozialen Kongresses held in Frankfurt in 1894. There, Weber had stated his normative premises quite succinctly:

“We do want ... to shape the conditions of life in a way that makes people feel good, but such that, under the pressures of the unavoidable struggle for life, the best in the, the physical and psychological qualities that we want to save for our nation, will be preserved. Well ... these are value-judgments and they are changeable. Anyway, there is an irrational element.”

Is this a pure nationalist talking? “German-ness”, as defined, can neither be understood as some form of brutal nationalism; nor does it have anything in common with the *homo economicus*, as we know from mainstream economic theorising. Weber’s *homini* are human beings; he exposes them to demands of a different quality. What is, at any rate, noteworthy is the diligence which Weber takes to differentiate between theoretical, economic(al), and the political orientations which should, in his view, inform the *Volkswirtschaftspolitik* (economic policy-making). When he diagnoses the readiness of migrant workers from Poland to accept the hardships of their new existence in the “host state”, he is, in fact, describing what we would call a “race to the bottom” and questioning precisely the “willingness to starve the most” as the underlying mechanism.<sup>7</sup> There is a very critical dimension in Weber’s position, in that he rejects any claim to “objective validity” of arguments presented in the name of economics; such arguments tend to camouflage normative judgements and political choices – a cardinal sin in the eyes of Weber’s epistemology. This is not to defend the substance of Weber’s pronouncements. We cannot but remain irritated when reading about the “role played by physical and psychological racial differences between nationalities [sic!] in their struggle for existence”.<sup>8</sup> But Rita Aldenhoff’s reference to Weber’s trans-economic *Menschenbild* is a stringent defence of Weber the methodologist against Weber’s political polemics. The methodologist remains of great topicality in his critique of spurious claims: not only of the historical school, but also of neo-classical economics<sup>9</sup> - and their negligent contem-

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<sup>7</sup> See Ola Agevall, *ibid.* (note 4), p. 174.

<sup>8</sup> This opening statement of the inaugural address is a core reference in the debates on Webers nationalism, see, for example, Karl Palonen, “Was Max Weber a ‘Nationalist’? A Study in the Rhetoric of Conceptual Change, (2001) 1 *Max Weber Studies*, pp. 196-214. Weber’s nationalism and his political interventions have later nurtured the suspicion of a *liaison dangereuse* with Carl Schmitt (see Kjell Ebelbrekt, “What Carl Schmitt picked up in Weber’s Seminar: A Historical Controversy Revisited”, (2009) 14 *The European Legacy*, pp. 667–684; the young Jürgen Habermas, who had helped to provoke this debate, has clarified his assessment suggesting that it seems more appropriate to call Carl Schmitt Max Weber’s “natural son” (see the reference in K. Engelbrekt, p. 668).

<sup>9</sup> See Ola Agevall, note 4 *supra*, pp. 172-74.

porary use in misguiding rationalisations of the integration project both as a whole and in so many of its segments.

## **II. THE EUROPEAN RESPONSE TO THE FAILURES OF WEBER'S NATION STATES AND THE PROBLÉMATIQUE OF ITS INSTITUTIONAL DESIGN**

The project of European integration can be understood and re-constructed as a response to the failures of the Weberian nation state, and, more generally and in broader perspectives, to Europe's bitter experiences in the twentieth century. After 50 years of integration, however, we are confronted with massive challenges: ever since the turn to majority-voting in the Single European Act of 1987, the compatibility of European rule with its democratic commitments has been discussed with ever increasing intensity. In the aftermath of the French and the Dutch referenda of 2005, concerns about its neo-liberal tilt and the social deficit, *i.e.*, the compatibility of its institutional design and the welfare traditions of European democracies moved to centre stage. The Irish “No” of 2008 to the Treaty of Lisbon was perceived as an erosion of the permissive consensus that had backed the progress of integration. During the present financial crisis, the instability of Europe's economic constitution has become manifestly apparent. All of these unresolved issues and queries seem to suggest that we can no longer be sure about the sustainability of the European project, but have, instead, to re-consider our premises.

It would, of course, be absurd to assume that conceptual re-orientations, which an academic legal exercise, such as the one that we are undertaking, could produce ready-made answers to the type of problems just named, or lead to immediate practical changes. The ambitions which we pursue when suggesting a new way of thinking are much more modest. But in their conceptualisation of the integration project, they propagate a change of paradigmatic proportions. To summarise and accentuate how they contrast with prevailing views, European law tends to be portrayed as an ever growing and ever more comprehensive body of rules and principles of steadily richer normative qualities. This edifice is expected to come together through successive steps of legal integration. Such visions of the integration project and process rest - in part explicitly, in part implicitly - on daring assumptions about the social functions of law and its powers – and its *leitmotiv*. Giandomenico Majone has recently characterised this conundrum as Europe's “operational code”: the “priority of integration over all other competing values”.<sup>10</sup> One need, by no means, subscribe to his diagnosis in all of its aspects when realising that law can, indeed, use this operational code on its “integration through law” path *only if*, and *as long as* it insulates itself from many specifics of national orders,

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<sup>10</sup> Thus, Giandomenico Majone, *Europe as the Would-be World Power. The EU at Fifty*, (Cambridge: Cambridge University Press, 2010), p. 1.

from inherited varieties of conflict patterns and institutional mechanisms within economy and society - and even from the aspirations of its Member States and their governments.

The messages which we are going to submit under the title of the “conflicts-law alternative” differ from the prevailing visions most markedly in two respects. As the recourse to the notion of conflicts law indicates, the approach assigns primacy to the resolution of conflicts arising out of Europe’s diversity, rather than the establishment of a unitary legal regime. Equally important, the approach takes account of the ongoing contestation about the kind of polity which the integration process is to generate. This contestation is not different in principle from the ongoing domestic contests about the proper political order – with the important difference, however, that the law of constitutional democracies provides a framework which channels political contestation, while, in contrast, the law of the integration process cannot build upon this type of legitimating framework. The modesty of the pragmatic ambitions which I have highlighted must not be understood as some complacent gesture. Quite to the contrary, we believe that the type of thinking and counter-visions which we seek to promote rests on quite solid grounds in the deeper structures of the European fabric. Its most widely-known reference point is the “unity in diversity” motto of the Draft Constitutional Treaty.<sup>11</sup> Further precursors and allies can be named, such as Joseph Weiler’s juxtaposition of “Europe as unity” v. “Europe as community”,<sup>12</sup> and Kalypso Nicolaïdes’ vision of a European “*demoi-cracy*”.<sup>13</sup> All that is original about the conflicts-law approach is the plea for a resort to legal categories derived from conflict-of-laws traditions and conflict-of-laws methodologies in the legal re-construction of the “unity in diversity” challenge.

What kind of validity can our plea for re-orientation claim? The binary right/wrong, legal/illegal, lawful/unlawful codes in which the legal system operates and to which lawyers appeal in their doctrinal argumentation cannot be relied upon our considerations without further ado. All of the important theories of legal integration have operated on horizons that cannot be reached directly by that code. They reflected the historical context of the integration project, they sought to cope with the specifics and deficiencies of its institutional design – and, indeed, they continue with similar comprehensive reflections when addressing Europe’s present challenges. The conflicts-law approach situates itself on an equivalent conceptual level. Just like its interlocutors in the legal integration theory, it seeks to re-construct both the accomplishments of the integration project and

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<sup>11</sup> See note 1 *supra*.

<sup>12</sup> See Sections II.3 and III.2.3 *infra*.

<sup>13</sup> K. Nicolaïdis, “The new constitution as European ‘demoi-cracy’?” (2004) 7 *Critical Review of International Social and Political Philosophy*, pp. 76-93.

its present *impasses* and crises; and to evaluate the pros and cons of the competing visions against such a background. It is of crucial importance to underline two limitations of this kind of exercise. It would, for one, be a misunderstanding to expect, from the re-constructions of historical contexts and assumptions, that they would reveal “the true story” - a Leopold Rankan tale of “*wie es wirklich gewesen ist*”. What we seek to understand is the meta-positive assumptions upon which legal conceptualisations of the integration project have relied, and from which they sought to derive normative guidance on their contributions to its operation. We will, then, necessarily, and thus deliberately, have to proceed selectively, albeit not arbitrarily. Our re-construction will depart from and be restricted to three schools of thought of long-term significance. Each of the three approaches has some *fundamentum in re*: each of them can claim to conceptualise important elements of Europe’s integration law, and each of them can provide normative reasons for its specific conceptualisation: the model of European rule (*Sozialmodell*) which it defends and promotes. It is a further characteristic of our re-construction that we take account of both the internal developments of each of these models and the continuous contestation among them, along with the ups and downs in terms of their practical impact. We will also argue, however, that all three have, notwithstanding their remarkable viability, deficits in common, which exhaust their potential to cope with the present challenges that Europe faces.

One common aspect of the three models can be stated negatively. They were perfectly aware of the discrepancy between the European and the national level of governance, and did not conceive of the European Economic Community as a constitutional democracy in being. What they have in common is a search for legitimate governance beyond nation-state confines and frames. Their messages on the modes of transnational governance, however, differ significantly: (1) “Europe should be institutionalised as a technocratic regime and be restricted to that function”. (2) “Europe’s vocation is the establishment of an ‘economic constitution’ which is to protect individual freedoms and to discipline the exercise of political power”; and (3) “Europe has accomplished and should preserve an equilibrium between a supranational legal order and ongoing political bargaining”. We will, in this section, focus on the foundational period, underline a common deficit; the further development of the three approaches; and their potential to cope with the “transformations of Europe” will be addressed in a separate section (III).

## **II.1. Europe as Technocratic Administration: Hans Peter Ipsen and Ernst Forsthoff**

Hans Peter Ipsen was the influential founding father of European Law in Germany. He was a very remarkable protagonist of Germany’s legal scholarship. The Nazi period had



left him paraphrasing Hans Ulrich Jessurun d'Oliveira,<sup>14</sup> “not totally flawless” (*nicht ganz fleckenlos*). His post-war work on the Basic Law of the young German democracy, however, documents very clearly democratic commitments in general, and to the *Sozialstaatlichkeit* of the new order in particular.<sup>15</sup> He started to work on European law at the age of 50 – and helped to establish *Europarecht* as a new legal discipline.<sup>16</sup> Precisely his democratic commitments may explain both: Ipsen’s sensitivity to the precarious legitimacy of the European system on the one hand, and the affinities between his own response and the work of one of the most famous contemporary constitutionalist, namely, Ernst Forsthoff, on the other. These affinities are, at first sight, somewhat surprising in view of the differences in their constitutional theorising;<sup>17</sup> they are, nevertheless, plausible in view of Ipsen’s search for a type of rule whose validity was not dependent on democratic legitimacy. The communities were to confine themselves to administer questions of “knowledge”, but to leave truly “political” questions to democratic and legitimated bodies.<sup>18</sup> The characterisation of the European Communities as “*Zweckverbände funktionaler Integration*” (organisations with functionally-defined objectives)” was path-breaking. With this theory, Ipsen rejected both further-reaching federal integration notions *and* earlier interpretations of the community as a mere international organisation. He saw Community law as a *tertium* between (federal) state law and international law, constituted by its “objective tasks” and adequately legitimised by their solu-

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<sup>14</sup> H.U. Jessurun d'Oliveira, “An Anecdote, A Footnote”, in: H.-P. Mansel *et al.* (eds), *Festschrift für Erik Jayme*, (Munich: Sellier. European Law Publishers, 2004), pp. 387-402. Oliveira, writing in 1968, referred to Hans Dölle, from 1954 onwards one of the Directors of the Max-Planck Institute für ausländisches und internationales Privatrecht in Hamburg; on Ipsen, see Ch. Joerges, “Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project”, in: Ch. Joerges & N.S. Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, (Oxford: Hart Publishing, 2003), pp. 167-191, at 182-84 (note 92).

<sup>15</sup> Suffice it here to point to H.P. Ipsen, “Über das Grundgesetz” (1949), reprinted along with all of his later essays in *idem*, *Über das Grundgesetz*, (Tübingen: Mohr Siebeck, 1988), pp 1-37.

<sup>16</sup> See Hans Peter Ipsen, “Der deutsche Jurist und das Europäische Gemeinschaftsrecht”, in: *Verhandlungen des 43. Deutschen Juristentages*, (Munich: C.H. Beck, 1964, vol. 2 L 14 *et seq*; *idem*, *Europäisches Gemeinschaftsrecht*, (Tübingen: Mohr Siebeck, 1972), p. 176 *et seq*; very remarkable, in the present context, is his rejection of the idea of an economic constitution at both European and national level in his *Gemeinschaftsrecht*, pp. 563-566.

<sup>17</sup> See H.P. Ipsen, *Über das Grundgesetz*, note 15 *supra*, reprinted also in: E. Forsthoff (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, (Darmstadt: Wissenschaftliche Buchgesellschaft, 1968), pp. 16-41, on the one hand, and E. Forsthoff, “Begriff und Wesen des sozialen Rechtsstaats”, in: (1954) 12 *Veröffentlichungen der Vereinigung deutschen Staatsrechtslehrer*, pp. 8-36.

<sup>18</sup> “Europäisches Gemeinschaftsrecht”, (note 16 *supra*), p. 1045.

tion.<sup>19</sup> This theory had an implicit answer to the queries about “the social” on offer. Ernst Forsthoff had, in his contribution to the so-called *Sozialstaatskontroverse*, argued that the realisation of social objectives had to operate outside the rule of law; the provision of welfare was, hence by virtue of the very nature of social policies, characterised as an administrative task, which was incompatible with the commitment to the *Rechtsstaat* (“rule of law”) in the Basic Law.<sup>20</sup> This was not a principled objection against welfare policies. Nevertheless, it is difficult to conceive how the European *Zweckverband* (purposive administrative compound) with its transnational machinery might actively pursue the type of activities which welfare states administer domestically. In more principled terms, it seemed, at any rate, inconceivable that the type of a “hard” legal *Sozialstaats*-commitment, which Forsthoff’s opponents understood as a constitutive dimension of the Federal Republic’s democracy,<sup>21</sup> could be institutionalised at European level.

## **II.2. Europe’s Economic *Ordo*: Walter Eucken and Franz Böhm**

The notion of the “social market economy” was formally introduced into Europe’s constitutional parlance by a joint motion of Joschka Fischer and Dominique Villepin in the course of the debates on the Constitutional Treaty.<sup>22</sup> Their initiative was meant to placate the anxieties over what was perceived as a neo-liberal tilt in the constitutional project. The clause on the social market economy has fulfilled this function quite well in

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<sup>19</sup> See H.P. Ipsen, *Verfassungsperspektiven der Europäischen Gemeinschaften*, (Berlin: Walter de Gruyter, 1970), p. 8 *et seq.*, and the interpretation by M. Kaufmann, *Europäische Integration und Demokratieprinzip*, (Baden-Baden: Nomos, 1997), p. 300 *et seq.*, & 312 *et seq.*; see, also, M. Bach, *Die Bürokratisierung Europas. Verwaltungseliten, Experten und politische Legitimation in Europa*, (Frankfurt aM: Campus, 1999), p. 38 *et seq.*

<sup>20</sup> Ernst Forsthoff, “Begriff und Wesen des sozialen Rechtsstaates”, note 17 *supra*.

<sup>21</sup> The so-called *Sozialstaats*-debate is an evergreen in German constitutionalism; for recent contributions, see O. Eberl, “Soziale Demokratie in Europa und zwischen Konstitutionalismus und Etatismus”, in: Andreas Fischer-Lescano, Florian Rödl & Christoph Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*, (Baden-Baden: Nomos, 2009), pp. 245-256. A. Fischer-Lescano, “Europäische Rechtspolitik als transnationale Verfassungspolitik. Soziale Demokratie in der transnationalen Konstellation“, ZERP Discussion Paper 2/2010, Bremen 2010, available at: <http://www.zerp.uni-bremen.de//publicationen>; Ch. Joerges, “*Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process”, (2010) 9 *Comparative Sociology*, pp. 65-85.

<sup>22</sup> See the references in Ch. Joerges, “What is left of the European Economic Constitution? A Melancholic Eulogy”, (2005) 30 *European Law Review*, pp. 461-489, at 486.

the general public debates, and in the constitutional discourses of both lawyers<sup>23</sup> and political scientists.<sup>24</sup> The vague notion of the “social” and simultaneously “competitive” market economy of the Convention and the Treaty of Lisbon is situated at a great distance from the original and fairly precise contours of Germany “*sozialer Marktwirtschaft*”.<sup>25</sup> As the most important protagonist of the concept, Alfred Müller-Armack, explained repeatedly, the social market economy was to provide a “third way” beyond economic liberalism on the one hand, and beyond socialism on the other. There was no conditioning of social justice by requirements of “competitiveness”; quite to the contrary, the governance of market mechanisms was subjected to the commands of social justice.<sup>26</sup>

Müller-Armack and his political allies were keen to underline the compatibility of their vision with the Ordo-liberal School and the essential role assigned to economic freedoms and the protection of an undistorted system of competition by law and strong politically-independent enforcement authorities. The development of Ordo-liberalism as an economic theory and a vision of a political order started in the early 1920s as a counter-move against the strong cartelisation of the German economy and its corporatist links with a weak political system. The school survived National Socialism; it was per-

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<sup>23</sup> See, for example, F.C. Mayer, “Die Rückkehr der Europäischen Verfassung? Ein Leitfaden zum Vertrag von Lissabon”, (2008) 68 *Zeitschrift für öffentliches Recht und Völkerrecht*, pp. 1141-1217, at 1165 *et seq.* and the contributions to: U. Neergaard, R. Nielsen & L. Roseberry (eds), *Integrating Welfare Functions into EU Law - From Rome to Lisbon*, (Copenhagen: DJØF Publishing, 2009), and most prominently the German Constitutional Court’s judgment of 30 June 2008 on the Treaty of Lisbon. Bundesverfassungsgericht, file no.: 2 BvE 2 / 08, 2 BvE 5 / 08, 2 BvR 1010 / 08, 2 BvR 1022 / 08, 2 BvR 1259 / 08 und 2 BvR 182 / 09, provisional English translation available at: [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html), paras. 195 *et seq.*, English translation at: [https://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208.en.html](https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.en.html).

<sup>24</sup> See, for example, U. Liebert, “Reconciling Social with Market Europe? The EU under the Lisbon Treaty”, in: Dagmar Schiek, Ulrike Liebert & Hildegard Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, (Cambridge: Cambridge University Press, forthcoming 2011), Chapter 2.

<sup>25</sup> See, on the following, Ph. Manow, “Modell Deutschland as an Interdenominational Compromise”, Minda De Gunzburg Centre for European Studies, Working Paper 003/2001; A. Ebner, “The intellectual foundations of the social market economy. Theory, policy, and implications for European integration”, (2006) 33 *Journal of Economic Studies*, pp. 206-223.

<sup>26</sup> See the references in Ch. Joerges & F. Rödl, “‘Social Market Economy’ as Europe’s Social Model?”, in: Lars Magnusson & Bo Stråth (eds), *A European Social Citizenship? Preconditions for Future Policies in Historical Light. Preconditions for Future Policies from a Historical Perspective*, (Brussels: Peter Lang, 2005), pp. 125-158.

ceived as a German tradition which had not been contaminated by National Socialism and was therefore entitled to broad public recognition and influence. The details need not concern us here. However, noteworthy is, our concern for the social dimension of the European project, the initial compatibility of Ordo-liberalism and the model of the social market, and the dissolution of this alliance which was replaced by a new alliance between the second generation of Ordo-liberalism and Anglo-Saxon neo-liberalism.

The leading protagonists of the Freiburg School, the intellectual *Heimat* of Germany's post-war Ordo-liberalism in both economic and legal scholarship, namely, Walter Eucken and Franz Böhm, derived from the dual commitments to the idea of an “undistorted system of competition” on the one hand, and to the promise of social justice and security on the other, the challenging task of institutionalising specific, albeit interdependent, orders, namely, a legally-structured order of industrial relations and of social security (“*Arbeits- und Sozialverfassung*”) along with the legally-guaranteed economic *ordo*: the structured “economic constitution” (*Wirtschaftsverfassung*). In this sense, the economic order which they envisaged was meant to be “socially embedded”.

The “really existing social market economy”, however, had never been as coherently realised as their conceptual *Vordenker* would have liked to see. Even its economic core institution - its *Wirtschaftsverfassung* – was, by no means, a theoretically-uncontested and legally-consolidated project. The strongest practical challenge to the Freiburg style of *Ordnungspolitik* was the *renaissance* of Germany's corporatist traditions already in the early years of the Bonn Republic. The Federal Republic was characterised by permanent tensions between *Theorie und Praxis*: striking discrepancies between the officious rhetoric of *Ordnungspolitik*, on the one hand, and the ongoing bargaining between the political system and the political and economic actors on the other - a German *Lebenslüge*, to be sure, albeit an economically-successful and socially-beneficial arrangement.<sup>27</sup> The perception of this discrepancy will have influenced the (ordo)-liberal “turn to Europe”, which implied a retraction from their earlier more global political preference.<sup>28</sup> The European level of governance promised to ensure stronger barriers against the *renaissance* of Germany's corporatist traditions and its political opportunism in economic affairs than the institutional pillars of Germany's *Ordnungspolitik*.

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<sup>27</sup> Well-documented by W. Abelshauser, *Die Langen Fünfziger Jahre. Wirtschaft und Gesellschaft in Deutschland 1949–1966*, (Düsseldorf: Schwann, 1987).

<sup>28</sup> The scepticism and resistance of leading ordo-liberals has been re-constructed and explained in detail by M. Wegmann, *Fruher Neoliberalismus und europäische Integration: Interdependenz der nationalen, supranationalen und internationalen Ordnung von Wirtschaft und Gesellschaft (1932–1965)*, (Baden-Baden: Nomos, 2002), in particular, p. 351 et seq., for the importance of the political and social constitution for the project of economic integration (pp. 359–366).

### II.3. Europe as Community: Joseph H.H. Weiler

In his very first publication on European issues,<sup>29</sup> Joseph Weiler presented a vision, which he substantiated and defended in his PhD-thesis,<sup>30</sup> then retold, refined and complemented in his seminal narrative on the “Transformation of Europe”:<sup>31</sup> Europe has, in its foundational period, as Weiler argued, managed to establish an equilibrium between legal supranationalism and political intergovernmentalism. His portrayal of European integration was inspired by his teachers in international law on the one hand, and by the work of Erik Stein on the other; but it was path-breaking and unique in its doctrinal lucidity and its sensitivity to the European synthesis of “the political” and the law.

Weiler’s *oeuvre* is a powerful critique of the type of national state which Weber’s inaugural address describes.<sup>32</sup> Nowhere, however, did he talk about something akin to “social Europe”. Even in the concluding passages on democracy in Europe and the legitimacy of the integration project of the “Transformations of Europe”, there is no mention of the possibility that democracy might pre-suppose social justice and that Europe’s socially-defined legitimacy might erode through a destruction of welfare state traditions. And yet, even though Weiler’s value-laden work is characterised by a profound distance from the technocratic precepts and economic rationalisation of the European Community, his visions seem surprisingly compatible with the benign neglect of the “social deficit” of the European order in European legal studies during the foundational period. To be sure, Weiler’s re-construction of Europe as a Janus-headed polity was not meant as a conceptualisation which would exclude Europe’s engagement in social issues as a matter of (legal) principle. However, due to the *Realpolitik* of his analysis, „social Europe“ was an unlikely option and only of limited significance, anyway. It was highly unlikely simply because its advent was dependent on unanimous inter-governmental voting; it was, by the same token, of little concern as the later tensions between the integrationist objective and the legacy of European welfarism were still dormant.

### II.4. Three Concluding Observations

As an interim summary, we can put on record an ambivalent legacy of the foundational period. On its bright side, we note the turning away from the Weberian nation state; less

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<sup>29</sup> J.H.H. Weiler, “The Community system: the dual character of supranationalism”, (1981) 1 *Yearbook of European Law*, pp. 257–306.

<sup>30</sup> *Idem*, *Il sistema comunitario europeo : struttura giuridica e processo politico*, (Bologna: Il Mulino, 1985).

<sup>31</sup> *Idem*, “The Transformation of Europe”, (1990–91) 100 *Yale Law Journal*, pp. 2403–2485.

<sup>32</sup> See the thorough analysis by D. Gaus, “Legitimate Political Rule without a State? An analysis of Joseph H.H. Weiler’s justification of the legitimacy of the European Union qua non-statehood”, RECON Online Working paper 2008/12, available at: [www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html](http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html).

fortunate, however, was the benign neglect of the welfarist commitments of West European democracies. Both aspects deserve some further comments.

#### ***II.4.1 The Taming of Weber's National State***

The designers of the EEC-Treaty were both realistic and wise enough to understand that the darker legacy of the European political and economic nationalism would not fade away with the end of the war. Their objectives, however, were institutionalised prudently. The three foundational theories which we have sketched out have understood these messages and integrated them into their conceptualisation of the European project: no discrimination on grounds of nationality, no resorting to the political power of the state as an instrument of parochial economic advantage, and common economic freedoms in the pursuit of economic prosperity – this was the lesson Europe seemed to have learned.

#### ***II.4.2 The Neglect of the Welfare State Legacy of European Democracies***

We have defined the second communality of the early legal-integration theories negatively. It is more troubling, because the institutionalisation of welfare commitments could be, and has been, in fact, widely understood as a “second pillar” of Europe’s democratic conversion, a societal shield providing protection against a rebirth of the social anxieties which nationalist movements had instrumentalised. Why is it, we are both inclined and entitled to ask, that precisely the welfare state traditions of European democracies are not visible in the legal theories of European integration? Why does it need historians such as Alan Milward<sup>33</sup> and Tony Judt<sup>34</sup> to remind Europe’s legal academia that welfare traditions are what Europeans *do* have in common and what distinguishes their collective memories from that of American citizens? Why does it need political scientists like Fritz W. Scharpf<sup>35</sup> and Giandomenico Majone<sup>36</sup> to remind European constitu-

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<sup>33</sup> A. Milward, *The Rescue of the European Nation-State*, (London: Routledge, 1992), p. 21 *et seq.*

<sup>34</sup> T. Judt, *Postwar: A History of Europe since 1945*, (New York: The Penguin Press, 2005), pp. 791 *et seq.*; *idem*, *Ill Fares the Land*, (New York: The Penguin Press, 2010), pp 127- 237 and *passim*.

<sup>35</sup> See, for example, Fritz W. Scharpf, “The European Social Model: Coping with the Challenges of Diversity”, (2002) 40 *Journal of Common Market Studies*, pp. 645-670, at 645-646, and, recently, “The Asymmetry of European Integration or why the EU cannot be a ‘Social Market Economy’”.

<sup>36</sup> *Europe as he Would-be World Power*, (note 10 *supra*), p. 128 *et seq.* Majone is well aware, however, of the foundational moment; see his classic *Regulating Europe*, (London-New York: Routledge, 1996), p. 1: “At the end of the period of reconstruction of the national economies shattered by the war income redistribution and discretionary macroeconomic management emerged as the top policy priorities of most Western European governments...”

tionalists, albeit in very different perspectives, of the structural asymmetries in their constitutional visions? How can a scholar of the format and sensitivity of Joseph Weiler, in his seminal narrative on the “Transformation of Europe”,<sup>37</sup> fail to address the issue of “social Europe”, and, even in his comment on the Treaty of Maastricht, continues to present “prosperity” as Europe’s second value without ever relating it to social justice. What he offers instead is quite in line with his appeal to “Community”, a somewhat metaphorical uploading of the notion of “prosperity” with a “solidarity” dimension: a soft power, which he expects to control “the demonic at the statal economic level”.<sup>38</sup> Is it by chance that, in European constitutionalism, it took primarily labour lawyers to remind us of the importance of “the social” for democratic constitutionalism?<sup>39</sup>

The omission of a “social dimension” in the conceptualisation of the European project does not seem like a surprising omission, as a downright failure. During the foundational period, welfare state policies and practices were, of course, controversial in many respects, but they were understood as *national* affairs. Only with hindsight have the implications and effects of this constellation become so clearly visible. Stefano Giubboni, who has carefully re-constructed both the mindset of the “founding fathers” and the political bargaining over the Treaty of Rome, concludes that we have to understand this outcome not as a mere failure, but as a “historical compromise”.<sup>40</sup> The parties to this compromise are said to have trusted in the wisdom of eminent economists who expected very positive effects from an opening of national *Volkswirtschaften*;<sup>41</sup> they may also have trusted in the sustainability of a constellation which eminent political scientists were to characterise as a politically and socially “embedded liberalism”.<sup>42</sup> Such positive

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<sup>37</sup> Note 31 *supra*, see, in particular, p. 2476 *et seq.*

<sup>38</sup> See J.H.H. Weiler, “Fin-de-Siècle Europe” in: R. Dehousse (ed), *Europe After Maastricht: An Ever Closer Union*, (Munich: C.H. Beck, 1994), pp. 203-216, at 208 *et seq.*

<sup>39</sup> See B. Bercusson, “Social policy at the Crossroads: European labour law after Maastricht”, in: R. Dehousse (ed), note 38 *supra*, pp 149-186; S. Giubboni, *Social Rights and Market Freedoms in the European Constitution. A Labour Law Perspective*, (Cambridge: Cambridge University Press, 2007); B. Bercusson, S. Deakin, P. Koistinen, Y. Kravaritou, U. Mückenberger & A. Supiot, “A Manifesto for Social Europe”, (1997) 3 *European Law Journal*, pp. 189-205.

<sup>40</sup> *Ibid.*, p. 7.

<sup>41</sup> See, most notably, the “Ohlin Report”: International Labour Organisation, “Social Aspects of European Economic Co-operation. Report by a Group of Experts”, in (1956) 74 *International Labour Review*, pp. 99-123.

<sup>42</sup> J.G. Ruggie, “International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order”, (1982) 36 *International Organization*, pp. 375-415; see J. Steffek, *Embedded Liberalism and its Critics: Justifying Global Governance in the American Century*, (New York: Palgrave Macmillan, 2006).

expectations seem well compatible with the stringent transnational regulation of the agricultural sector where such interventionism has been held to be indispensable. Legal scholarship, however, treated this socially extremely-important and economically extremely-costly domain as an “exception” in the European edifice, which did not deserve, and did not, in fact, attract, closer academic scrutiny for a very long time to come.<sup>43</sup>

### ***II.4.3 Historical Indeterminacy and the Indispensability of Theory in Legal Argumentation***

The differences in the re-construction of the foundational constellation between the institutional generalists in European legal scholarship on the one hand, and a later generation of labour law constitutionalists on the other, are quite illuminating: Brian Bercuson, writing under the impression of the Treaty of Maastricht, put all his hopes on the “outstanding importance” of what was accomplished therein.<sup>44</sup> Stefano Giubboni, writing a decade later,<sup>45</sup> complemented the projection of positive signals in European development in his comments on the later Treaty amendments and on the (Draft) Constitutional Treaty;<sup>46</sup> in addition, he started to seek legally-relevant backing for his views of the “compromise” which he read into the Treaty of Rome:

*“[T]he apparent flimsiness of the social provisions of the Treaty of Rome (and of the slightly less meagre ones of the Treaty of Paris, was in reality consistent with the intention, imbued with the embedded liberalism compromise, not only preserve but hopefully to expand and strengthen the Member States’ powers of economic intervention and social governance: i.e., their ability to keep the promise of protection underlying the new social contract signed by their own citizens at the end of the war.”<sup>47</sup>*

*Lasciate ogni speranza* is, instead, the main message of Florian Rödl,<sup>48</sup> writing in the

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<sup>43</sup> Until F. Snyder, *Law of the Common Agricultural Policy*, (London: Sweet and Maxwell, 1985); for a comprehensive recent analysis, see K. Zurek, “European Food Regulation after Enlargement: Should Europe’s Modes of Regulation Provide for more Flexibility”, Ph.D Thesis EUI Florence 2010 (Chapter III).

<sup>44</sup> *Ibid.*, note 39 *supra*, p. 183.

<sup>45</sup> S. Giubboni, *Diritti Sociali e Mercato. La Dimensione Sociale dell’Integrazione Europea*, (Bologna: Il Molino, 2003); English version: *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective*, note 39 *supra*.

<sup>46</sup> Giubboni, *Social Rights*, note 39 *supra*, pp. 94-150.

<sup>47</sup> *Ibid.*, p. 16.

<sup>48</sup> F. Rödl, “Labour Constitution”, in: A. v. Bogdandy & J. Bast (eds), *Principles of European Constitutional Law*, (Oxford: Hart Publishing, 2010), pp. 605-640; very similar, see L. Niglia, “Form and Substance in European Constitutional law: The ‘Social’ Character of Indirect Effect”, (2010) 16 *European law Journal*, pp. 439-457.



wake of *Viking* and *Laval*, as far as the actual development of the Union is concerned. He renews, however, the defence of “Social Europe” by the re-construction of the foundational constellation as a legally significant “compromise”. It seems, indeed, plausible to argue that the premises of the negotiators and their understanding of the EEC Treaty should be taken into account in the interpretation of Treaty provisions such as Article 153 (5) TFEU (ex-Article 137 (5)), which stipulates that “the provisions of this Article shall not apply to pay, the right of association, the right to strike and the right to impose lock-out”.<sup>49</sup> The legal surplus of such suggestions seems minimal, however, and is a shaky ground for far-reaching conclusions as to the Union’s social commitments. The Treaty of Rome has mentioned significant social fields in its Title III of Part Three, and Member States were, as Article 118 EEC Treaty confirms, expected to co-operate closely. It is also true that distributional and income policies were foreseen in an important part of the European Economy, namely, agriculture. Agustín José Menéndez<sup>50</sup> reads these provisions as strong elements of a federal structure foreshadowing the strengthening of the federalisation of Europe, whereas, in Giandomenico Majone’s view,<sup>51</sup> they confirm that the social-policy domain was “considered to be outside the competence of the supranational institutions”.<sup>52</sup> Both of these readings are based upon the same historical evidence. Both of them can claim to be valid – but they need to base their claims upon re-constructions which are informed by non-historical theoretical premises.

What we can more safely assume is simply that the negotiators operated on the assumption of some kind of “embedded liberalism” and its sustainability, so that the protagonists of welfare policies could live with the compromise. If such expectations are proved to be wrong, legal reasoning must not assume that conclusive normative arguments can be derived from “historical facts”; it must, instead, engage in conceptual deliberations and controversies. It must also become aware of the non-historical normative and analytical issues underlying historical re-constructions such as those we have just mentioned. These issues are complex and sensitive: Does democratic governance, as a matter of principle, require that the objectives of social justice can be pursued by the political system? If so, is it at all conceivable that welfare policies can be successfully institutionalised at European level, or do in view of the diversity of socio-economic conditions, political traditions and preference rather promise to preserve their variety?

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<sup>49</sup> On the doctrinal controversies on this provision, see Section V.3.2. *infra*.

<sup>50</sup> “United they diverge? From conflicts to constitutional theory? Critical remarks on Joerges’ theory of conflicts of law”, this volume.

<sup>51</sup> Majone, *Europe as the Would-be World Power*, note 10 *supra*, p. 131 *et seq.*

<sup>52</sup> *Ibid.*, p. 132.

### III. HINDSIGHT AND FORESIGHT

We started this chapter by listing some enormous challenges which Europe is facing today. The “social deficit”, which we have traced back to the institutional design of the Treaty of Rome, is just one of them, albeit one of particular importance in view of the collateral damage in terms of the social acceptance of the Union and the growing risks of populism and xenophobia. The social deficit furthermore illustrates particularly drastically the *impasses* of European politics, which result from the reliance of the integration project on the so-called Community Method. We will - in the first step of this section - illustrate these difficulties briefly before we take up the discussion of the three legal conceptualisations of the integration project again. The development of these conceptualisations mirrors the practical *impasses* of European politics, as we will argue. However, it is important not to misunderstand the exercise that we are undertaking as some fundamental critique, not even as a further characterisation of Europe as a “faltering project”.<sup>53</sup> Instead, its objective is to pave the way for a paradigm shift which would defend the Union’s accomplishments, and simultaneously open new perspectives.

#### III.1. Fragile Pillars of “Social Europe”

The story of Social Europe has much in common with Michael Ende’s most famous fairy tale.<sup>54</sup> Every move in the process of economic integration was accompanied by counter-moves towards a social re-embedding of the European polity. However, these counter-moves did not merely occur through the conferral of new competences to the Community in treaty amendments and subsequent legislative arenas. The ECJ, in particular through its anti-discrimination jurisprudence, operated as a progressive instigator, and the reference procedure was often enough prudently and successfully used by labour law networks.<sup>55</sup> However, most of the changes were piece-meal without comprehensive long-term background agenda.

Social aspirations were more explicitly articulated in the aftermath of the Treaty of Amsterdam. The contours of what was to constitute Europe’s “social dimension”, however, remained vague. Key concepts from national welfare states appeared in official documents without an equivalent institutional background. This held true for Germany’s “*soziale Marktwirtschaft*”,<sup>56</sup> for France’s “*services publiques*”,<sup>57</sup> and T.H. Marshall’s

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<sup>53</sup> See J. Habermas, “European Politics at an Impasse. A Plea for a Policy of Graduated Integration” in: *idem, Europe: The Faltering Project*, (Cambridge: Polity Press, 2009), pp. 78-106.

<sup>54</sup> Michael Ende, *The Neverending Story*, (*Die unendliche Geschichte*) (New York: Penguin Books, 1983).

<sup>55</sup> See S. Sciarra, (ed), *Labour Law in the Courts. National Judges and the European Court of Justice*, (Oxford: Hart Publishing, 2001).

<sup>56</sup> See references above in notes 25, 26 & 35.

notion of “social rights”.<sup>58</sup> The only transnational European innovation was the “Open Method of Co-ordination” (OMC) which the Lisbon Council of 2000 brought to bear in new areas of social policy.<sup>59</sup> Even Fritz W. Scharpf initially suggested that this alternative to the traditional community method “could hold considerable promise”.<sup>60</sup> Sophisticated theorists were persuaded by the prospect of a seemingly democratic “learning through monitoring”.<sup>61</sup> This initial enthusiasm was to fade away with the rather modest accomplishments of the Treaty of Lisbon, so many ambivalent or inconclusive practical experiences<sup>62</sup>, and, the recent dis-embedding moves in the labour law jurisprudence of the ECJ.<sup>63</sup>

### **III.2. The Foresight of Theory: Three Retractions**

The rejection of all the constitutional ambitions in the Treaty of Lisbon and the present *impasses* of the integration *praxis* (practise) are also observable in the legal integration theory. Tellingly enough, this holds true for all of the three conceptualisations that we have sketched out above. This observation seems the more significant, as these three models – technocratic rule, economic rationality, and the community vision – were not chosen at random. They represent - quite comprehensively - the evolutionary options

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<sup>57</sup> See the comparative account in M. Krajewski, *Grundstrukturen des Rechts öffentlicher Dienstleistungen*, (Heidelberg: Springer, 2010), p. 55 *et seq.*; for the European level, see U. Neergard, “Services of General (Economic) Interest: What Goals and Values Count?”, in: U. Neergard *et al.*, note 23 *supra*, pp. 191-225.

<sup>58</sup> T.H. Marshall, “Citizenship and Social Class”, in: *idem*, *Class, Citizenship and Social Development*, (Westport CT: Greenwood Press, 1973), pp. 65-122.

<sup>59</sup> See for an analysis of the legal meaning of coordination powers by Beate Braams, “Die Kompetenzordnung im Vertrag von Lissabon”, in: Ingolf Pernice (ed), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?*, (Baden-Baden: Nomos, 2008), pp. 115-134.

<sup>60</sup> See F.W. Scharpf, “European Governance: Common Concerns vs. The Challenge of Diversity”, in: Christian Joerges, Yves Mény & J.H.H. Weiler (eds), “Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance”, EUI Florence/NYU Law School 2002, pp. 1-12, at 9, available at: <http://www.eui.eu/RSCAS/Research/OnlineSymposia/Governance.shtml>.

<sup>61</sup> Ch.F. Sabel & J. Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the European Union”, (2008) 14 *European Law Journal*, pp. 271-327.

<sup>62</sup> For a recent comprehensive evaluation in legal theory perspectives, see M. Dawson, *New Governance and the Proceduralisation of European Law: The Case of the Open Method of Coordination*, (Cambridge: Cambridge University Press, forthcoming 2011), for an analysis in social theory perspectives, see Poul F. Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe’s Post-national Constellation*, (Oxford: Hart Publishing, 2010).

<sup>63</sup> See Section V.2 *infra*.

among which the integration project could choose and kept oscillating. All of them have been continuously present since the foundational period. They have been developing, even mutating, within their particular perspectives, be it in their responses to changing contexts, or be it through mutual observation and political learning. We can neither try to document the continuities and innovations within each tradition, nor discuss the affinities between them in any detail. It is sufficient, for our argument, to characterise crucial transformations within each of them – and to underline telling parallels in their diagnosis of the current *impasses*.

### ***III.2.1 Technocracy without Efficiency: Majone's Critical Turn***

The importance of the technocratic tradition in the *praxis* (practise) of the integration project can hardly be over-estimated. Its weight was bound to increase with the involvement of the European Community in ever more regulatory policies which were to be organised at transnational levels without the backing of a consolidated democratic order. How else than through an “objective” and expertise-based conceptualisation of its enormous tasks could the European Community hope to ensure the acceptance of its involvement in ever more problem-solving activities? The by far most interesting and influential work which renewed and refined the technocratic legacy is that of Gian-domenico Majone.<sup>64</sup> It is unique not only in its clarity and coherence, but also in its reflections of the options for an alternative to the democratic constitutionalism of the Member States of the European Union. Majone's famous conceptualisation of Europe as a “regulatory State”<sup>65</sup> which operates essentially through non-majoritarian institutions was conceived as ensuring the credibility of commitments to what were, in principle, uncontested policy objectives. Welfare policies pose additional problems. The Union's failure to institutionalise a comprehensive social policy results partly from the “reluctance of the Member States to surrender control of a politically salient and popular area of public policy”; equally important is the factual difficulty and political impossibility of replacing the variety of European welfare state models and traditions with some integrated European scheme.<sup>66</sup> Not only does Majone respect the primacy of constitutional

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<sup>64</sup> Who confronted Europe's integration studies right upon his return to Europe with essays like “Regulating Europe: Problems and Prospects”, (1989) 3 *Jahrbuch zur Staats- und Verwaltungswissenschaft*, pp. 159-177; “Cross-national resources of regulatory policymaking in Europe and the United States”, (1991) 11 *Journal of Public Policy*, pp. 79-106 and kept working on the perspectives outlined therein ever since (see, most recently, his *Europe as the Would-be world power*, (note 10 *supra*).

<sup>65</sup> G. Majone, “The European Community as a Regulatory State”, 1994-V/1 *Collected Courses of the Academy of European Law*, (The Hague-Boston MA-London: Martinus Nijhoff, 1996), pp. 321-419.

<sup>66</sup> Majone, *Europe as the Would-be World Power*, (note 10 *supra*), p. 144.

democracies, he also, and with increasing urgency, underlines the fallacy of an ever more perfect and comprehensive subjection of the integration project to its “operational code”, the principle “that integration has priority over all competing values”,<sup>67</sup> and also the camouflage strategies which he calls “integration by stealth”.<sup>68</sup> This is an alarming retraction from his earlier trust in the problem-solving potential of the European project. However, his warnings do, by no means, reflect a change of theoretical premises. Majone continues to underline that Europe is not legitimated to pursue the type of distributional politics which welfare states have institutionalised.<sup>69</sup> He does not retract his plea for regulatory efficiency. His critical turn is, instead, motivated by the *inefficiencies* which he observes in the Union’s operations. His quest for more modesty in Europe’s ambitions (“*Geht’s nicht eine Nummer kleiner?*” [Can we not lower our sights])<sup>70</sup> summarises these observations. His adaptation of the “unity in diversity” formula<sup>71</sup> is an implication of these insights to which we will return in Section IV.

### ***III.2.2 What is Left of the Economic Constitution: Ordo-liberal Concerns***

The institutionalisation of economic rationality is most widely perceived today, either affirmatively or critically, as Europe’s main agenda.<sup>72</sup> This perception has gained prominence since the legendary White Paper on the Completion of the Internal Market.<sup>73</sup> At that stage of the integration process, the ordo-liberal tradition had experienced a deep transformation. That mutation had started at national level with the move of Friedrich von Hayek from Chicago to Freiburg and his promotion of version of neo-liberalism situated between the Freiburg School’s orthodoxy on the one hand, and the Chicago School’s normative complacency on the other. Von Hayek’s notion of “compe-

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<sup>67</sup> *Ibid.*, p. 1.

<sup>68</sup> See his *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, (Oxford: Oxford University Press, 2005).

<sup>69</sup> Majone, *Europe as the Would-be World Power*, (note 10 *supra*), p. 128 *et seq.*

<sup>70</sup> *Ibid.*, p. 170 *et seq.*

<sup>71</sup> *Ibid.*, p. 205 *et seq.*

<sup>72</sup> See, on the one hand, the contributions on European economic law in A. von Bogdandy & J. Bast (note 48 *supra*) by A. Haltje (“The Economic Constitution within the Internal Market), pp. 589-629, and J. Drexler (“Competition Law as Part of the European Constitution“), pp. 659-679, which are strongly indebted to the ordo-liberal tradition, and M. Höpner & A. Schäfer (2010): “A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe”, (2010) 33 *West European Politics*, pp. 344-368, on the other. Such theoretical controversies vary, of course, as strongly as Europe’s varieties of capitalism.

<sup>73</sup> European Commission, “White Paper to the European Council on Completion of the Internal Market”, COM (85) 310 final, 14 June 1985.

tion as a discovery process” captures the essence of his messages best. They have led the second generation of ordo-liberal scholars to re-define the objectives and the methods of national and European competition law. Attention shifted from the control of economic power to the protection of entrepreneurial freedom and the critique of anti-competitive regulation. What happened in the 1970s had been not anticipated, but was analysed with an amazing precision a good number of years ago by Michel Foucault in the course of the lectures he delivered at the *Collège de France*.<sup>74</sup> There, Foucault characterised the ordo-liberal vision of the strong state which is committed to the protection of the competitive ordering of the market as new type of *governmentalité*, namely, the acceptance of market governance by the political system and the whole of society.<sup>75</sup> There are remarkable affinities between the second generation Ordo-liberalism and the Chicago school when it comes to practical issues of competition law and policy, but they have never led to a real merger of the two schools. The heirs of Eucken and von Hayek did not subscribe to the Chicago understanding of economic output efficiency and “consumer welfare” but continued to define and defend the “system of undistorted competition” as the core of Europe’s “economic constitution”.<sup>76</sup> They witnessed, however, a steady decline in the impact of their visions, which became clearly visible in the substantial broadening of European economic policies in the Treaty of Maastricht,<sup>77</sup> the so-called “modernisation” of European competition law,<sup>78</sup> and the move towards a “more economic approach”.<sup>79</sup> The weakening of their ideational power was symboli-

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<sup>74</sup> M. Foucault, *Naissance de la biopolitique. Cours au Collège de France*, (Paris: Seuil/Gallimard, 2004), especially the lesson of 7 February 1979 pp. 105-134, and the lesson of 14 February 1979, pp. 135-164.

<sup>75</sup> *Idem*, “... [A]u lieu d’accepter une liberté du marché, définie par l’État et maintenue en quelque sorte sur surveillance étatique... eh bien, disent les ordolibéraux, il faut entièrement retourner la formule et se donner la liberté du marché comme principe organisateur et régulateur de l’État... Autrement dit, un État sous surveillance du marché plutôt qu’un marché sous surveillance de l’État”, *Biopolitique* (note 7), Lesson 5, p. 120.

<sup>76</sup> See E.-J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union. Beiträge zu Recht, Theorie und Politik der europäischen Integration*, (Baden-Baden: Nomos, 2003), with a collection of essays written from 1965 to 2001 and his recent critique of E. Posner in: *A legal theory without law: Posner v. Hayek on Economic Analysis of Law*, (Tübingen: Mohr Siebeck, 2007), also available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1168422](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1168422).

<sup>77</sup> See M.E. Streit & W. Mussler, “The Economic Constitution of the European Community. From ‘Rome’ to ‘Maastricht’”, (1995) 1 *European Law Journal*, pp. 5-30.

<sup>78</sup> H. Schweitzer, “Competition Law and Public Policy: Reconsidering an Uneasy Relationship: The Example of Art. 81” (December 1, 2007), available at SSRN: <http://ssrn.com/abstract=1092883>.

<sup>79</sup> See D. Schmidtchen, M. Albert & Stefan Voigt (eds), *The More Economic Approach to European Competition Law*, (Tübingen: Mohr Siebeck, 2007).

cally confirmed when French Prime Minister Sarkozy saw to it that the Union's commitment to "a system ensuring that competition is not distorted" was not included in Article 3 TFEU (ex-Article 2 TEU), but moved back into Protocol 27 of the Treaty of Lisbon.<sup>80</sup>

### ***III.2.3 Unity without Community: J.H.H. Weiler's Constitutional Complacency***

Joseph Weiler's early work can, in hindsight, be identified as being truly path-breaking in that it synthesised, in a novel way, Europe's constitutive historical move towards a common peaceful future, the construction of a supranational legal alternative to the role of international law in the system, while remaining aware of the political embeddedness and dependency of these accomplishments. The great normative perspectives and the sensitive realism in his design of equilibrium between "legal supranationalism" and "political intergovernmentalism", however, gradually became even more apparent as Weiler sought to develop his construct and vision further in the light of European experiences, accomplishments and failures. In his seminal article on the "Transformation of Europe", he delivered an insightful diagnosis of the problematical implications of majority-voting in terms of Europe's legitimacy.<sup>81</sup> He was among the first to realise the normative and political ambivalences of the completion of the Internal Market by the Delors Commission:

*"[T]o regard the Community as a technological instrument is, in the first place, to underestimate the profound political choice and cultural impact which the single market involves – a politics of efficiency, a culture of market."*<sup>82</sup>

We can summarise the forgoing observations in a second interim conclusion: the *impasses* of the integration *praxis* are mirrored and foreshadowed by the exhaustion of the main theoretical perspectives which have accompanied and oriented legal reflections, theoretical conceptualisations and the prescriptive modelling of Europe's *finalité*. Where practice and theory concur that significantly in their retroactive moves, the time for re-considering an alternative paradigm seems to be right.

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<sup>80</sup> Legally speaking, the removal looks insignificant, as, for example, Peter Behrens has underlined: "Der Wettbewerbsvertrag von Lissabon", (2008) 21 *Europäische Zeitschrift für Wirtschaftsrecht*, p. 193; the Law's truth, however, is not the whole truth.

<sup>81</sup> Weiler, "The Transformations of Europe", note 31 *supra*, p. 2461 *et seq.*

<sup>82</sup> Weiler, "Fin-de-Siècle Europe", note 38 *supra*, p. 215.

#### **IV. EUROPE’S LEGITIMACY PROBLEM REVISITED: THE CONFLICTS-LAW ALTERNATIVE**

Europe’s “operational code” is to prioritise integration “over all other conceivable values including democracy”.<sup>83</sup> “Unity in diversity”, the motto of the Constitutional Treaty, has become Majone’s new *leitmotiv*.<sup>84</sup> The legal form of this motto is the reconceptualisation of European law as a new type of supranational conflicts law. That approach, however, seeks to open much broader perspectives than Majone envisages in his plea for political modesty. Rather than repeating this argument once more,<sup>85</sup> commentary is restricted here to a depiction of its five core messages.<sup>86</sup>

##### **IV.1. Conflicts Law as Democratic Commandment**

The entire construction is built upon a sociological observation with normative implications. Under the impact of Europeanisation and globalisation, contemporary societies experience an ever stronger schism between decision-makers and those who are impacted by decision-making. This schism is explained by Niklas Luhmann within his sociological risk theory. According to Luhmann, the problem arises because decision-making on risks is always characterised by the fact that the potential damage is not simply borne by individual decision-makers, nor is it only suffered by the persons profiting from the decision.<sup>87</sup> Luhmann’s sociological observation is normatively disquieting in democratic orders. Suffice it here to point to Jürgen Habermas’ first essay on European integration,<sup>88</sup> which he published prior to the completion of his discourse theory of law

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<sup>83</sup> Majone, *Europe as the Would-be World Power*, note 10 *supra*, p. 1.

<sup>84</sup> *Ibid.*, p. 205 *et seq.*

<sup>85</sup> For early versions, see Ch. Joerges, “The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Legal Disciplines - an Analysis of the Directive on Unfair Terms in Consumer Contracts”, (1995) 3 *European Review of Private Law*, pp. 175-192; “The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective”, (1997) 3 *European Law Journal*, pp. 378-406; “Deliberative Supranationalism” – A Defence”, European Integration online Papers (EIoP); 5 (2001) No. 8, available at: <http://eiop.or.at/eiop/texte/2001-008a.htm>.

<sup>86</sup> In the following, I draw on “Integration through Conflicts Law: On the Defence of the European Project by means of alternative conceptualisation of legal constitutionalisation”, in: Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification*, (Antwerp: Intersentia, 2010), pp. 377-400.

<sup>87</sup> N. Luhmann, *Soziologie des Risikos*, (Berlin: Walter de Gruyter, 1991); colourfully and laconically summarised in, for example, *idem*, *Das Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1995), pp. 141-143.

<sup>88</sup> J. Habermas, *Staatsbürgerschaft und nationale Identität*, (Citizenship and National Identity), (Zurich: Erkner, 1991).



and democracy,<sup>89</sup> and later elaborated in greater detail:<sup>90</sup> increasingly, constitutional states are unable to guarantee the inclusion of all of those persons who are impacted upon by their policies and politics within their internal decision-making processes. The democratic notion of self-legislation, however, which postulates that the addressees of a law should be able to understand themselves as its authors, demands “the inclusion of the other”.

## **IV.2. The Supranationality of European Conflicts Law**

This plea for a new understanding of EU law must not serve as a retraction from supranationalism as such, the connotations of its terminological origin notwithstanding. Quite to the contrary, it furnishes a justification for the validity of the supranational jurisdiction – albeit one which is, just like the three models of legal integration theory discussed above,<sup>91</sup> at the same time depicting the limits of supranational rule. To rephrase its sociological and normative basis slightly: as a consequence of their manifold degree of inter-dependence, the Member States of the European Community/Union are no longer in a position to guarantee the democratic legitimacy of their policies. A European law that concerns itself with the amelioration of such external effects, *i.e.*, which seeks to compensate for the failings of national democracies, may induce its legitimacy from this compensatory function. With this, European law can, at last, free itself from the critique that has accompanied it since its birth; a critique that states that it is *not* legitimate. It can thus operate to strengthen democracy within a contractual understanding of statehood, without needing to establish itself as a democratic state.<sup>92</sup>

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<sup>89</sup> J. Habermas, *Faktizität und Geltung*, (Frankfurt aM: Suhrkamp Verlag, 1992), see Annex III therein, also in, *idem*, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, (Cambridge MA: The MIT Press, 1998), pp. 491-516.

<sup>90</sup> J. Habermas, “The European Nation State: On the Past and the Future of Sovereignty and Citizenship”, in: *idem*, *The Inclusion of the Other*, (Cambridge: Polity Press, 1998), pp. 105-128.

<sup>91</sup> Sections II.1-3 and III.2.

<sup>92</sup> The argument has been taken up or reinvented repeatedly: see, for example, R. Howse, & K. Nicolaïdis, “Democracy without Sovereignty: The Global Vocation of Political Ethics”, in: T. Broude & Y. Shany (eds), *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity*, (Oxford: Hart Publishing, 2008), 163-191; K.-H. Ladeur, “The State in International Law”, in: Ch. Joerges & J. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford: Hart Publishing, 2011), It has also provoked critique, in particular, by A. Somek, “The Argument from Transnational Effects I: Representing Outsiders Through Freedom of Movement”, (2010) 16 *European Law Journal*, pp. 315-344; “The Argument from Transnational Effects II: Establishing Transnational Democracy”, (2010) 16 *European Law Journal*, pp. 375-394. It will become apparent from our exemplary discussion in Sections V and VI that, in our

### IV.3. Convergence, Re-construction, Critique

Clearly, such a democratic exoneration of European law is only plausible to the exact degree that it may be re-constructed within this perspective, or that it may be furnished with a conflicts-law orientation. This, however, is already often enough the case: European law has given legal force to principles and rules which serve the purpose of supranational “recognition” – the non-discrimination principle, the supranational definition and the demarcation of legitimate regulatory concerns, the demands for justification for actions that are imposed upon national legal systems, and the proportionality principle – which supplies a legal yardstick against which respect for supranationally-guaranteed freedoms may be measured. All these principles and rules may be understood as a concretisation of a supranational conflicts law, which guarantees that the actions of the Member States are reconcilable with their position within the Community. This is not to say, however, that the solutions to the conflicts at which European law has actually arrived, are always convincing. Our re-construction of European law in the normative perspectives just outlined will reveal tensions between “facticity” and “validity”, as well as failures and missed opportunities – the conflicts approach shares this type of experience with the three approaches which it seeks to replace.

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understanding, Part I of Somek’s argument fails to acknowledge the conflicts-law framework of the argument, which is “embedded” in the Habermasian notion of the “co-originality” of private and public autonomy; the whole point of the conflicts approach is about the defence of co-originality against the supremacy of “economic freedoms” (see Section V.1 *infra* and the references in note 102); Part II of the argument seeks to take the interdependence *problématique* too lightly. As F. Rödl has recently put it: “The border-crossing interdependence of national societies generates types of problems that can no longer be solved by the States on their own or through their consensual cooperation, but require a unitary political space that corresponds to the continental or even global scope of the problems” (“Democratic Juridification without Statization: Law of Conflict of Laws instead of a World State”, Ms. Frankfurt/Main 2010; on file with the author). To argue that the conflicts approach conceptualises the interdependence problem adequately is not to suggest, however, that it would generate good answers to all true conflicts – see Section IV 2.3 *infra*. Also, to refer to Habermas is not to suggest that the discourse theory of law has a privileged access to a query which is raised by others, lawyers and political theorists alike, in similar ways; see N. Nic Shuibhne, “The Resilience of market citizenship”, forthcoming in *Common Market Law Review*, and R. Bellamy, “The liberty of the post-moderns? Market and civic freedom within the EU”, LEQS paper No. 01/2009, available at: <http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPapers.aspx>.

#### **IV.4. The Internal Differentiation of Conflicts Law within Europe's Multi-level System: the Idea of a Three-dimensional Conflicts Law**

The metaphor of the multi-level system asserts that European “rule” cannot be organised hierarchically. This argument is reflected not only within the apportionment of competences within the EU but also by the fact that vast discrepancies exist in the operational resources available at each ruling level. Accordingly, we are able to distinguish between three forms of legal collision – vertical, “diagonal”, and horizontal. Diagonal collisions are an important and unique feature of multi-level systems. They are a constant feature of life within the EU, since the competences required for problem-solving are, at times, to be found at the level of the EU itself, and, at other times, at the level of the Member States. This division of competences gives rise to two forms of potential conflict – on the one hand, between divergent EU and national political orientations, and, on the other, between divergent interest constellations in the Member States – with the result that very particular mediation arrangements must be identified. This need for mediation is true for all multi-level systems, but is particularly pressing in the case of the EU, where the existence of diagonal conflict has had, as its corollary, the evolution of a particularly intense degree of administrative co-operation, the institutionalisation of advice-giving instances, and the systematic construction of non-governmental co-operative relationships. This infrastructure may be understood as furnishing the integral components of a conflicts law, a law that may no longer restrict itself to the individual adjudication of situational cases of conflict, and which must, instead, constantly busy itself with the finding of general solutions to universal problems. At the same time, such conflicts law must be - methodologically and organisationally - open to evolution, which has seen the development of post-interventionist regulatory practices and legal forms within national law. Accordingly, we may identify three types of European conflicts law, which operate in three dimensions:<sup>93</sup> conflicts law of the “first order” is flanked, on the one hand, by a conflicts law which, most specifically in the realm of European comitology, has concerned itself with the elaboration of material

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<sup>93</sup> See, for more detail, Ch. Joerges & F. Rödl, “Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation”, in: Graf-Peter Calliess *et al.* (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, (Berlin: Walter de Gruyter, 2009, pp. 765-778; Ch. Joerges, “The Idea of a Three-dimensional Conflicts Law as Constitutional Form”, in: Ch. Joerges & E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, 2nd ed. (Oxford: Hart Publishing, forthcoming; also available at: [www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html](http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html)). For similar terminological usage, though built upon a different conceptual base, Poul F. Kjaer, “Three-dimensional Conflict of Laws in Europe”, ZERP-DP 2/2009, available at: <http://www.zerp.uni-bremen.de/>; see, also, Poul F. Kjaer, note 62 *supra*, p. 141 *et seq.*

(substantive) regulatory options, and, on the other hand, by a conflicts law which governs the supervision of para-legal law and self-regulatory organisation.

#### **IV.5. Conflicts Law as Proceduralising Constitutionalism**

It follows from the preceding sections that it would be factually and normatively mistaken to regard European law as a system of law dedicated to the incremental construction of a comprehensive legal edifice. Europe must, at last, take the motto of the draft constitutional treaty<sup>94</sup> to heart, and learn to accept the fact that its diversity will accompany it far into the future, so that conflict born of diversity will continue to characterise the process of European integration. It must further concede that this “process” should be overseen by a conflicts law, which, by virtue of its identification of the principles and rules that govern conflict, will generate the law of the European multi-level system. Europeanisation is not simply a process of change; it is also a learning process. Law cannot pre-determine the substance of such processes, but may yet secure its own normative character, by virtue of its self-dedication to the processes of law-making/legal-justification (*Recht-Fertigung*), which mirror and defend the justice and fairness within law.<sup>95</sup> This understanding is by no means simply some Teutonic idiosyncrasy.<sup>96</sup> It is, for example, akin to Antje Wiener’s notion of “the invisible constitution”,<sup>97</sup> or Deirdre Curtin’s concept of the “living constitution”.<sup>98</sup> Should it be that these daring ideas are realistic in the sense that they represent the only conceivable type of responses to the challenges to which the European project is exposed? In his comments on the conflicts-law approach, Andrea Greppi has identified these difficulties with radical clarity.<sup>99</sup> The proceduralisation of law risks foregoing all substance, in particular, a commitment to social justice. Its openness and its plea for deliberative problem-solving risks are seized by the

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<sup>94</sup> Article I-8 Draft European Constitutional Treaty (note 1 *supra*). The formula was dispensed with by the Lisbon Treaty on the Functioning of the EU.

<sup>95</sup> See R. Wiehölter, “Just-ifications of a Law of Society”, in: O. Perez & G. Teubner, (eds), *Paradoxes and Inconsistencies in the Law*, (Oxford: Hart Publishing, 2005), pp. 65-77, available at: <http://www.jura.uni-frankfurt.de/ifawz1/teubner/RWTexte/justum.pdf>.

<sup>96</sup> See M. Everson & J. Eisner, *The Making of the EU Constitution: Judges and Lawyers Beyond Constitutive Power*, (Milton Park: Routledge-Cavendish, 2007), in particular, p. 41 *et seq.*

<sup>97</sup> A. Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters*, (Cambridge: Cambridge University Press, 2008).

<sup>98</sup> D. Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution*, (Oxford: Oxford University Press, 2009).

<sup>99</sup> Andrea Greppi, “Procedure and substance in postnational constitutionalism: ¿Montesquieu or Sieyes?”, Chapter 7 in this volume.

logic of technocratic managerialism. To summarise these concerns and hopes in a citation:

*“Whether intentionally or unintentionally, legal theory and philosophy suggest that they contain a remedial potential which in fact they lack, and necessarily must lack, to the extent that they fail to incorporate the inchoate values of individuals and institutions in society, the phenomenon Ernst Cassirer called the ‘constitution that is written in the citizens’ minds’.”<sup>100</sup>*

## **V. THE DEEPENING OF EUROPE’S LEGITIMACY PROBLEM BY THE ECJ’S LABOUR LAW JURISPRUDENCE**

As indicated, the conflicts-law approach is not meant as an artificial juxtaposition to positive European law, but it does claim to take up the legacy of legal realism, and, hence, to articulate the “real life” of the law. This, however, is by no means a purely affirmative exercise. Both of the case studies in the following sections will use the approach to raise objections or to articulate reservations against important decisions of the ECJ.

### **V.1. The Example of *Cassis de Dijon***

The conflicts-law approach advocates mitigation between controversies over diverging policies and complex interest configurations. With this aspiration, the approach departs markedly from the traditional treatment of public law provisions in private international law, international public and administrative law. Europe has, as Jona Israël put it, the chance and vocation to transform the *comitas* (voluntary and diplomatic co-ordination) among its states and societies into a legally-binding commitment to co-operative problem-solving.<sup>101</sup> This has been accomplished in countless cases - more or less convincingly. The ECJ’s legendary *Cassis de Dijon* judgment of 1979<sup>102</sup> may serve to illustrate this point. The ECJ’s response to the controversy between Germany and France over Germany’s prescriptions on a minimum percentage of alcohol in liquor was as plausible as it was trifling: the confusion of German consumers could be avoided, and a reasonable degree of protection against erroneous decisions by German consumers could be

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<sup>100</sup> V. Grosswald Curran, “Law’s Past and Europe’s Future”, (2005) 6 *German Law Journal*, pp. 483-512, at 486, available at: <http://www.germanlawjournal.com>. The reference is to E. Cassirer’s posthumously published *The Myth of the State*, (New Haven CT: Yale University Press, 1946), p. 91.

<sup>101</sup> J. Israël, *European Cross-Border Insolvency Regulation*, (Antwerp-Oxford: Intersentia, 2005), pp. 123, 150-152, & 323-334.

<sup>102</sup> Case 120/78, ECR [1979] 649.

achieved by simply disclosing the lower alcohol content of the competing French liqueur.

Damian Chalmers and Agustín José Menéndez have raised objections of different weight. As Chalmers rightly underlines, the “centre of gravity” of the case was in Germany and concerned conflicts of interest between a German distributor (REWE) and German liquor producers.<sup>103</sup> This is the fact, but it does not affect the involvement of the ECJ in a conflict constellation which is *within* the European multi-level system. Chalmers’ critique touches upon the upgrading of economic freedoms to constitutional rights which entitle those affected to the supervision of national legislation by the ECJ. This move of the ECJ was anything but trivial, because the Court has assumed *en passant* the constitutional functions. This kind of power is inherent in any supranational supervision of national public law. Its constitutional sensitivity control becomes apparent when we re-construct the issue within the framework of the discourse theory of law. Economic freedoms belong to the sphere of private autonomy and deserve recognition as constitutional rights. However, within consolidated constitutional democracies, the recognition of the constitutional status of the private sphere is complemented by the constitutional recognition and protection of political rights. Both spheres must be understood in the conceptualisation of Jürgen Habermas as “co-original”.<sup>104</sup> The issue, then, is of whether the ECJ has gone a step too far when complementing the recognition of the constitutional status of the economic freedoms by its authoritative definition of the kind of concerns which are deemed to be compatible with the establishment of a common European market. It is this latter query to which Menéndez refers in his critique of the constitutional ambitions of the conflicts-law approach.<sup>105</sup> This point is well taken,<sup>106</sup> but

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<sup>103</sup> “Deliberative Supranationalism and the Reterritorialization of Authority”, in: B. Kohler-Koch & B. Rittberger (eds), *Debating the Democratic Legitimacy*, (Lanham MD: Rowman & Littlefield, 2007), pp. 329-343, at 334.

<sup>104</sup> J. Habermas has developed this notion in the context of his theory of democratic constitutionalism; see his *Between Facts and Norms* (note 89 *supra*), p. 118 *et seq.* Very convincingly, in my view, Rainer Nickel and Florian Rödl have suggested its application “beyond the state”: see R Nickel, “Private and Public Autonomy Revisited: Jürgen Habermas’ Concept of Co-Originality in Times of Globalisation and the Militant Security State”, in: Martin Loughlin & Neil Walker (ed), *The Paradox of Constitutionalism*, (Oxford: Oxford University Press, 2007), pp. 147-167; F. Rödl, “Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law ‘Beyond the State’”, (2008) 56 *American Journal of Comparative Law*, pp. 743-768.

<sup>105</sup> See A.J. Menéndez, “When the market is political: The socio-economic constitution of the European Union between market-making and polity-making”, in: R. Letelier & A.J. Menéndez (eds), *The Sinews of Peace. Reconstituting the Democratic Legitimacy of the Socio-Economic Constitution of the European Union*, Oslo: ARENA, pp. 39-62 (RECON Report 10, available at: <http://www.reconproject.eu/main.php/RECONreport0910.pdf?fileitem=29736964>), more recently his

it does in no way affect the reading of *Cassis* as a conflicts law case. The ECJ handed down a ruling on a complex conflict constellation, a ruling which provides a legal framework for this conflict. This “is” conflicts law, albeit not necessarily good law.<sup>107</sup>

## **V.2. A Market Community? The ECJ’s Recent Labour Law Jurisprudence**

The much-debated recent labour law jurisprudence of the ECJ provides a line of cases in point. It is difficult for anybody aware of continental private and public international law or Anglo-Saxon conflict of laws *not* to realise the discrepancies between the latter disciplines and the decisions which the ECJ has handed down under European law. This is not, in itself, deplorable. What deserves closer scrutiny, however, is the content of the principles and rules which the ECJ has invoked and developed in its responses to the conflict constellations which were referred to it.

### **V.2.1 Viking, Laval, Rüffert**

These three cases are, by now, so well-known that it should suffice here to summarise their contents very briefly.

The first case was decided on 11 December 2007.<sup>108</sup> Finnish seafarers, employed on the ferry *Rosella*, become aware of the intention of their employer to flag out to Estonia. Since they were afraid of losing their jobs or being forced to accept lower wages, they tried to impress their employer by threatening to strike. This was legal under Finnish

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“United they Diverge? From Conflict of Laws to Constitutional Theory? On Christian Joerges’ Theory, RECON WP 2011/06, Oslo 2011.

<sup>106</sup> See, a good while ago, E. Steindorff, “Probleme des Art. 30 EWG”, (1984) 148 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, pp. 338-355.

<sup>107</sup> There is no space in this lengthy essay to review related approaches which share this insight. G. Conway’s Ph.D Thesis on “Values and Conflicts of Norms in EU Law and the Legal Reasoning of the European Court of Justice” (Brunel 2010), however, deserves exceptional treatment [see, also, his “Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ”, (2010) 11 *German Law Journal*, pp. 966-1005, available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1280>]. With his notion of “conflict of norms”, Conway has chosen a term which, very fortunately, avoids connotations and confusion which the “conflicts law” approach tends to provoke. Conway also does not engage extensively in constitutional deliberations. It is all the more remarkable and enlightening that his analyses documents – the avoidance of the term by the ECJ notwithstanding (see page 185, note 333) – the omnipresence of conflicts and the need for legal responses in all spheres of the law of the EU.

<sup>108</sup> Case C-438/05, International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti, judgment of 11 December 2007, [2007] ECR I-10779.

law. But, as their Finnish employer argued, such action was incompatible with *Viking*'s right of free establishment as enshrined in Article 43 EC.

The response of the ECJ is conciliatory in its tone, but is, in fact, quite rigid. The ECJ starts out by underlining that the “right to take collective action, including the right to strike ... [is] a fundamental right which forms an integral part of the general principles of Community law”.<sup>109</sup> Then, however, the Court fundamentally re-configures the traditional balance between economic freedoms at European level and social rights at national level, explaining that the Member States, although “still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question...must nevertheless comply with Community law [...]. Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC”.

The second case was decided only one week later.<sup>110</sup> *Laval*, a company incorporated under Latvian law, had won the tender for a school building on the outskirts of Stockholm. In obtaining the tender, it had profited from the differences in the wage levels of Latvia and Sweden. In May 2004, when work was to start, and after *Laval* had posted several dozens of its workers, the Swedish trade unions resorted to hostile actions against *Laval* with such determination and intensity that *Laval* gave up.

The Unions had acted legally according to Swedish law, but the Court referred to Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.<sup>111</sup>

This Directive requires, with respect to a number of essential working conditions, that foreign workers are not to be disadvantaged. According to Article 3, workers are to be guaranteed the minimum rates of pay. According to the general principle of the same Article, the rates of pay must be laid down either “by law, regulation or administrative provision” or “by collective agreements which have been declared universally applicable within the meaning of paragraph 8”. Sweden, however, had refrained from changing its pertinent laws, but had, instead, relied on the exceptions listed in Article 3 Paragraph 8 (providing therein the absence of a system for declaring collective agreements or arbitration awards universally applicable. It left the determination of wage levels to collec-

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<sup>109</sup> Case C-438/05 (*Viking*), para 44.

<sup>110</sup> Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet*, avd. 1, Svenska Elektrikerförbundet, judgment of 18 December 2007, [2007] ECR I-11767.

<sup>111</sup> Directive 96/71/EC OJ 1996, L18/1.



tive agreements concluded among the undertakings themselves. The Court argued that, in this respect, Sweden was in breach of (secondary) Community law.<sup>112</sup>

In the third judgment, which was handed down on April 2008, the ECJ further entrenched its position.<sup>113</sup> *Rüffert* concerned the legality of a tender proffered by one of the German *Länder* (federal states), Lower Saxony, which contained a clause indicating that the public authorities were bound to respect existing collective-bargaining agreements, so that tendering firms would also be required to abide by the relevant collective-bargaining agreements. The ECJ held that Lower Saxony's legislation was irreconcilable with Article 49 EC, since it prevented foreign service-providers from benefiting from lower wage costs within their country of origin.

The vital point within the judgment is its evaluation of the protective purpose of the clause committing the public authorities to respect collective agreements: in this respect, the Court held that:

*“Contrary to the contentions of Land Niedersachsen and a number of the Governments, such a measure cannot be considered to be justified by the objective of ensuring the protection of workers.”*

This finding is all the more remarkable in view of a prior pertinent decision of Germany's Constitutional Court, which had explained only in 2006:<sup>114</sup>

*“The combating of unemployment, together with measures that secure the financial stability of the social security system, are particularly important goals, for the realisation of which the legislator must be given a relatively large degree of decisional discretion, and especially so under current, politically very difficult, labour market conditions.”<sup>115</sup>*

### ***V.2.2 Dissenting Opinions in Luxembourg and their Disregard***

In all of the three cases, the Court's Advocate Generals – Póitares Maduro in *Viking*, Mengozzi in *Laval*, Bot in *Rüffert* – had submitted Opinions which differed, more or less significantly, from the Court's later judgments. In two more recent cases, the signals of dissent were becoming stronger and more articulate.

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<sup>112</sup> See paras. 70-71 of the judgment.

<sup>113</sup> Case C-346/06, *Rüffert v Land Niedersachsen*, Judgment of 3 April 2008, European Court reports [2008] ECR I-01989.

<sup>114</sup> Bundesverfassungsgericht, - 1 BvL 4/00 - (First senate, 16 July 2006), available at the Court's website at: [http://www.bverfg.de/entscheidungen/ls20060711\\_1bvl000400.html](http://www.bverfg.de/entscheidungen/ls20060711_1bvl000400.html).

<sup>115</sup> Para. 103 (translation by the author; references to earlier judgments omitted).

The first case concerns the applicability of Directive 2004/18 on a German pension scheme for public employees, and has considerable affinities with *Rüffert*.<sup>116</sup> The German scheme foresaw the involvement of Trade Unions in the transformation of parts of their remuneration into pensions (“*Entgeltumwandlung*”). The European Commission found the involvement of the trade unions in the selection of insurers to be compatible with the Directive.

The opinion which AG Verica Trstenjak delivered on 14 April 2010 does not directly question the Court’s labour law jurisprudence.<sup>117</sup> She explicitly refrains from supporting Germany’s quest for “*Albany* exclusion”,<sup>118</sup> and confirms the applicability of the economic freedoms. She then adds, however, that the social right to collective-bargaining and the freedoms are of equal weight and invokes the principle of proportionality as a guide for its resolution.<sup>119</sup> The conflict is to be resolved at the level of primary law and this resolution has then to guide the interpretation of secondary legislation. This leads her to question the validity of the Commission’s reading of the said directive and to suggest that the complaint be dismissed.<sup>120</sup>

The second case concerns the compatibility of Belgian requirements relating to the posting of workers in Belgium with the Posted Workers Directive.<sup>121</sup> It is, in this respect, closer to *Laval*. GA Cruz Villalón, in his opinion of 5 May 2010, characterises this directive as a response to the conflicts between the social values and the economic freedoms which the internal market is bound to generate,<sup>122</sup> and then complements the argument of his Slovenian colleague by a reference to Articles 9 and 3 TFEU, suggesting that, under Treaty of Lisbon, social protection is no longer to be understood as an exception from the economic freedoms, but as commitment of general validity. Like his colleague, he then invokes the proportionality principle to resolve these tensions.<sup>123</sup>

The two opinions move the conflict between economic freedoms and social rights to the European level and thereby strengthen Europe’s judicial supranationalism. The premises and implications of this projection are difficult to understand. Both cases concern policy fields in which national law has *not* been replaced, but is *only partially* af-

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<sup>116</sup> Case C-271/08, *European Commission v Federal Republic of Germany*.

<sup>117</sup> See, in particular, para. 196 *et seq.*, on the *Rüffert* case.

<sup>118</sup> See her discussion of Case C-67/96 [1999] ECR I-5751 in para. 54 *et seq.*

<sup>119</sup> See paras. 186 *et seq.*

<sup>120</sup> See para. 237.

<sup>121</sup> Case C-515/08, *Vitor Manuel dos Santos Palhota and Others*. The judgment of the ECJ case dates from 7 October 2010.

<sup>122</sup> Para 38.

<sup>123</sup> Para. 52 *et seq.*

fectured by European prerogatives. The prospects for a clarification of such queries, however, do not seem bright. In its judgement of 15 July 2010, the ECJ (Grand Chamber) rather flatly rephrased what had been stated in *Viking* and *Laval*:

*“[W]hile it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in accordance with European Union law.*

Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 are intended to implement, and be in accordance with the principle of proportionality.”<sup>124</sup>

### **V.3. The Conflicts-law Alternative**

What is wrong with all this? Here is no space to comment on the European wide discussion of this jurisprudence. The following remarks will be restricted to some aspects, which illuminate the specifics of the conflicts-law approach.

#### **V.3.1 Sweden’s Social Democratic Sonderweg**

Patricia Mindus<sup>125</sup> has, after her review of social and legal integration theories, turned to a dimension of the *Laval* case which she is extremely well-equipped to take up in such sophistication: the *Laval* litigation does, indeed, illustrate aspects of “the Swedish *Sonderweg*” such as the legal status and social function of *kollektivavtalsystemet* which the Swedish legislature did not dare to touch when implementing the Posted Workers Directive. She argues very convincingly that the “Swedish model” is, by now, politically contested, and not only under pressure exerted by some “kleptomaniac competence extension” of the ECJ. In a conflicts-law language, Sweden has to become aware of the tensions between its *Sonderweg* and its European commitments. The Union and its highest Court must defend these commitments which are, at the same time, Community

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<sup>124</sup> Case C-271/08, paras. 43-44. In Case C-515/08 (note 119), the ECJ has handed down its judgment of the ECJ on 7 October 2010. The Court confirmed that “overriding reasons relating to the public interest capable of justifying a restriction on the freedom to provide services include the protection of workers” and “recognised that the Member States have the power to verify compliance with the national and European Union provisions” (paras. 47-48) without mentioning the TFEU and the Charter. In their proportionality analysis of the Belgian legislation, the AG and the ECJ concurred.

<sup>125</sup> P. Mindus, “Theorising Conflicts and Politicisation in the EU”, this volume, Chapter 6.

entitlements. They must also be aware of the instrumentalisation of European law and court proceedings in internal Swedish power battles<sup>126</sup> – the *Laval* case was, after all, initiated and financed in Sweden.<sup>127</sup> This is an instructive explanation of the background and the implication of *Laval*. *Simultaneously*, it is also an instructive illustration of the conflict patterns which the Europeanisation process generates. This observation confirms the assertion that European law “is” conflicts law. But is *Laval* “good conflicts law”? The constellation is structurally the same as in *Cassis de Dijon*,<sup>128</sup> but so much more dramatic. The message of the conflicts-law approach is seemingly abstract: the law should civilise the contest over divergent policies and interests without assuming the mandate to streamline Europe’s diversity.

### **V.3.2 Prudence of Conflicts Laws**

“Judicial restraint” *versus* “judicial activism” is a misleading dichotomy here, and does not exhaust the potential of the traditions on which the conflicts-law approach builds at all.

Antoine Lyon-Caen, the doyen of French labour law, has, without resorting to the conflict of law or private international law terminology, recalled one core message:

*“Dans les sociétés d’Europe de l’Ouest, le droit du travail s’est constitué par émancipation du droit du marché, dénommé moyennant les variations terminologiques qu’il importe de ne pas oublier: liberté du commerce ici, freedom of trade ailleurs... Ce n’est pas que des règles sur le travail n’existaient pas avant cette émancipation, mais elles relevaient d’avantage d’une police du travail, partie plus ou moins autonome d’une police du ou des marchés.”*<sup>129</sup>

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<sup>126</sup> P. Mindus, text accompanying note 35 *et seq.*

<sup>127</sup> Battle is going on in Swedish politics, legislation and jurisprudence. In a judgment of 2 December 2009, the Swedish *Arbetsdomstolen* imposed “exemplary damages” on the trade unions which had taken action against *Laval*. See the annotation by Norbert Reich, “Laval ‘Vierter Akt’”, (2010) 21 *Europäische Zeitschrift für Wirtschaftsrecht*, pp. 21-22.

<sup>128</sup> See Section V.1 *supra*.

<sup>129</sup> “In West European societies Labour Law as was constituted as an alternative to the law of the market. It developed terminological distinctions which one must not disregard... *liberté de commerce* here, freedom of trade there... To be sure, legislation relating to work had been in place prior to that emancipatory move, but pertinent rules were meant to controlling work in a way which was more or less distinct from the laws policing the market or markets in general” (translation by the author); thus A. Lyon-Caen, “Droit communautaire du marché v.s. Europe sociale.” Contribution to the Symposium on “*The Impact of the Case Law of the ECJ upon the Labour*

There is a categorical difference between economic law and labour law, Lyon-Caen argues. The most basic notion which conflicts law has at its disposal is “characterisation”<sup>130</sup> and, Ernst Rabel’s universalist visions notwithstanding, characterisation has, according to the prevailing view, to take the views of the forum seriously. The categorical difference is not written in stone and not pre-given as some transpositive *ordo*, but deeply rooted, albeit in a variety of forms, in the history of industrial and democratised societies.

Parallelism in European law is the principle of enumerated competences. However, awareness of this parallelism is no longer widespread among European law scholars, which is unfortunate because the sensitivity of the elder discipline for the specifics of legal fields provides some guidance in the interpretation of such opaque provisions as Article 137 (5) EC (now Article 153 (5) TFEU).<sup>131</sup>

The prudence suggested by conflicts law coincides with what we have noted in our references to the discourse theory of law and democracy.<sup>132</sup> What the ECJ did in the perspective of this theory was to disregard the autonomy and co-originality of private and political autonomy, and to assign supremacy to economic freedoms over political citizenship. The conflicts-law approach does, of course, claim to have delivered an elaborated re-construction of this inter-dependence at European level. Its understanding of the constitutionalisation strongly suggests, however, to respect the *variety* in Europe’s social models and to promote their co-ordination in the light of practical experiences. It seems perfectly justified to further the efforts of the new Member States to exploit their competitive advantages. It is by no means plausible that “direct wage competition”<sup>133</sup> would signal solidarity with these countries, and further both the prosperity within, and distributional justice among, Europe’s diverse regions. It may be that, through the opening of the Western Markets for cheap labour, we foreclose the chances for the accession states to build up their own social model. Should we really assume that

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*Law of the Member States*”, Berlin 26 June 2008, organised by the Federal Ministry of Labour and Social Affairs, available at: [http://www.bmas.de/portal/27028/2008\\_\\_07\\_\\_16\\_\\_symposium\\_\\_eugh\\_\\_lyon-caen.html](http://www.bmas.de/portal/27028/2008__07__16__symposium__eugh__lyon-caen.html).

<sup>130</sup> E. Rabel, “Das Problem der Qualifikation”, (1931) 5 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, pp. 241-288.

<sup>131</sup> See A. von Bogdandy & J. Bast, “The Federal Order of Competences”, in: *idem*, *Principles*, note 48 *supra*, pp. 275-307, at 294, note 144; but see also, for example, G. Conway, “Values and Conflicts of Norms in EU”, note 107 *supra*, Chapter 5.6, p. 285 *et seq.*

<sup>132</sup> See notes 92 and 102 *supra*.

<sup>133</sup> See F. Rödl, “Transnationale Lohnkonkurrenz: ein neuer Eckpfeiler der ‘sozialen’ Union?”, in: A. Fischer-Lescano *et al.*, (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*, (Baden-Baden: Nomos, 2009), pp. 145-160.

the Swedish employer organisations seek to give a hand to the development of Estonia by the kind of strategies they pursued with Laval and the financing of the lengthy litigation in that case? European law should know more about the social price to be paid for the bringing of cheap labour to Old Europe before engaging in the flattening of Europe's diversity.<sup>134</sup>

“Restraint” *versus* “activism” is not the proper frame for these issues. The type of prudence which the conflicts-law approach requires is at least as demanding as, albeit not identical with, what we expect from the constitutional courts of consolidated nation states or federations in their supervision of legislation. To this issue, however, we will have to return.

## **VI. CONFLICTS LAW OR COMMUNITY METHOD? RESPONSES TO UPPER AUSTRIA'S CONCERNS WITH ATOMIC ENERGY**

The protection of the “health and life of humans, animals and plants” was mentioned as a legitimate regulatory concern in Article 36 EEC Treaty and complemented by the recognition of environmental protection as a matter of “general interest” in the aftermath of *Cassis de Dijon*. Environmental issues are, indeed, the best conceivable case for the theoretical and normative core of the conflicts-law approach. Nowhere is it more evident that national decision-making has external effects, and that those affected in another territory are regularly excluded from domestic decision-making processes. Nowhere does it seem more plausible to establish a transnational regime with the potential to correct such failures. Last, environmental issues are often enough of such political sensitivity that it makes sense to insist on the kind of horizontally-inclusive constitutionalism which the conflicts law advocates.

European law and pertinent theoretical conceptualisations had been for a long time, far from respecting such insights. The unanimity rule governed in environmental policies. Political scientists provided us with the distinction of product and process regulation which seemed to rationalise the autonomy of national preference-building. However, since Maastricht, environmental protection has become a commitment of constitutional dignity – and has retained this status ever since.<sup>135</sup>

It should, hence, be easy to provide plausible evidence militating in favour of our claim that the conflicts-law approach is not something external to the integration project, but a dimension which can be re-constructed in Europe's political and legal devel-

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<sup>134</sup> Tellingly enough, in the US, nobody seems to doubt that, in cases in which an enterprise from a poorer and lower-wage state brings its workers to a higher-wage, more generous state, the latter's higher labour standards apply to those workers. Communication from Professor *Cynthia Estlund*, NYU Law School.

<sup>135</sup> See Article 11 TFEU.

opment. However, the discussion here will be restricted to one troubling example of particular sensitivity, namely, the litigation over the Temelín nuclear power plant, between its operator ČEZ, a power-supply undertaking in the Czech Republic, and the Austrian Land of *Oberösterreich*, the owner of a piece of land located at a distance of just 60 km from Temelín. The Temelín saga began in the 1980s long before the Czech Republic became a member of the European Union.<sup>136</sup>

The Temelín nuclear power plant was built close to the Austrian border and authorised by Czechoslovakian authorities back in 1985. The Austrians were concerned about its technological standards from the very beginning. In the enlargement process, three similar power plants were closed down while Temelín was modernised by *Westinghouse*, an American company. The Austrian position must be understood in the context of its own principled rejection of atomic energy. This took legal shape in the *Atomsperrgesetz* (“*Anti Zwentendorf-Gesetz*”) (statute on the prohibition of atomic energy) of 1978, then in the *Bundesverfassungsgesetz für ein atomfreies Österreich* (federal constitutional law on an Austria free of atomic energy) of 1999. Intergovernmental negotiations, in which the European Commission became involved, continued. This led to the “*Melk Protocol*” of 2000, an agreement signed by the Austrian and the Czech government, and to the “*Brussels Agreement*” of 2001, which substantiated the follow-up of the *Melk Protocol*. Jörg Haider profited from the Austrian sentiments through a referendum which sought to make the accession of the Czech Republic to the EU dependent upon the closure of Temelín<sup>137</sup>

While the political conflict was not settled, the Temelín plant, modernised according to EU standards, went into operation at full capacity in 2003. The Austrian opponents turned to law for help.

## **VI.1. Case C-343/04: *Land Oberösterreich v ČEZ***

They had done so throughout the whole history of Temelín and explored, always in vain, the potential, first, of international law, then of European law. Now they turned to what was left, namely, private law. The protection offered by Austrian private law is twofold: an owner of land can, by the *actio negatoria* of § 364 (2) ABGB, prohibit damaging interference beyond “the normal local level”.<sup>138</sup> This is what the Province of

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<sup>136</sup> For a detailed and instructive account ending, however, in 2007 see W. Hummer, “Temelín: Das Kraftwerk an der Grenze”, (2008) 62 *Zeitschrift für öffentliches Recht*, pp. 501-557.

<sup>137</sup> The populist move had a very remarkable resonance. In Upper Austria, Haider obtained support of 23.5b %; see Hummer, *ibid.*, p. 526.

<sup>138</sup> That provisions reads: (2) Der Eigentümer eines Grundstückes kann dem Nachbarn die von dessen Grund ausgehenden Einwirkungen durch Abwässer, Rauch, Wärme, Geruch, Geräusch, Erschütterung und ähnliche inso-

Upper Austria argued against the Czech power-supply undertaking (ČEZ) as the owner of the land located in the North of *Oberösterreich*, which is used for agricultural purposes including trials relating to plant cultivation, and is also home to an agricultural college. What the complaint held to be beyond “the normal local level” was the ionising radiation emanating from the plant and crossing the border into Austria. But is Austrian law at all applicable? Do Austrian Courts have jurisdiction, and, if so, will their judgments be enforceable in the Czech Republic? These issues bring us to the pertinent rules of private international law and the jurisdictional provisions of the Brussels Convention of 1968.

AG Poiares Maduro, in his opinion of 11 January 2006, and the ECJ, in its judgment of 18 May 2006,<sup>139</sup> accordingly asked: Are there rights *in rem* at issue here, so that the Austrian courts could claim exclusive jurisdiction as provided under Article 16 of the Convention? Or, is this matter, to be qualified as a tort in the sense of Article 5 III, governed by the *lex loci delicti instead?* (“the place where the harmful event occurred”). The answer given by the ECJ to the questions so framed sounds plausible:

*“... it cannot be considered that an action such as that pending before the national court should in general be decided according to the rules of one State rather than the other and in conclusion: this is no case of exclusive Austrian in rem jurisdiction.”<sup>140</sup>*

Plausible as it sounds, one remains puzzled: if Austrian standards must not govern, is the consequence that the defendant can operate the plant according to the standards of the Czech Republic without regard for the Austrian concerns? This would constitute a democracy failure of the type described above.<sup>141</sup> AG Poiares Maduro, in one of his scholarly opinions, was, however, digging deeper: the courts of both interested states should be able to claim exclusive jurisdiction for the analysis of the statutory restrictions on ownership over immovable property located in their respective territories.<sup>142</sup> This, however, implies the risk of conflicting judgments.<sup>143</sup> “In such cases, the judgment

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weit untersagen, als sie das nach den örtlichen Verhältnissen gewöhnliche Maß überschreiten und die ortsübliche Benutzung des Grundstückes wesentlich beeinträchtigen. Unmittelbare Zuleitung ist ohne besonderen Rechtstitel unter allen Umständen unzulässig“ (“The owner of land may prohibit his neighbour from producing effects, emanating from the latter’s land, by effluent, smoke, gases, heat, odours, noise, vibration and the like, in so far as they exceed normal local levels and significantly interfere with the usual use of the land. Direct transmission, without a specific legal right, is unlawful in all circumstances.”)

<sup>139</sup> [2006] ECR I-04557.

<sup>140</sup> Case C-343/04, para. 36.

<sup>141</sup> Section IV.1.

<sup>142</sup> Para. 90.

<sup>143</sup> Para. 91.



to be delivered must pay special attention to the transnational character of the situation.”<sup>144</sup> This may sound a bit sibylline, but it does, in fact, indicate the need for a conflicts-law response:

*“If the national legal system allows the protection of property either through a property rule or a liability rule, the transnational dimension of the case and the possible difficulty of making a full cost-benefit analysis may be relevant to such a choice. Secondly, the same concern for the consideration of the transnational character of the situation may be relevant in seeking a balance of all relevant elements with respect to the assessment of the amount of damage or the assessment of the risk that such damage may occur.”<sup>145</sup>*

The ECJ took a more comfortable way out, explaining merely that Austria cannot claim exclusive jurisdiction. However, this was only a preliminary end of the saga’s first chapter.

## **VI.2. Case C-115/08: Land Oberösterreich v ČEZ a.s.**

The Czech Republic and Austria returned to negotiating. Finally, both states “declared that they would fulfil the series of bilateral obligations, including safety measures, monitoring free movement rights and the development of energy partnerships, set out in a document known as ‘The Conclusions of the Melk Process and Follow-Up’, which was concluded in November 2001”.<sup>146</sup>

### ***VI.2.1 The Shadow of Weber over Austria’s Oberster Gerichtshof?***

But this agreement did not stop Upper Austria from pursuing its complaint further. In April 2006, they obtained a judgment from the *Oberster Gerichtshof*, which was based upon the exception from § 364 (2) adopted in § 364a. This provision reads:

*“However, if the interference is caused, in excess of that level, by a mining installation or an officially authorised installation on the neighbouring land, the landowner is entitled only to bring court proceedings for compensation for the damage caused, even where the damage is caused by circumstances which were not taken into account in the official authorisation process.”*

The Austrian Court’s judgment is as traditional as it is interesting in the reasons stated for the refusal to recognise the authorisation of the Czech plant. Such authorisations, the

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<sup>144</sup> Para. 93.

<sup>145</sup> AG Maduro in Case C-342/04, para. 95.

<sup>146</sup> AG Maduro, *ibid.*, para. 3; ECJ (note 136), paras. 43 *et seq.*

Court explained, have to weigh conflicting considerations and interests. This weighing, however, occurred in a foreign jurisdiction, and, hence, there was “no reason why Austrian law should restrict the property rights of Austrian landowners purely in the interests of protecting a foreign economy and public interests in another country”.<sup>147</sup> This can be read as a tribute to the political nature of decisions on high-risk activities and the need for a democratic basis for such decisions. A blatant refusal of Austrian courts to recognise the legitimacy of foreign authorisation would be irreconcilable with the transformation of pure comity among European nations into legal commitments among the Member States.<sup>148</sup> Unsurprisingly, both the ECJ and its Advocate General concurred in their conclusions. The delicacy of the case, however, stems from the constitutional background of the Austrian refusal to recognise the Czech authorisation. It was not a discretionary balancing of economic interests and of risks to health and the environment, but the principled rejection of atomic energy by a constitutional amendment which was the foundation for the Austrian Higher Court’s refusal to respect the foreign administrative act.<sup>149</sup> Neither the Court nor the AG addressed acknowledged this objection. They differed, however, significantly and illuminatingly, in the reasoning upon which they based their findings.

### ***VI.2.2 Administrative Supranationalism in the ECJ’s Grand Chamber?***

When confronted with the differences between Austria and the Czech Republic, the ECJ started to search for a resolution at a higher legal level. This search, however, did not lead to conclusive results. True, the EAEC Treaty of 1957, in its Title II, contains “provisions designed to encourage progress in the field of nuclear energy”. However, neither this treaty, nor any other provision of European law grants the competence “to authorise the construction or operation of nuclear installations”.<sup>150</sup> All that Articles 30-31 EAEC provide for are procedures for the co-ordination of national standards for the protection of human and animal life from ionising radiation.<sup>151</sup> The gap between these articles remains puzzling – and the way out of this dilemma which the ECJ took is troubling: it would be discriminatory, as the ECJ explains, to subject a nuclear power plant situated in the territory of another Member State to an injunction in a case in which the foreign undertaking is in possession of the necessary official authorisations. What follows substantiates this reasoning:

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<sup>147</sup> Thus the report at para. 51 of the judgment in Case C-115/08, [2009] ECR I-10265.

<sup>148</sup> See J. Israël, European Cross-Border Insolvency Regulation, note 101 above.

<sup>149</sup> See the summary of the Austrian reasoning reported in para. 56.

<sup>150</sup> Para. 103.

<sup>151</sup> See paras. 111 *et seq.*

*“It is for the national court to give, in so far as possible, to the domestic legislation which it must apply an interpretation which complies with the requirements of Community law. In the last instance, however, the national court is bound to protect the rights which Community law confers on individuals.”<sup>152</sup>*

### **VI.2.3 AG Poiares Maduro’s Flirt with Conflicts Law**

The opinion which AG Maduro delivered to the Court on 22 April 2009 sounds more elegant:

*“This case may be characterised as one which turns on the question of reciprocal externalities. On the one side, Austria and, in particular, the Land Oberösterreich believe they are victims of an externality imposed on them by ČEZ and the Czech authorities in installing a nuclear power plant next to the Austrian border without taking into account the risks imposed on those living on the other side of the border. On the other side, ČEZ and the Czech Republic argue that it is the interpretation of Austrian law made by the Austrian Supreme Court that imposes on them an externality by requiring them to close the Czech nuclear power plant simply to protect the interests of Austrian citizens and without taking into account the situation in the Czech Republic.”<sup>153</sup>*

It is not only the diagnosis, but also the suggested therapy which, at first sight, seems to be in line with the conflicts-law approach. Maduro defines the law’s proper objective as:

*“making national authorities, insofar as is possible, attentive to the impact of their decisions on the interests of other Member States and their citizens since this goal can be said to be at the core of the project of European integration and to be embedded in its rules.”<sup>154</sup>*

He arrives at his solution in two bold steps. The first is an upgrading of the economic freedoms, which he had already prepared in his Ph.D.,<sup>155</sup> and later on famously developed further.<sup>156</sup> He transforms the “argument from external effects” into a legal duty to respect the extra-territorial interests of economic actors:

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<sup>152</sup> See paras. 138-140.

<sup>153</sup> Para. 1.

<sup>154</sup> *Ibid.*

<sup>155</sup> M. Poiares Maduro, *We the Court. The European Court of Justice and the European Economic Constitution*, (Oxford: Hart Publishing, 1998), p. 150 et seq.

<sup>156</sup> Very markedly, for example, in *Viking*, note 108 *supra*, and in his opinion in Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, delivered on 22 May 2008.

*“[T]he rules of free movement aim at eliminating any restriction imposed by a Member State on economic activity in or with another Member State. A cross-border element is required but that cross-border element does not need to involve an actual hindrance of free movement from or to the State imposing the measure. It is sufficient that the extra-territorial application of that State measure may affect economic activity in another Member State or between other Member States.”<sup>157</sup>*

This move implies that it is up to Austria to justify the impact of its restrictive non-authorisation policy on the Czech Republic. In this respect, he seems to proceed more subtly than the ECJ. The duty to take the impact of Austrian decisions on its neighbours into account is, indeed, an implication of the “argument from external effects”.<sup>158</sup> It is also worth noting that the AG does not camouflage the *lacunae* of European law in the present constellation.<sup>159</sup> This argument, however, if taken seriously, would have to work both ways. The Czech Republic must take the concerns of its neighbours seriously. This is precisely the type of “true” conflict which should, according to the conflicts of law theory of the American conflicts scholar Brainerd Currie, be brought to a higher legislative authority. Although AG Maduro does not refer to such theorising, he seems to be perfectly aware of the *problématique* to which Brainerd Currie responded in such an uncomfortable way. He implicitly subscribes to the “true conflict” analysis with his notion of “reciprocal externalities”<sup>160</sup> – and then seeks to forego Currie’s *non possumus* in a search for a reconciliation of both concerns:

*“In balancing the achievement of public policy goals, such as protection of human health and property rights, with the restriction of rights protected by Article 43 EC and other free movement provisions which a refusal to recognise a Czech authorisation will entail, the Austrian court must take account of the fact that Community law specifically authorises the development of nuclear installations and the development of nuclear industries in general. It must also give weight to the fact that the authorisation granted to the Temelín facility by the Czech authorities was granted in accordance with the standards established by the relevant Community law.”<sup>161</sup>*

The first step in the argument sounds nothing but logical; the second, however, is not easily reconciled with the AG’s observation that “the EAEC rules are only aimed at regulating the conditions under which a nuclear facility should be authorised to oper-

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<sup>157</sup> Thus AG Maduro in para. 16 of his opinion in Case 115/08, para. 16. delivered on 22 April 2009.

<sup>158</sup> See Somek, note 92 above.

<sup>159</sup> *Ibid.*, paras. 1, 13.

<sup>160</sup> AG Maduro, note 153.

<sup>161</sup> AG Maduro, *ibid.*, para. 16.

ate”.<sup>162</sup> It is by no means clear why such regulations should trump Austria’s constitutionalised “No” to atomic energy.

### **VI.3. *Quis iudicabit* in “true conflicts”?**

Would the conflicts-law approach provide a superior response? Its analysis would, at least, be closer to the challenging issues of our case. We can identify no less than seven queries:

- (1) There is a horizontal conflict between two Member States. The Czech Republic has opted for; Austria has opted against, atomic energy. Is the Czech Republic entitled to expose Austria to the risks of atomic energy? Is Austria entitled to impose its views on the Czech Republic?
- (2) There is a vertical conflict between European law and Austrian law if we assume that the EA-Treaty’s encouragement of atomic energy trumps Austrian constitutional law.
- (3) There is also a vertical conflict if we assume that the economic freedoms are supreme.
- (4) There is a “diagonal” conflict between the two levels of government if we assume that the EA-Treaty is incomplete and respects the autonomy of the Member States in the realm of atomic energy policy.
- (5) Can we read the European competence to establish safety standards as a resolution of the conflict, or is that a spurious response?
- (6) The most challenging conflict is temporal: Back in 1957, atomic energy was not a nightmare but a cherished future. How can the law get away from a Panglossian past?
- (7) Last, but not least: *Quis iudicabit*? Is the European Court of Justice legitimated to decide upon all this?

Let us first re-consider the Weberian flavour to the refusal of Austria’s *Oberster Gerichtshof* to acknowledge the authorisation granted in the Czech Republic.<sup>163</sup> Why not read this disrespect as a tribute to the political nature of decisions on high-risk activities and the need for a democratic basis to such decisions? Why not take it seriously, in legal terms, that the authorisation granted by the Czech Republic would not have been conceivable under Austrian law? Here, we return to the beginning: Does European law entitle the Czech Republic to impose risks on Austria which Austria is not prepared to take? In the shadow of the noble anti-discrimination principle, the ECJ has decided upon a politically highly-sensitive issue. Would it have been better to decide in Austria’s fa-

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<sup>162</sup> AG Maduro, *ibid.*, para 13.

<sup>163</sup> See IV.2.1. *supra*.

vous? Normative reasons can be given. Atomic energy imposes ultra-hazardous risks. They produce irreversible damages if they materialise. Hence, they must not be taken.

It would seem problematic, however, to entrust a Court with the task of taking such a decision. It seems, in such a case, even more stringent than in the types of “true conflicts” which Brainerd Currie had in mind when he argued that their resolution should be left to a higher legislative authority (namely, Congress in the American federal system).<sup>164</sup> Europe, *hélas*, has no authority like this. Was the conflict not left to the political process then? Here, just as in *Viking*, the ECJ did not hesitate to take a decision. This is a dis-empowerment of politics by law. How responsible would it be to re-deliver the case into Europe’s political arenas? After Fukushima, it seems likely that the contest over atomic energy is arriving precisely there anyway, even though Europe remains well-advised to debate its safety standards.

## VII. THE “GEOLOGY” OF CONTEMPORARY LAW AND THE PROJECT OF A THREE-DIMENSIONAL CONFLICTS LAW

“Unity in Diversity”, *unitas in pluralitate*, the motto of the Constitutional Treaty, transposes the European ambitions and the perspectives of the conflicts-law approach. Neither the significance of this motto, nor its translation into the language and proceduralising methodology of the conflicts-law approach are confined to Europe’s postnational constellation. The need to cope with conflicting policies and to ensure the legitimacy of both their “weight” and their co-ordination is present at all levels of governance, in the international system as well as within constitutional democracies. At all levels, this *problématique* has provoked a turn to “proceduralisation”, and fostered the insight that legal decision-making cannot be deductive, but must be constructive and must derive its legitimacy from the quality of the procedures guiding its decision-making processes. The identification of this *problématique* at all levels of governance and in the “diagonal conflicts constellations” between them, which multi-level constellations generate, is just one message of the conflicts-law approach, which these concluding remarks wish to underline. Equally important is a second message which requires a three-dimensional differentiation of the conflicts-law approach. The title of this section alludes to this second message. “Geology” is a term borrowed from Joseph Weiler, who introduced it to explain transformations of international law of paradigmatic importance.<sup>165</sup> “International law as Regulation” is a notion which he contrasts with “international law as

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<sup>164</sup> See B. Currie, “The Constitution and the Choice of Law: Governmental Interests and the Judicial Function”, in *idem, Selected Essays on the Conflict of Laws*, (Durham NC: Duke University Press, 1958), pp. 188-282, at 272.

<sup>165</sup> J.H.H. Weiler, “The Geology of International Law – Governance, Democracy and Legitimacy”, (2004) 64 *Heidelberg Journal of International Law (ZaöRV)*, pp. 547-562, at 552.

Transaction” and “international law as Community”. It represents “a new mode of international law, specific in its normativity and legitimacy”. This latter insight corresponds to the grand debates on the new functions and normative qualities of the law of post-*laissez faire* welfare states, which dominated the agenda of the pre- and post-1968 generations.

## VII.1. Post-interventionist Law and the Turn to Regulation and Governance

These two generations witnessed, or participated in, two big waves of theorising. The first wave was preoccupied with the social deficits and methodological flaws of “legal formalism”; the replacement of formalism by substantive rationality criteria was the slogan of the day.<sup>166</sup> “Law as regulation” was not the (then) prevailing terminology; substantive rationality was to be carried into law through “interventionism”. As all this did not really work out, a second wave of theorising was initiated: substantive rationality was replaced by post-interventionist programming, in particular through reflexive law and the quest for a proceduralisation of the category of law.<sup>167</sup>

These moves sought to come to grips with the law’s assumption of and involvement in ever new tasks and problem-solving activities. The search for post-interventionist programming (“governance structures” is the now widely-used term) and legal methodologies sought – or should have sought - to reconcile the erosion of formerly “conditional” legal programmes with the legacy of the rule of law and the idea of law-mediated legitimacy of democratic rule. Nobody has characterised this new challenge as pointedly as Rudolf Wiethölter in one of his early essays: “Purposive programming” is the living law and legal *conditio sine qua non* and lifeblood (“*Lebenselexier*”) of modern democracies, he wrote back in 1973,<sup>168</sup> and complemented this message in 1977 through the discovery of the affinities or structural analogies with conflict of laws.<sup>169</sup> In

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<sup>166</sup> See Ch. Joerges, “*Politische Rechtslehre* and Critical Legal Studies: Points of Contacts and Divergencies”, in: *idem.* & D.M. Trubek (eds), *Critical Legal Thought: An American-German Debate*, (Baden-Baden: Nomos, 1989), pp. 597-643, at 611 *et seq.*, republished in 12 *German Law Journal* 554-598 (2011), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1333>

<sup>167</sup> See Ch. Joerges, *ibid.*, p. 626 *et seq.*, and previously G. Brüggemeier & Ch. Joerges, “Workshop zu Konzepten des postinterventionistischen Rechts”, Zentrum für Europäische Rechtspolitik, Materialien 4, Bremen 1984.

<sup>168</sup> See his “*Rechtswissenschaft in Kritik und als Kritik*”, (Critique of legal science and legal science as critique), (Mainz: Universitätschriften, 1973), available at: [http://www.jura.uni-frankfurt.de/1\\_Personal/em\\_prof/s/wiethoelter/RWTexte/KritikalsRecht\\_Sonderdruck.pdf](http://www.jura.uni-frankfurt.de/1_Personal/em_prof/s/wiethoelter/RWTexte/KritikalsRecht_Sonderdruck.pdf).

<sup>169</sup> R Wiethölter, “Begriffs- oder Interessenjurisprudenz – Falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm”, in: A. Lüderitz *et al.* (eds), *Festschrift für Gerhard Kegel*,

the meantime, he had already proclaimed the need for a “proceduralisation of the category of law”.<sup>170</sup>

Practice, sociological research, and theoretical reflections did not come to a standstill. We have been accustoming ourselves to ever more sophisticated regulatory programming for many years (now), and we have, more recently, witnessed a turn to “governance”, a notion encompassing a grand variety of widely-used co-operative arrangements between governmental and non-governmental actors. There is neither space nor need to elaborate on all issues. The only observation to be underlined concerns the structural parallels in the national and the post-national constellations. The geology which Joseph Weiler has depicted in international law can be observed at all levels, even within constitutional law. Parallel structures generate similar challenges. Regulatory politics need to be institutionalised and governance arrangements established both within the European Union *and* beyond its “borders”. The practical challenges and normative problems that these developments pose, however, vary considerably.

## **VII.2. The Need for a Three-dimensional Conflicts Law**

Throughout the preceding sections, we have dealt with primary and secondary European law on the one hand, and the legal systems of the Member States on the other. The sociological background analytics and the normative premises of the doctrinal fabric of the conflicts approach can, quite plausibly, claim to capture the distinctiveness of the EU multi-level system and its vertical, horizontal, and diagonal conflicts adequately. With regard to the latter, it should have become particularly apparent why the conflicts-law approach cannot be reduced to the choice of a particular legal order. However, European conflicts law is also distinct in the conceptualisation of “vertical” and “horizontal” conflicts. Its rules and principles are supranationally valid, and, in this respect, stronger than the legal regimes established by international law; equally unique is the degree to which European law has transformed the *comitas* among Member States into binding legal-commitments.<sup>171</sup> However, this conflicts-law system is by no means comprehensive. The structural reasons have just been addressed: the transformations which

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(Frankfurt aM: Metzner, 1977), pp. 213-263. G. Teubner, “Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter”, in: O. Perez & G. Teubner (eds), *Paradoxes and Inconsistencies in the Law*, (Oxford: Hart Publishing, 2005), pp. 41-64; partisan positions are cited there in note 5; to be added to this list is now G. Conway, “Values and Conflicts of Norms in EU Law”, note 107 *supra*, Chapter 1 and *passim*.

<sup>170</sup> “Materialization and Proceduralization in Modern Law”, in: G. Teubner (ed), *Dilemmas of Law in the Welfare State*, (Berlin-New York: Walter de Gruyter, 1986), pp. 221-249.

<sup>171</sup> For a comparison with WTO law, see R. Howse & K. Nicolaidis, “Democracy without Sovereignty”, note 92 *supra*, and Ch. Joerges, *Three-dimensional Conflicts Law*”, note 93 *supra*.



have occurred at the national level in the turn to regulation and governance are also under way in the EU and in the international system.

Regulatory politics in the European Union have led to the establishment of complex transnational non-legislative, quasi-administrative regimes, which have been characterised as a *second dimension of conflicts law*. It responds to the irrefutable need to accompany the Europeanisation of the economy by transnational regulatory politics which must operate outside the administrative-law frameworks which nation states have at their disposal. These needs have triggered the co-operation of national bureaucracies with networks of epistemic communities and with the European Commission in the much criticised - but also much praised - comitology system, the establishment of ever more European agencies most of which are without genuine decision-making powers. Also in this context does the conflicts-law approach seek to defend the idea of the rule of law and law-mediated legitimacy. Its constitutional hopes and prospects focus on the quality of transnational decisions-making and its anchoring in, and supervision by, democratically legitimated actors – hence, again, on a proceduralisation of law.<sup>172</sup>

The *third dimension of conflicts law* reacts to the “privatisation” of regulative tasks and the development of new “governance arrangements”, which can also be observed at national level, but which are, unsurprisingly, particularly important at transnational levels.<sup>173</sup> Any sharp differentiation between primarily administratively-anchored regulative forms with which the conflicts law of the second dimension is concerned by the primarily private regimes is not possible because of the participation of expert communities and societal actors in both of them. What the law needs to be concerned about is the regulative function which both types exercise; and what it has to consider is its potential to ensure their legitimacy. The conflicts-law approach in its third dimension does, therefore, not qualify these regimes complacently and without further ado as transnational “law”. Instead, it seeks to develop and promote the impact of normative yardsticks for their recognition by democratic legal orders; it, furthermore, builds upon the law’s shadow, particularly the interests of non-statal orders in external recognition and their ensuing readiness to subject themselves to a stringent procedural discipline.<sup>174</sup>

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<sup>172</sup> See Ch. Joerges & M. Everson), “Re-conceptualising Europeanisation as a public law of collisions: comitology, agencies and an interactive public adjudication”, in: C.H. Hofmann & A.H. Türk (eds), *EU Administrative Governance*, (Cheltenham: Edward Elgar Publishing, 2006), pp. 512-540.

<sup>173</sup> See O. Dilling, M. Herberg, & G. Winter, *Responsible Business. Self-Governance and Law in Transnational Economic Transaction*, (Oxford: Hart Publishing, 2008).

<sup>174</sup> Thus is the conclusion of the extensive inquiries of H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, (Oxford: Hart Publishing, 2005), p. 223.

### **VII.3. The Mandate of the ECJ in Conflicts-law Perspectives**

Critical assessments of the ECJ, as they have been submitted above, are apparently difficult to digest even in the relatively progressive law quarters of European law scholarship and with the critics who are stigmatised as “enemies”.<sup>175</sup> The circle of potential addresses is widening. It not only includes political organisations such as trade unions, but may also be directed against those who argue that the ECJ operated outside good legal manners in the *Mangold* case,<sup>176</sup> and without further ado, it included the German Constitutional Court after its pronouncements on the Treaty of Lisbon.<sup>177</sup> The discovery of such enemies may, however, signal more of a crisis of the courts and the Dominicans among their academic allies, than some malicious anti-European scepticism among its critics. It should be recalled that the first seminal article on the constitutionalising activity of the ECJ explained the Court’s success by the fact that the ECJ operated “tucked away in the fairytale Kingdom of Luxembourg”.<sup>178</sup> Eric Stein’s most famous disciple warned, as early as 1994, that the “extended honeymoon” between the Court and its interlocutors may have come to an end.<sup>179</sup> We know, indeed, too much about the context and the conditions which have fostered the broad acceptance of the Court’s jurisprudence simply to assume that the Court’s performance and the Court’s recognition by its interlocutors will remain stable.<sup>180</sup>

Should the impact of the ECJ have resulted from the belief in the non-partisan and the non-political nature of its adjudication and the beneficial effects of these beliefs, the conflicts-law approach has to plead guilty to the accusation of not respecting this fiction. This unmasking of what cannot be concealed anyway builds upon both the many conclusive analyses of the ECJ in particular and the politicisation of the integration pro-

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<sup>175</sup> See Franz C. Mayer, “Der EuGH als Feind? Die Debatte um das soziale Europa in der europäischen Rechtsprechung”, (2009) 14 *Integration*, pp. 247-265.

<sup>176</sup> See D. Grimm, “Die große Karlsruher Verschiebung”, in: *Frankfurter Allgemeine Zeitung*, 09.09.2010, Nr. 209, p. 8.

<sup>177</sup> Note 23 *supra*.

<sup>178</sup> E. Stein, “Lawyers, Judges and the Making of a Transnational Constitution”, (1981) 75 *American Journal of International Law*, pp. 1-27.

<sup>179</sup> J.H.H. Weiler, “The Least Dangerous Branch: A Retrospective and Prospective of the ECJ in the Arena of Political Integration”, in: *idem*, *The Constitution of Europe. “Do the new clothes have an Emperor?”*, (Cambridge: Cambridge University Press, 1999), pp. 188-218, at 206.

<sup>180</sup> A. Vauchez, “The transnational politics of judicialization. *Van Gend en Loos* and the making of EU polity”, (2010) 16 *European Law Journal*, pp. 1-28.

ject as a whole.<sup>181</sup> The state of the Union is too critical, and the integration project too precious to benefit from this type of critical exchange. Europe and its Court would deserve a more serious effort. Lawyers and political scientists have produced very strong analyses of the Court's performance and impact.<sup>182</sup> It is, nevertheless, stunning to observe how cautious the *maître penseur* of constitutional and legal theory operates when it comes to defining the theoretical basis and legitimate functions of the ECJ.<sup>183</sup> What these analyses do not include is a political theory of the kind and of the quality of the theorising on constitutional courts and their legitimacy. The conflicts-law approach cannot claim to fill this gap conclusively. The distinction, however, between the supervision of political powers within constitutional democracies on the one hand, and the compensation of democracy failures of nation states by European law on the other, should at least provide some new orientation for further research.

## BIOGRAPHICAL NOTE

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<sup>181</sup> See the pathbreaking study by A-M. Burley (Slaughter) & W. Mattli, "Europe before the Court: A Political Theory of Legal Integration", (1993) 47 *International Organisation*, pp. 41-76, and, for the politicisation thesis, M. Zürn & M. Ecker-Ehrhardt (eds), *Gesellschaftliche Politisierung und internationale Institutionen*, (Frankfurt aM: Suhrkamp Verlag, forthcoming).

<sup>182</sup> See, recently, K. Alter, *The European Court's political power: selected essays*, (Oxford: Oxford University Press, 2009), p. 34 *et seq.*

<sup>183</sup> Suffice it to point here to M. Rosenfeld, "Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court", (2008) 4 *International Journal of Constitutional Law*, pp. 618-651; on p. 633, we read: "In spite of the remarkable success ... that the ECJ has had with national judges, it does have a vertical division-of-powers legitimacy problem. ... Unlike the U.S. Constitution, ... the EU treaties do not address the supremacy issue. It is the ECJ itself that has ruled that Community law is supreme in its landmark *Costa* decision." Does Rosenfeld provide us with an answer or a re-statement of the problem?