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Democracy and European Integration:
A Legacy of Tensions, a Re-conceptualisation
and Recent True Conflicts

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Abstract

This paper seeks to synthesise two concerns which are usually discussed separately One concerns the much discussed democracy deficit of the European polity. In this respect, it is considered that the democratic quality of the EU needs to be discussed in conjunction with Europe's potential to enable European citizens to see themselves as the sovereigns of the economic and social order. The decoupling of Europe's economic constitution from the social constitutions of Member States by the 1957 EEC Treaty has created a "social deficit" of the European construction which needs to be overcome if the EU is to gain full democratic legitimacy. The second concern is with the modes of governance that Europe has established in order to respond to irrefutable regulatory needs, including the quests for a European social model. Here, Europe is, especially in areas of social policy, resorting to soft law and non-legal governance techniques, which seem hardly reconcilable with Europe's commitment to the rule of law. Before paying the high price of de-legalisation, Europe should try out the alternative of re-conceptualising European law as new type of conflict of laws. This law would seek to attain what the Constitutional Treaty had called the "motto of the Union", namely, a reconciliation of "unity and diversity"; it would not only help to rescue the rule of law but also serves to enhance Europe's chances of coping with the unresolved substantive tensions, including the social deficits of the European polity.

Keywords

Constitution for Europe, democracy, diversity/homogeneity; European social model, governance, national autonomy; open co-ordination, rule of law, private international law, supranationalism, welfare state

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Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts[*]

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Bremen/Florence

A) Introductory Remarks

'Democracy and European integration' is an unavoidable assignment in an event which addresses European challenges in the present century. It is also an extremely wide, and, in this sense, an indeterminate one. In the sub-heading, I have taken the liberty of substantiating my assignment in a manageable way – the wording inevitably reflects specific interpretation of these challenges. This interpretation may, at the outset, be summarised in three theses or concerns: The first concerns the original construction of the European Community. According to a widely-held view, this construction suffers from a democracy deficit; this view, it is submitted, is too simplistic; Europe's so-called democracy deficit requires responses to a "social deficit", which is deeply engraved into the institutional structure of the European polity. The second thesis concerns the responses on which policy-makers and academics place so much hope: Europe's institutional *impasses* have led to a gradual substitution of the traditional Community method by new modes of governance. However, the turn to governance, although unavoidable/inevitable? and successful in many policy fields, will not cure Europe's social deficit. This failure, we argue, threatens the legitimacy of the integration project as a whole. There are now ready-made recipes available for these queries. Europe should – this is the third thesis – first of all understand the conflicts that it is confronted with, and re-design its objectives accordingly.

These three concerns will be substantiated in three steps. In the first (Part B), we will substantiate the thesis that tensions exist between democratic principles and the

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integration project, by first outlining our understanding of constitutional democracy (B.I) and then confronting this understanding with integration strategies pursued in the formative era of the European Community and thereafter (B.II-III). The second step (Part C) will be dedicated to the most recent of these strategies, namely, the turn to governance. It will first explain why this turn occurred and why it seems irreversible (C.I). It will then point to the risks that this turn involves, in particular, its tensions with the European commitment to the rule of law. The third step of the argument (Part D) is a response to this dilemma. The tensions between the original design of the European Community and the irrefutable needs of the EU can be overcome by a re-conceptualisation of European law as a new type of supranational conflict of laws. This law seeks to achieve what the Constitutional Treaty had called the "motto of the Union", namely, a reconciliation of "unity and diversity". It is submitted that such a move would not only help to rescue the rule of law, but would also increase our capacity to cope with the unresolved substantive tensions within the European polity. This, however, is only a potential; the Epilogue (E) of this essay will point to two current controversies in which Europe's capability to cope with the tensions between democracy and integration is at stake.

B) Tensions

I. Principles of Constitutional Democracy

Professional constitutionalists tend to start their deliberations with a sketch of the extremely rich theoretical debate on democratic constitutionalism both in our disciplines and in political philosophy. On the basis of such exercises they will reflect upon the specifics of the European constellation and focus upon three issues:[1] (1) Is it adequate to call the legal framework in place in Europe a constitution in the formal sense, and/or, indeed, in a material sense? (2) Is the constitutional frame democratic, or can it claim some other type of authority? (3) If this frame is not fully democratic and alternative claims to authority cannot meet with general acceptance, how can Europe's democratic deficit be cured?

I have to refrain, however, from such an exercise and restrict myself to revealing the two most important among my own theoretical premises.

- Constitutionalism and democracy are not just academic artefacts but socially and historically embedded products. The recent striving for a European Constitution has disregarded this insight.

[1] See, for a particularly well structured legal analysis, M. Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called', (2006) 54 *American Journal of Comparative Law* 505 *et seq*., and, for a recent summary of the democracy debate in social theory and political science, C. Offe & U.K. Preuß. 'The Problem of legitimacy in the European Polity. Is Democratization the Answer?' in: C. Crouch & W. Streeck (eds.), *The Diversity of Democracy. Corporatism, Social Order and political Conflict*, (Cheltenham, UK: Edward Elgar), available also at: www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/Research/PaperSeries/ConWEBPapers/.

- One particularly sensitive legacy of Europe's constitutionalism is the promise of social justice, which is neither a uniform heritage nor an innocent one, but is one to which European constitutionalism must find a response.

It must suffice here to elucidate these points with references to the German case. Germany's post-war constitutionalism needs to be understood as a response to the experiences of the Weimar Republic and its *Staatsrechtslehre.* It was Hermann Heller, building upon the ideas of *Wirtschaftsdemokratie* (economic democracy) and *Sozialverfassung* (social constitution) as promoted by Franz Neumann, Hugo Sinzheimer and Ernst Fraenkel, who presented a constitutional theory of a *social Rechtsstaat.* The "bitter experiences" of the Weimar Republic were present in the minds of the drafters of Germany's basic law.[2] What did this mean in 1948? The constitution, in order to foster legitimacy of the new political order, had to distance itself from the past, and, in addition, had to strive for social justice. This is not just a German *Sonderweg*. Certainly, there is no particular common social model in Europe.[3] What Europeans have in common, however, is a broad social consensus on nationally specific variants of welfarism.[4] The constitutional status of these commitments varies and the strength and design of social policy is never written in stone. What is quite firmly established, however, is the understanding that the citizens of a constitutional democracy are entitled to vote in favour of welfare policies.[5] This is, legally speaking, by no means a trivial principle, certainly not at European level, as we will see in the next Sections, but not even at national level. Friedrich August von Hayek was the most outspoken proponent of this thesis, namely, that the turn to welfare policies means taking "The Road to Serfdom".[6] A legendary debate in the young German Federal Republic between Wolfgang Abendroth and Ernst Forsthoff concerned precisely that *problématique*,[7] and these debates are going on even today.[8] Not in European constitutionalism, however – and this is a failure with significant consequences.

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[2] P.C. Caldwell, 'Is a Social *Rechtsstaat* Possible? The Weimar Roots of a Bonn Controversy', in: P.C. Caldwell & W. Scheuerman (eds.), *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic*, (Boston: Humanities Press, 2000), 136 *et seq*.

[3] The use of the term is nevertheless widespread; see, with many references, B. Bercusson, 'The Institutional Architecture of the European Social Model', in: T. Tridimas & P. Nebbia (eds.), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*. Vol. 2 (Oxford: Hart Publishing, 2004), 311-331. That may be explained by the wish to underline differences to the US, but does not provide us with a positive definition.

[4] See, for example, recently St. Leibfried & M. Zürn, 'Reconfiguring the national constellation', in: St. Leibfried & Michael Zürn (eds.) *Transformation of the State*, (Cambridge: Cambridge UP, 2005), 93-117. [= European Review, Volume 13, Supplement S1, available at: http://0journals.cambridge.org.].

[5] The possibility of a change between government and opposition is, according to Niklas Luhmann, a constitutive feature of democracies (see, for example, his 'Meinungsfreiheit, öffentliche Meinung, Demokratie", in: E.-J. Lampe (ed.), *Meinungsfreiheit als Menschenrecht*, (Baden-Baden: Nomos, 1998), 99 *et seq*., 106 *et seq*. One need not subscribe to systems theory, however, to come to that conclusion (see, for example, Offe & Preuß, note 1, at 9 *et seq*.). I prefer to substantiate that formula because it seems to me that European constitutionalism has lost of sight that constitutions are supposed to reach out into *Wirtschaft und Gesellschaft* (economy and society).

[6] (London: Routledge, 1944).

[7] See A. Fischer-Lescano & O. Eberl, 'Der Kampf um ein soziales und demokratisches Recht. Zum 100. Geburtstag von Wolfgang Abendroth', (2006) 51 *Blätter für deutsche und internationale Politik*, 577-585.

To rephrase this point and to prepare for the next step: the integration project was designed as a economic project that would leave competences for social policy in the hands of the Member States. Fritz Scharpf has called this division the decoupling of the social sphere from the economic sphere.[9] As the integration project has progressed, this decoupling has produced a "social deficit".[10] The European "economic constitution" has been completed. It has affected the room for manoeuvre for social policy at national level while failing to compensate this erosion by establishing European competences of equivalent weight in the field of social policy. Assuming that this description is fairly adequate, do we have to conclude that Europe's social deficit is of constitutional importance? The dominance of economic policies would mean that European integration is a partisan project. Its in-built bias is not exposed to the cycles of government and opposition which characterise democracies. There is an additional risk involved. If it should turn out to be true that the design of the integration project is politically-biased, Europe is likely to lose support from a significant part of its

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[8] See, the Special Issue on 'Social Democracy' of the (2004) 17 *Canadian Journal of Law and Jurisprudence on Social Democracy*, (Guest Editor: Colin Harvey); to cite just one contributor, namely, R. Burchill, 'The EU and European Democracy – Social Democracy or Democracy with a Social Dimension?', 185 *et seq*, who argues: "In addressing the 'wider issues' of democracy, we are taken beyond the political sphere to engage with the social and economic organisation of society. Once we move in this direction, agreement about the nature, scope and content of democracy becomes very contentious. If the overall purpose of democracy is to provide the conditions for the full and free development of the essential human capacities of all the members of the society … [D]emocracy needs to be something more than the existence of a few basic political procedures. By bringing the idea of 'social' into the frame, we then begin to address the wider issues by incorporating the social and economic aspects of society into our understanding of democracy. However, as this involves making normative claims in relation to democracy, it is widely felt that this stretches the understanding of democracy too far" (*ibid.*, at 186).

[9] F.W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 *Journal of Common Market Studies*, 645-670. – It deserves to be underlined that the founding fathers of Ordo-liberalism to whom we owe the theory of the economic constitution have insisted on the interdependence of both spheres (the *Interdependenz der Ordnungen*; see, famously, W. Eucken, *Grundzüge der Wirtschaftspolitik*, (Tübingen: Mohr/Siebeck, 1952), 6th ed. 1990, 180 *et seq*.); out of the rich literature on the interdependence theorem, see, for an extremely subtle reconstruction, M. Wegmann, *Früher Neoliberalismus und europäische Integration: Interdependenz der nationalen, supranationalen und internationalen Ordnung von Wirtschaft und Gesellschaft (1932-1965)*, (Baden-Baden: Nomos, 2002), in particular at 369 *et seq.* This may look like a tiny detail, but it is one which reveals, that the drafters of the Constitutional Treaty did not really know what they were referring to when they inserted the notion "*soziale Marktwirtschaft*" (social market economy) in the Constitutional Treaty; see Section E.I below.

[10] The use of the term is by no means uniform. For example, according to M. Poiares Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU', in P. Alston (ed.), *The EU and Human Rights* (Oxford, Oxford U.P., 1999), 449-472, at 464 *et seq*., the European social deficit can be defined by the sytematic bias of the inegration process for econonmic freedoms as opposed to social rights. His analysis is based upon the distinction between competition within markets (the domain of economic freedoms) and competition among states (the porocess of regulatory competition which affects the balance achieved within States between social values and economic freedoms). Social rights concern the latter. In the integration process they to "guarantee participation and representation in market decisions" (470). The premisis of the argument are explained in: M. Poares Maduro, *We the Court – The European Court of Justice and the European Economic Constitution*, (Oxford: Hart, 1998), esp. at 103-149.

population.[11] Since the people cannot direct their protest against the dichotomy of government or opposition, they will oppose the European project itself. There are many reasons to believe that this mechanism was at work in the French referendum, and it is certainly useful to take a closer look at the dynamics which resulted from the decoupling of the social from the economic constitution, since the formative era of the European Economic Community.

II. Tensions between Integration and Democracy

The observation that the integration project stands in a tense relationship with democratic constitutionalism may be understood to be only one exemplar of a more general problem, namely that of the social integration of capitalist societies; an issue which the German Ordo-liberal tradition characterises as the necessary interdependence of societal and the economic "orders" (*Ordnungen/Verfassungen*[12]). The following section will examine it in the specific context of the integration project. This project, we submit, has decoupled the European economic "constitution" (*Wirtschaftsverfassung)* from the national social "constitutions" *(Sozialverfassungen)*. How was this intervention into national orders perceived and reflected in Europe's "*Wandelverfassung*"?[13] In our discussion of the issues, we will distinguish between three conceptualisations of the European polity, each of which has relied upon different mechanisms as the bases of its institutional suggestions.[14] These three concepts of paradigmatic importance are law, economic efficiency, and, most recently, governance.

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[11] A political science version of this thesis is Fritz Scharpf's well-known contention that democracies that prove to be unable to resolve problems of economic and social stability risk the loss of social legitimacy, ['Democratic Policy in Europe', (1996) 2 *European Law Journal*, 136-155, a thesis closely linked to Scharpf's seminal analysis of Europe's "political deficit"; see 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', (1988) 66 *Public Administration,* 239-278.

[12] *Verfassung* in German has a double meaning. It can be a legal constitution and a social structure or pattern. The notion of *Ordnung* (order) too, comprises this twofold meaning. This clarification is necessary to convey our idea of a constitutionalisation of the economy, of other societal spheres or parts of the legal system. Such constitutionalisation can either claim the dignity of constitutional law (e.g. supremacy within the legal system) or be an integral part of the constitutional order (in this sense, Jürgen Habermas talks of the co-originality of private and public law; see his *Faktizität und Geltung*, (Frankfurt aM: Suhrkamp, 1992), 112 *et seq*.

[13] H.P. Ipsen, 'Die Verfassungsrolle des Europäischen Gerichtshofs für die Integration', in: J. Schwarze (ed.), *Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz*, (Baden-Baden: Nomos, 1982), 29 *et seq*.

[14] This approach is inspired by M.R. Lepsius, 'Die Europäische Gemeinschaft: Rationalitätskrterien der Regimebildung', in: W. Zapf (ed.), *Die Modernisierung moderner Gesellschaften.Verhandlungen des 25. Deutschen Soziologentages in Frankfurt am Main 1990*, Frankfurt a.M./New York: Campus 1991, 309-317. On the categorioes used here see, in more detail, Ch. Joerges & M. Everson, 'Law, economics and politics in the constitutionalization of Europe', in: E.O. Eriksen, J.E. Fossum & A.J. Menéndez (eds.), *Developing a Constitution for Europe*, (London/ew York: Routledge, 2004), 162-179; Ch. Joerges, 'What is left of the European economic constitution? A melancholic eulogy', (2005) 30 *European Law Review,* 461-489 (O que resta da Constituição Econômica Européia? Uma elegia melancólica, forthcoming).

II.1 Integration through Law

This is the paradigm associated with the formative era of the European Community.[15] Generations of scholars have built upon it and tried to decipher it,[16] and the analytical strength of the paradigm becomes apparent when we look at social and economic policy through its lenses. Only the European economic system was juridified through supranational law, whereas social policy at European level could at best be said to have been handled through intergovernmental bargaining processes. This is why the integration through law paradigm combines so well with the theory of the European economic constitution promoted by Germany's Ordo-liberals.

Let me repeat this much here: the affinities between Ordo-liberalism and the construction of the European Economic Community of 1958 were manifold – for a series of reasons. As a concept, *Ordo*-liberalism appeared particularly appropriate in terms of both the legitimisation and the orientation of the integration project. The freedoms guaranteed in the EEC Treaty, the opening up of national economies, and anti-discrimination rules and the commitment to a system of undistorted competition were interpreted as a "decision" that supported an economic constitution, and which also matched the Ordo-liberal conceptions of the framework conditions for a market economic system (at least to the degree that the many departures from the system might be classified as exceptions, and a blind eye could be – had to be! – turned to the original sin of the Common Agricultural Policy). The fact that Europe had started out on its integrationist path as a mere economic community lent plausibility to Ordo-liberal arguments – and even required them: in the Ordo-liberal account, the Community acquired a legitimacy of its own by interpreting its pertinent provisions as prescribing a law-based order committed to guaranteeing economic freedoms and protecting competition by supranational institutions. This legitimacy was independent of the state's democratic constitutional institutions. By the same token, it imposed limits upon the Community: thus, discretionary economic policies seemed illegitimate and unlawful.[17]

Regardless of one's affinity for the argument, it is coherent and compatible with the institutional order of the European Economic Community as it was originally conceived. The Ordo-liberal European polity has a twofold structure: at supranational level, it is committed to economic rationality and a system of undistorted competition, while, at national level, re-distributive (social) policies may be pursued and developed further.

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[15] See, path breaking, J.H.H. Weiler, 'The Community system: the dual character of supranationalism'. (1981) 1 *Yearbook of European Law* 257-306.

[16] Most recently, A. Vauchet, 'A Europe of Norms. A Political Sociology of a "Community of Law"', Manuscript 2007 (on file with author).

[17] Significant, here, is A. Müller-Armack, 'Die Wirtschaftsordnung des Gemeinsamen Marktes', in: *idem*, *Wirtschaftsordnung und Wirtschaftspolitik*, (Freiburg i.Br: Rombach, 1966), 401 *et seq*. Ordo-liberalism continued to be the leading school of Economic and private law in the Federal Republic. Its outstanding intellectual head is Ernst-Joachim Mestmäcker is the uncontested and of the ordo-liberal tradition. He has recently published his most important essays on the constitutionalisation of the economy in the EU: *Wirtschaft und Verfassung in der Europäischen Union. Beiträge zu Recht, Theorie und Politik der europäischen Integration*, (Baden-Baden: Nomos, 2003). The time span ranges from 1965 to 2001. All the stages of the integration process are considered and all grand issues discussed. Less impressive in terms of theoretical grounding, however, is the new edition of his *Europäisches Wettbewerbsrecht* (Munich: Beck, 1974): E.-J. Mestmäcker & H. Schweitzer, *Europäisches Wettbewerbsrecht*, 2nd ed. (Munich: Beck, 2004).

To summarise: Europe was constituted as a dual polity. Its "economic constitution" was non-political in the sense that it was not subject to political interventions. This was its constitutional-supranational *raison d'être*. Social policy was treated as a categorically-distinct subject. It belonged to the domain of political legislation and, as such, had to remain national. The social embeddedness of the market could, and, indeed, should, be accomplished by the Member States in differentiated ways – and, for a decade or so, the balance seemed stable.[18]

II.2 Jacques Delors' Internal Market Programme and the Erosion of Europe's Economic Constitution

The Delors Commission's 1985 *White Paper on Completion of the Internal Market*[19] is widely perceived as a turning point and a breakthrough in the integration process. Jacques Delors' initiative promised to overcome a long phase of stagnation; the means to this end was the strengthening Europe's competitiveness. Economic rationality, rather than "law", was from now on understood as Europe's orienting maxim, its first commitment and regulative idea. In this sense, it seems justified to characterise Delors' programme as a deliberate move towards an institutionalisation of economic rationality. This seems even more plausible when we consider the two complementary institutional innovations accomplished through and subsequent to the Maastricht Treaty, namely, monetary Union and the stability pact. Europe looked like a market-embedded polity governed by an economic constitution, rather than by political rule.

The praise of the Internal Market Programme was not to last long.[20] What had started out as a collective effort to strengthen Europe's competitiveness and to accomplish this objective through new (de-regulatory) strategies soon led to the entanglement of the EU in ever more policy fields and the development of sophisticated regulatory machinery. It was, in particular, the concern of the European legislation and the Commission with "social regulation" (health and safety of consumers and workers, and environmental protection) which served as irrefutable proof. The weight and dynamics of these policy fields had been thoroughly under-estimated by the proponents of the "economic constitution". Equally important and equally unsurprising was the fact that the integration process deepened with the completion of the Internal Market and affected ever more policy fields. This was significant not so much in terms of its factual weight, but, in view of Europe's "social deficit", in terms of the new efforts to strengthen Europe's presence in the spheres of labour and social policy.

These tendencies became mainstream during the preparation of the Maastricht Treaty which was adopted in 1992. This is why that Treaty, officially presented as both a

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[18] This all fits well into the analysis of "the national configuration of the state in the Golden Age" by St. Leibfried & M. Zürn (note 4, above) at 4 *et seq*.; it seems worth noting that the ordo-liberal construct has structural affinities, or is at least compatible, with J.H.H. Weiler's analysis of the co-existence of, and interdependence between, legal supranationalism and political intergovernmentalism in the EEC (see note 14 above).

[19] Commission of the EC, 'Commission White Paper to the European Council on Completion of the Internal Market', COM(85) 310 final of 14 June 1985.

[20] See, on the following, in some detail, Ch. Joerges, 'Economic Law, the Nation-State and the Maastricht Treaty", in: R. Dehousse (ed.), *Europe after Maastricht: an Ever Closer Union?* (Munich: C.H. Beck, 1994), 29-62.

deepening and a consolidation of the integration project, met with fierce criticism. The most outspoken critique came not from the left, but from the proponents of the new economic philosophy and in particular from German's Ordo-liberal school.[21] And, indeed, the Maastricht Treaty of 1992 can be read as a break with the Ordo-liberal economic constitution. After the explicit recognition and strengthening of new policy competences, it seemed no longer plausible to assign a constitutive function to the "system of undistorted competition" because this very "system" had been now downgraded to one among many others. It seemed obvious that, from now on, the relative weight of the competing political objectives was to be determined in political processes.[22] The Ordo-liberal belief in competition as *the* discovery procedure in economic affairs was, in particular, irreconcilable with the acknowledgement of industrial policy as a constitutionally-legitimated concern. In addition, the expansion of competences in labour law by the Social Protocol and Agreement on Social Policy of the Treaty blurred the formerly clear lines between Europe's (unpolitical) economic constitution and the political responsibility Member States had for social and labour policies.

II.3 An Interim Conclusion

The efforts to institutionalise economic rationality, we have to conclude, were only partly successful. Competing policy objectives, even elements of a social policy, were established at European level. Why did all this happen? Was it the resistance of vested interests? The lobbying of environmentalists? The parochialism of national policy-makers? A bit of each of these? These are queries of fundamental importance. We cannot explore them empirically, but it seems useful to rephrase them with the help of the competing views of two master thinkers, namely, Michel Foucault and Karl Polanyi. In his lectures on the *Birth of Biopolitics* delivered at the *Collège de France* in the 1970s, Foucault discussed the Ordo-liberal philosophy quite extensively[23] – and he captured their messages well:

> "[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 sur surveillance du marché plutôt qu'un marché sous surveillance de l'État."[24]

"That may be all right in theory, but does not do in practice", Polanyi might object. The message of his "Great Transformation", published back in 1944, questions the Ordo-liberal philosophy – and hence also the practical relevance of Foucault's argument – on sociological grounds: markets are "always socially embedded", he had insisted.[25] Polanyi had not spelled out the political and normative implications of his sociological

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[21] See M. Streit & W. Mussler, 'The Economic Constitution of the European Community. From "Rome" to "Maastricht",' (1995) 1 *European Law Journal* 5 -30.

[22] See Article 2 ad 3 (g) of the Treaty as amended by G (2) and (3) TEU.

[23] M. Foucault, *Naissance de la biopolitique. Cours au Collège de France*, (Paris: Seuil/Gallimard 2004), in particular the lecture of 7 February 1979, 105-134 and the lecture of 14 February 1979, 135-164.

[24] *Biopolitique* (previous note), Lecture 5, 120.

[25] K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time (1944)*, (Boston: Bacon Press, 1992), esp. at 45-58, 71-80.

observation, but they were, in principle, irrefutable. Once it was recognised that markets could not be understood simply as being mechanisms that functioned perfectly and automatically to adjust supply and demand, but, instead, were understood to be quite fragile, morally, socially and politically embedded institutions, then it also became necessary to consider how to ensure that they functioned in a way that was socially responsible.

> "[T]he critical question is no longer the quantitative issue of how much state or how much market, but rather the qualitative issue of how and for what ends should markets and states be combined and what are the structures and practices in civil society that will sustain a productive synergy of states and markets".[26]

It is unsurprising that the European policy process accompanying the completion of the internal market became both more important and more burdensome – and the European regulatory machinery more sophisticated and more dependent upon the support of governmental and non-governmental actors. This is the background against which Europe took another turn, the turn to governance. This turn, however, seems to have led the EU into a new dilemma.

C) The Turn to Governance

Our discussion of the turn to governance in this section will be primarily descriptive. We will start with some remarks on its officious beginning at the turn of the millennium and then briefly outline the main modes of governance. They all depart, albeit with very different intensity, from the Community method. This is not – in itself – disquieting. Our real query is with the compatibility of governance practices with the EU's commitment to the rule of law. It is to this query that Section C will seek to respond.

I. The New Message

As the preceding remarks in Section B.II.3 should indicate, the turn to governance is, in my view, an irresistible development. This thesis implies that the turn cannot be so new, but must have had precursors, which is, indeed, the case. It is equally true, however, that the turn to governance became widely visible as an official Community strategy only at the turn of millennium, with a speech by the President of the Commission delivered on 15 February 2000 to the European Parliament. On this occasion, Romano Prodi announced far-reaching and ambitious reforms. This was a message spoken in a new vocabulary, announcing a fresh agenda and a novel working method. The Commission's – then – new president envisaged a new division of labour between political actors and civil society, and a more democratic form of partnership between the layers of governance in Europe. This was a package of innovation, openly admitting the need to embed the European market in European society better, that was launched strategically

[26] See F. Block, 'Towards a New Understanding of Economic Modernity,' in: Ch. Joerges, B. Stråth & P. Wagner (eds.), *The economy as a polity. The political construction of modern capitalism – an interdisciplinary perspective*, (London: UCL Press, 2005), 3.

into the legally-undefined space located somewhere between administrative[27] and constitutional reform.[28] The Commission followed up on the rhetoric of the speech, and a "Governance Team" was entrusted with the task of elaborating the reform agenda.[29] Following intense debate both within and outside the Commission, a White Paper was published in July of 2001.[30] While the first responses in academic circles were quite reserved and critical,[31] the new concept was to become an enormously popular object of academic endeavours, especially once the Commission decided to support the "Network of Excellence" (CONNEX, based in Mannheim) and one "Integrated Project" (NewGov, based at the EUI) dedicated to governance research. The CONNEX bibliography collecting the relevant literature now contains (May 2007)[32] 3.345 entries.

Political scientists dominate this literature. Indeed, the turn to governance is wonderfully compatible with what political-science integration research has been telling us for some years now: the EU must be understood as a "multi-level system of governance", a heterarchy, rather than a hierarchy, an only partially-integrated polity without a government, which needs to ensure the co-operation of semi-autonomous political and administrative bodies. Though a far broader term, governance can also, and in the specific terms of the "always socially-embedded market", be understood as an effort to structure civil society and market relations beyond our traditional understandings of state-market dichotomies.

II. Some New and not so New Modes of Governance

The language is new, the concepts employed are non-legal, but a good deal of the practices that these concepts describe have long been there and the law has observed them more or less attentively.

The European committee system is the oldest form of the "new" modes of governance. It emerged where complex European governance incorporating national actors first became indispensable, namely, in agricultural policy.[33] "Comitology" is by now legally

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[27] See, Reforming the Commission – A White Paper, COM(2000) 200 final of 1 March 2000; See, http://europa.eu.int/comm/reform/index_en.htm.

[28] Which was set in motion by the EU Charter of Fundamental Rights, (OJ 2000, C 346/1 of 18 Dec. 2000), followed by the Laeken Conference of 14-15 Dec. 2001 with its concluding declaration on the future of the Union and the setting up of a constitutional convention, which took up its work in March 2002. (http://europeanconvention.eu.int/plen_sess.asp?lang=EN).

[29] 'Enhancing democracy in the European Union. Working Programme', SEC(2000) 1547, 7 final of 11.10.2000; http://europa.eu.int/comm/governance/work/en.pdf.

[30] 'European Governance. A White Paper', COM(2001) 428.

[31] See, Ch. Joerges, Y. Mény & J.H.H. Weiler 'Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance', European University Institute-Robert Schumann Centre/NYU School of Law-Jean Monnet Center 2002, www.jeanmonnetprogram.org/papers/01/010601.html.

[32] www.connex-network.org/govlit.

[33] See J. Falke, 'Komitologie – Entwicklung, Rechtsgrundlagen und erste empirische Annäherung', in: Ch. Joerges & J. Falke (eds.), *Das Ausschußwesen der Europäischen Union. Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*, (Baden-Baden: Nomos, 2000), 43-159.

well-defined. It is the term used for the committees entrusted with the "implementation" of Community law framework provisions.[34]

The principle of mutual recognition is widely perceived as a legal principle, not as a governance practice. The principle has been used sensitively and subtly by the ECJ, often so as to "regulate" regulatory competition. Political scientists Kalypso Nikolaïdes and Susanne Schmidt use the term "managed mutual recognition",[35] which designates the discretionary dimensions of the concept better. An adequate *legal* conceptualisation of mutual recognition requires – in my view – a conflict-of-laws methodology. This thesis will be explained in Section D below.

The "New Approach to technical harmonisation and standards" is, strangely enough, hardly ever mentioned in the new governance literature. This may be because the "new approach" is by now more than 20 years old. The features that one refers to when characterising "new governance" are, however, all present: a circumvention of the Community method, the involvement of non-governmental actors, resort to expertise, and European-wide networking.[36]

Independent agencies were the institutional core of Giandomenico Majone's conceptualisation of the EU as a "regulatory state".[37] However, while Europe took over the vocabulary that Majone had brought from the US and also created an impressive

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[34] Through these committees, made up of representatives of the member states and experts appointed by them, the Commission organises a "Community" (*i.e.*, overarching and co-operative) "administration" of the internal market in such policy areas as food safety, safety of technical products and safety at work. The committee system has to compensate for the Community's lack of genuine administrative powers and guarantees. It ensures the accountability of the Commission-driven European administrative machinery to the Member States – not to the European Parliament, which for decades has striven for a strengthening of its institutional powers. By incorporating national bodies, however, it also promotes acceptance of European rules in Member States. The committees do the detailed work on reducing the functional and structural tensions of the internal market project. Even though, for the most part, the issues at stake seem purely technical, they may have important economic implications and politically sensitive dimensions. Thus comitology can be characterized as a mediator of functional requirements and normative concerns. The changing composition of the committees follows from the task of balancing differing sorts of technical knowledge and regulatory concerns and bringing them into a sort of synthesis. It also, however, reflects the multiplicity of interests and political differences that have to be coped with in the implementation process. The committees often act like "mini-Councils"; they act as venues for mediation between market integration and member states' concerns and reliable indications suggest that their discussions take place objectively and deliberatively [Ch. Joerges & J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', (1997) 3 *European Law Journal*, 273-299].

[35] K. Nikolaïdes & S.K. Schmidt, 'Mutual Recognition on Trial: The Long Road to Services Liberalisation", (2007) 18 *Journal of European Public Policy*, 667-681.

[36] The cunning in the "New Approach" was concealed in a package of interrelated measures: European law-making had a large burden taken away from it, essentially by henceforth contenting itself with laying down "essential safety requirements". Fleshing these out was delegated to experts from European and national standardisation organisations well-used to dealing with each other. In practice, the inclusion of non-state actors meant "a delegation" of legislative powers that obviously could not be admitted openly. The protagonists of the new approach had to paper over it with the fiction that the "essential safety requirements" adequately programmed the work of the standardisation organisations. "Private Transnationalism" is the adequate characterisation of this mode of governance; see H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, (Oxford: Hart, 2005).

[37] G. Majone, 'The Rise of the Regulatory State in Europe', (1994) 17 *West European Politics*, 77-101.

number of institutions that were termed agencies, it is not disputed that new European agencies share only nomenclature with their American namesakes. The new European agencies meet the need for market-correcting, sector-specific regulations, either indirectly or as executive organs working under the Commission's supervision. Despite their formal subordination and the fact that the representatives of national authorities sit on their management bodies, the agencies seem, thanks to their founding charters, their organisational stability, the relative autonomy of their budgets (taking different shapes in individual cases), and their networking with national administrations, to be fairly well-protected against direct, explicit political influences. They may best be understood as a re-organised comitology, the powers of which are *de jure* confined to the form of the advisory committee, part of Europe's political administration.

III. The Paradigmatic Case of the Open Method of Co-ordination

The so-called Open Method of Co-ordination (OMC) deserves particular attention in the present context for three interdependent reasons. Firstly, since the introduction of the new Title VIII on employment in the Amsterdam Treaty, and after the Lisbon European Council's recommendation to apply the OMC in areas of social policy, the OMC was widely presented as the best cure to Europe's "social deficit" as described above.[38] Secondly, and somewhat irritatingly, the Method's proponents praise as a virtue what lawyers used to perceive as a weakness: the OMC is recommended and used in areas where political actors feel considerable pressure to act, but where the Treaty offers them no legislative powers. The mode of action is essentially one of multilateral supervision, in which, on the basis of guidelines or benchmarks laid down by the European Council, the Council and the Commission, governance occurs through mutual systematic monitoring (multilateral surveillance) and through assessment of the performance of the individual governments in peer review processes. In short, the method has moved social policy "from Bismarck to benchmark" (Gunnar F. Schuppert). No judicial protection is provided against this sort of governance, still less some constitutional review thereof. Similar measures would, after all, appear downright dysfunctional if political action were to be exercised outside the powers provided for by law. It is surprising to observe how lightly the legacy of the rule of law is taken. A related third query concerns the notion of law itself. David and Louise Trubek, in a recent analysis of the relationship between the Community method and new governance, differentiate between complementarity, rivalry and hybridity, arguing that all three should be understood as new modes of law.[39] Other prominent authors, such as Graínne de Búrca and Neil Walker, criticise the "conceptual imperialism of law", which they seek to overcome with a vision of "law as a distinctive *medium* of social activity" which would cover "both law and new governance, like all forms of normative order".[40]

All of the three concerns are related. Their interdependence becomes apparent when we contrast the new learning with the, by now, old efforts to come to terms with the

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[38] Section A.I.

[39] D.M. Trubek & L.G. Trubek, 'Hard and Soft Law in the Construction of the Social Europe: the Role of the Open Method of Co-ordination', (2005) 11 *European Law Journal*, 343-364.

[40] G. de Búrca & N. Walker, 'Reconceiving Law and New Governance', EUI Working Paüper Law No. 2007/10 (San Domenico di Fiesole, 2007), at 13 ff, available at: www.iue.it/LAW/Publications.shtml.

deficiencies of legal formalism, political interventionism, command and control regulation in the 1980s.[41] These deficiencies were *cum grano salis* identical with those that the critique of the traditional Community Method has identified and the practices now named "governance" which were then called "post-interventionism" – the one and only important difference being that the debates of the 1980s focused on national, rather than post-national, constellations. It was characteristic of these efforts[42] that they sought to link legal theory to social theory (*Gesellschaftstheorie*), to define the functions of law, and to reflect the schisms between sociological studies of the legal system, normative theories and doctrinal arguments. When contrasted with these efforts to define the embeddedness of legal theory, the promotion of a new transformation of the category of law seems under-theorized and in that sense premature.[43]

European governance comes, as even this very brief outline has documented, in many forms. What these forms have in common is that they organise policies and decision-making processes outside the legal frameworks foreseen in the original Treaty and its successive amendments. But this is nothing unusual. All legal systems are continuously confronted with social change, new claims and the need to give answers to questions not yet decided. Each of the modes of governance is challenging in some distinct way. And it is precisely because the turn to governance is irreversible that it seems preferable to ask how the rule of law may survive that development. The answer to this question will have to operate at two levels. It will have to (re-) conceptualise Europe's post-national constellation – this will be done through a conflict-of-laws approach to European law – and it will have, at the same time, to explain its theoretical credentials – this will be done with the help of the discourse theory of law.

D) Constitutionalising Europe through a Supranational Conflict of Laws

The idea of re-conceptualising European law as a new type of conflict of laws is less idiosyncratic than it may appear at first sight. The argument rests upon two basic premises.

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[41] See, on the following, Ch. Joerges, 'Compliance research in legal perspectives', in: Ch. Joerges & M. Zürn (eds.), *Law and Governance in Postnational Europe. Compliance Beyond the Nation-State*, (Cambridge: Cambridge UP, 2005), 218-261 (Section 7.3) and Ch. Joerges, 'Integration through de-legislation? An irritated heckler', European Governance Papers (EUROGOV) No. N-07-03, 2007, available at: www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf (Section 2).

[42] Mentioned just in passing by G. de Búrca & N. Walker (note 40), at 8, note 13.

[43] This critique neglects the links of the suggestions cited to the much more comprehensive and ambitious project of democratic experimentalism as developed in particular by Charles F. Sabel and Jonathan Zeitlin (see, recently, their 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', EUROGOV Working Paper No. C-07-02, available at www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf.network.org/eurogov with many references). I cannot see, however, that this type of theorising would do justice to the historical weight of European diversity, the complex legacy of European welfarism; for these reasons, democratic experimentaliam cannot adequately address the political and social conflicts which Europe is currently facing. See the examples discussed in Section E below.

The first concerns the democracy deficit and suggests that we turn the pertinent debates on their head: European constitutionalism should not be fixated on curing the democracy deficits of the European Union. The law of the European Union should instead be understood as a potential cure for the democratic failure of its Member States and should derive its legitimacy out of that function. These democracy failures are structural. They stem from the inevitable extra-territorial effects that nation states impose – by all of their decisions of some weight – on other states and on their citizens. European law needs to address the gap between the empowerment to take decisions and the effect that those decisions have upon non-nationals – this is the task which should be assigned to a "first order conflict of laws".

The second suggestion builds upon the first. European law has to organise responses to the ever more apparent inability of the Member States of the European Union to deal with the concerns of their citizens autonomously at national level. Such responses require the institutionalisation of co-operative modes of problem-solving – "a second order conflict of laws".

I. First Order Conflict of Laws – the Legitimacy of European Suprantionalism

Back in 1997, Jürgen Neyer and I presented the first explicit argument under the heading of "deliberative suprantionalism".[44] The primary objective of our essay was to explain the surprisingly sensible operation of the comitology system,[45] but the normative basis of our argument concerned the democracy failure of nation states:

> "The legitimacy of governance within constitutional states is flawed insofar as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies pre-suppose and represent collective identities, they have very few mechanisms [through which] to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes."[46]

If the legitimacy of supranational institutions can be designed to cure these deficiencies – as a correction of "nation-state failures", as it were – they may then derive their legitimacy from this compensatory function. To quote my recent restatement:

> "We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires."[47]

This, of course, is not the way in which the supranational validity of European law was originally understood and justified. Fortunately enough, however, the methodologically

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[44] Ch. Joerges & J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes' (note 34, above).

[45] See Section B.II (1) above.

[46] *Ibid.*, at 293.

[47] Ch. Joerges '"Deliberative Political Processes" Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making', (2006) 44:*Journal of Common Market Studies*, 779-802, at 790.

and theoretically bold and practically successful ECJ decision in favour of a European legal constitution[48] can be rationalised in this way. The European "federation" thus found a legal constitution that did not have to aim at Europe's becoming a state, but was able to derive its legitimacy from the fact that it compensates for the democratic deficits of the nation states. This is precisely the point of Deliberative Supranationalism. Existing European law had, we argued, validated principles and rules that meet with and deserve supranational recognition because they constitute a palpable community project. All one has to do is look: community members cannot implement their interests or laws without restraint, but are obliged to respect the European freedoms; they are not allowed to discriminate and can pursue only legitimate regulatory policies which have been blessed by the Community; they must, in relation to the objectives that they wish to pursue through regulation, harmonise with each other, and they must shape their national systems in the most community-friendly way possible. Why should this type of law be called a new type of conflict of law? Conflict of laws in all its sub-disciplines – private international law and public international law – has traditionally denied the application of foreign "public" law; each state unilaterally determines the international scope of public law. Traditional international administrative law is a paradigm example of "methodological nationalism".[49]

But conflict of laws thinking has a further potential: it is helpful wherever legal principles differing in content and objectives come up against each other. It needs to guide the search for responses to conflicting claims where no higher law is available for decision-makers to refer to. In the European case: to give voice to "foreign" concerns means, first of all, that Member States mutually "recognise" their laws (that they are prepared to "apply" foreign law), that they tolerate legal differences and refrain from insisting on their *lex fori* and domestic interests. This is the principle. The discipline imposed on a Member State's political autonomy must be limited. The principle and its limitations can be discovered and best studied in the jurisprudence of the ECJ pertaining to Article 28 [ex 30]. This jurisprudence has repeatedly documented how mediation between differences in regulatory policies and the diverse interests of the concerned jurisdictions can be accomplished. These examples, we submit,[50] represent a truly European law of conflict of laws. It is 'deliberative' in that it does not content itself with appealing to the supremacy of European law; it is 'European' because it seeks to identify principles and rules that make different laws within the EU compatible with one another.

Once it is recognised and acknowledged that legal responses to conflicting claims of democratically legitimised legal systems need to be conceptualised as conflict of laws problems, the methodological dimension and implication of this insight should become equally clear: European conflict of laws requires a proceduralisation of the category of law. It has to be understood as a "law of law-making",[51] a *Rechtfertigungs-Recht*.[52] This

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[48] Case 26/62, [1963] ECR 1 – *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen*.

[49] M. Zürn, 'The State in the Post-national Constellation – Societal Denationalization and Multi-Level Governance', Oslo: ARENA Working Paper No. 35/1999.

[50] See references in notes 44, 47, and Ch. Joerges, 'Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws', in: B. Kohler-Koch & B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union*, (Lanham MD: Rowman & Littlefield, 2007), 311-327).

[51] F.I. Michelman, *Brennan and Democracy*, (Princeton NJ: Princeton UP, 1999), 34.

conflict of laws viewpoint retains the supranationality of European law, but gives it a different meaning. It takes away from European law those practical and legitimatory expectations that it cannot reasonably hope to fulfil. At the same time, it opens a window on the manifold vertical, horizontal, and diagonal[53] conflict situations in the European multilevel system. It promotes the insight that the Europeanisation process should seek flexible, varied solutions to conflicts, rather than striving to perfect an ever more comprehensive body of law.[54]

II. Second Order Conflict of Laws – The Juridification of Transnational Governance

"The EU can currently be understood as a decentralised, territorially differentiated, transnational negotiation system dominated by élites" – this generalising description of the Union by Ulrich Beck and Edgar Grande[55] rephrases the multi-level analysis, and documents well how far political scientists and sociologists have moved away from the "integration-through-law" paradigm. "Deliberative supranationalism" remains faithful to this tradition. Comitology, as Jürgen Neyer and I argued a decade ago, needs to be "constitutionlised". The comitology procedures were developed in the course of the completion of the internal market in order to keep the internal market project compatible with concerns of social regulation (safety at work, consumer and environmental protection, etc.). The framework regulations to be implemented here typically employ general clause type formulae which do not seek to programme this co-ordination in detail, but leave the elaboration of individual solutions to the implementation process. Typically, the problem situations concerned are ones in which expert knowledge has to be taken into account. It is the involvement of the Member States – through their representatives on the regulatory committees combined with discussion by a plural expert community – that should guarantee both political legitimacy and the objective viability of the regulations developed. Safeguard clause procedures employed when new knowledge is acquired or a regulation proves to be insufficient serve to strengthen their normative and procedural qualities. A conflict of laws interpretation of this form of governance is appropriate because the co-ordination effort aims to achieve a solution that is acceptable to a Union of relatively autonomous states that have to manage without any hierarchically ordered, or, at least, any uniformly structured, administrative apparatus. Admittedly, a "constitutionalisation" of this machinery, then has to find answers to a series of further questions, such as: the appointment and function of the experts to be included in the decision-making process; the ties with parliamentary bodies on the one hand, and with civil society on the other;

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[52] 'Just-ifications of a Law of Society', in: O. Perez & G. Teubner (eds.), *Paradoxes and Inconsistencies in the Law*, (Oxford: Hart, 2005), 65-77, available at: www.jura.uni-frankfurt.de/ifawz1/teubner/RW.html.

[53] These conflicts arise out of the allocation of powers needed for problem-solving and therefore objectively connected to different levels of government. It follows from the principle of limited individual empowerment that the primacy rule can find no application here.

[54] This is readily compatible with the existence of European secondary law and does not in any way in principle call its legitimacy into question. There are important problem areas in which "second order" law of conflict is insufficient and the "federation" has to develop supranational substantive law. This question cannot be dealt with systematically here.

[55] U. Beck & E. Grande, *Cosmopolitan Europe*, (Cambridge: Polity, 2007), 53 (italics in the original).

and the reversibility of decisions taken in the light of new knowledge or changes in social preferences. What needs to be understood is the status of these efforts. The constitutionalisation of European governance arrangements is no direct substitute for democratic rule; its objective, rather, is to define the procedures through which democratic polities organise their responses to common problems under conditions of mutual interdependence. There is no guarantee that such a solution will be discovered, but this is a price that we should be prepared to pay. In any event, it is not a sound enough reason to forget about the rule of law and the idea of law-mediated legitimation of governance practices.

E) Epilogue: "Judgment Day"?[56]

Would the conflict-of-laws approach help cure Europe's social deficit? It is, of course, impossible to defend its potential through a comparative evaluation of the plethora of suggestions which have been developed in the broad debates on "social Europe" in this paper. We will restrict ourselves to some critical comments on the options which have gained prominence thanks to their inclusion in the Draft Constitutional Treaty as revised by the June 2004 IGC[57] (Section E.I). It has become more unlikely than ever that these suggestions might one day form the pillars of a European social constitution in a new Constitutional or Reform Treaty. Nevertheless, they remain on the agenda of both political actors and academics. This is but one reason to remain aware of their fallacies. Their weaknesses have become even more apparent in the light of two pending cases, which may prove to be acid tests for the potential of European law to further Europe's social integration. In these two cases – *Viking*[58] and *Laval*[59] – the new *problématique* of social Europe after the accession of the new Member States came to the fore. We will not claim that the conflict-of-laws approach offers a convenient solution to these conflicts. What we submit, instead, is that this approach is helpful, at least to the extent that it provides a proper definition of the challenges we are confronted with (Section E.II).

I. The Failures of the Draft Constitutional Treaty

Europe's "social deficit" came on the agenda of the Convention somewhat belatedly, but, given the strength of welfare state tradition in Europe, this was not surprising. The ambition of the Convention to design a document of constitutional dignity left no real

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[56] The term is a reference to B. Bercusson, 'The Trade Union Movement and the European Union: Judgment Day', (2007) 13 *European Law Journal*, 279-308.

[57] Final text in OJ 2004 C 310,1.

[58] Case C-438/05 *Viking Line Abp OU Viking Line Eesti* v. *The International Transport Workers' Federation, The Finnish Seamen's Union.*

[59] Case C-341/05, *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundet, Avdelning 1, Svenska Elektrikerforbundet.*

choice. "Social Europe" was to rest, in particular, on three[60] corner stones: the commitment to a "competitive social market economy",[61] the recognition of "social rights",[62] and "soft law" techniques for the co-ordination of social policies.[63] This architecture was neither conceptually nor politically solid. Joschka Fischer and Domenique Villepin, to whom we owe the assignment of constitutional dignity to the concept of the "social market economy", were giving a political signal. But they were hardly aware of the interdependence of the economic and the social constitution in the theory of the "*soziale Marktwirtschaft*". This legacy would have required what was not yet an imperative in the formative era of the European Economic Community, namely, a compensation for the decoupling of both spheres in the European Treaty.[64] Thus, the new social rights and the new co-ordination competences were presented as elements of precisely this type of cure.

In the case of social rights, a threefold difficulty has to be considered. One is their "political content", which has led social philosophers such as Jürgen Habermas to suggest that the content of such rights needs to substantiated through deliberative democratic political processes.[65] This seems to be too rigid a position for many people.[66] But should we, the citizens, really entrust the Court with the shaping of a "social Europe". Should the Court take over where the citizens' representatives in the Convention and elsewhere have failed to produce clear constitutional guidance? In the concrete case of the Constitutional Treaty, we could not even be confident that this text

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[60] And, in addition, the defence of the *services publiques*/services of general economic interest, *Daseinsvorsorge* in Article II-36; this is an important signal, because it confirms the right of Member States to pursue distributional objectives. The compatibility of such policies with the opening of national or regional markets to "foreign" competitors is a complex issue Article II-36; this is an important signal, because it confirms the right of Member States to pursue distributional objectives. The compatibility of such policies with the opening of national or regional markets to "foreign" competitors is an issue, which can in my view productively be resolved within the conflict-of-laws approach; see, for an exemplary discussion of the *Altmark Trans* case, Ch. Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline', (2005) 24 *Duke Journal of Comparative and International Law*, pp. 149-196, at 187 *et seq*.

[61] Article 3 Section 3. –'Les tenants d'une Europe sociale se félicitent de quelques avancées – la référence à "l'économie sociale de marché", au plein-emploi, aux services publics', noted *Le Monde* on 10 November 2003.

[62] See Title IV of the Draft Constitutional Treaty (OJ C310/1, 16/12/2004).

[63] See, especially, Article I-14 (4) of the DCT; the assignment of a *competence* 'to promote and co-ordinate the economic and employment policies of the Member States' has been repealed. Article I-11(3) as amended on 22 June 2004.

[64] See Section B.I *supra*, and, in more detail, Ch. Joerges & F. Rödl, 'The 'Social Market Economy' as Europe's Social Model?', in: L. Magnusson & B. Stråth (eds.), *A European Social Citizenship? Preconditions for Future Policies in Historical Light*, (Brussels: Lang, 2005), 125-158.

[65] J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of law and Democracy*, (Cambridge MA: MIT Press, 1999), 82-132, 401-409, 503-507. "Social rights signify, from a *functionalist* viewpoint, the installation of welfare bureaucracies, whereas from a *normative* viewpoint, they grant compensatory claims to a just share of social wealth", *ibid.,* at 504); see, for a lucid interpretation, Baynes, 'Rights as Critique and the Critique of Rights. Karl Marx, Wendy Brown and the Social Function of Rights', (2000) 28 *Political Theory*, 451-468.

[66] See the contributions to G. de Búrca & B. de Witte (eds.), *Social Rights in Europe*, (Oxford: Hart, 2005).

could have served as a sufficiently stable basis for some daring judicial activism.[67] To be sure, the social rights agenda will survive the Draft Constitutional Treaty in some form, and the view that their legitimate concretisation pre-supposes a legitimising framework is widely shared.[68] It is nevertheless difficult to believe that there is a sufficiently strong social basis for a proactive social rights policy which could be promoted, and could, therefore, be dependant upon the co-operation of all those involved.[69] And even assuming that this could happen, we should not be too sure that the ECJ will be ready to face the foreseeable fierce opposition against what would be perceived as imposing taxes on the Member States which would have to finance the new social rights. Last, but not least, would a European social rights strategy be a normatively attractive option in an economically and socially still very diverse Union?

This last question leads us back to the conflict-of-laws perspective and to the Open Method of Co-ordination. The conceptual difference between them is primarily about the need to subject the exercise of public power, hard or soft, to legal constraints and the function of law as a mediator of legitimacy.[70] However, the uncertainty about the practical impact of the Method[71] is not, in itself, a normative issue – unless the OMC is presented without proper caution as an effective cure for Europe's social deficit. The two approaches converge in that they both defend the autonomy of national societies/nation states in the search for their social policies, and in that a proceduralisation of the processes of co-ordination in the form of a "second order conflict of laws"[72] seems conceivable.[73] Last, but not least, the two approaches are likely to agree about the difficulty to respond to the new dimension of Europe's "social deficit", as it has come to the fore in *Laval*[74] and *Viking*.[75]

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[67] Article II-52 (5) which provided: "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".

[68] Such as a European labour constitution (*Arbeitsverfassung*) guaranteeing the exercise of collective rights and the validity of collective agreements; see F. Rödl, 'Constitutional Integration of Labour Constitutions', in: E.O. Eriksen, Ch. Joerges & F. Rödl (eds.), *Law, Democracy, and Solidarity in Europe's Post-National Constellation*, (London: Routledge, forthcoming), Ch. 8.

[69] See S. Fredman, 'Transformation or Dilution: Fundamental Rights in the EU Social Space', (2006) 12 *European Law Journal*, 41-60, at 49; see, also, G. Ruffer, 'Can European Courts Cure the Social Deficit? *Justiciability* of Fundamental Social Rights of Non-EU Migrant Workers', contribution to the International Conference and Joint Annual Meetings of the Law and Society Association and the Research Committee on Sociology of Humboldt University, Berlin, Germany, July 25-28, 2007 (on file with author).

[70] See B.II above and Ch. Joerges, 'Integration through de-legislation?' (note 41, above).

[71] See, most recently, M. Lodge, 'Comparing Non-Hierarchical Governance in Action: the Open Method of Co-ordination in Pensions and Information Society", (2006) 45 *Journal of Common Market Studies*, 343-365.

[72] See C.II *supra.*

[73] B. Braams, 'Co-ordination as a Category of Competence? – New Modes of Governance and the Search for Legitimacy", Typescript Jena 2007 (on file with author).

[74] Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundet, Avdelning 1, Svenska Elektrikerforbundet*

[75] Case C-438/05 *Viking Line Abp OU Viking Line Eesti* v *The International Transport Workers' Federation, The Finnish Seamen's Union.*

II. "True Conflicts"[76]

These two cases are about the tensions between economic freedoms guaranteed by the Treaty, and the potential of national labour law to limit the exercise of these freedoms.[77]

The plaintiffs in the *Viking* case[78] are a Finnish shipping company (Viking) and her Estonian subsidiary (OÜ Viking Line Eesti). Viking was the owner and operator of the ferry *Rosella*, registered under the Finnish flag. The crew was predominantly Finnish; a collective agreement negotiated by the Finnish Seamen's Union regulated the terms and conditions of employment. Viking decided to re-flag the ferry to Estonia with a view to replacing the Finnish crew with less costly Estonian seamen. Both the Finnish and the Estonian Union were affiliates to the The International Transport Workers' Federation. Both Unions sought to defend the principle that employment conditions should be negotiated by the Union of the country in which the ferry was owned.

The plaintiff in the *Laval* case (Laval Un Partneri)[79] is a company incorporated under Latvian law, whose registered office is in Riga. Its subsidiary L & P Baltic Bygg AB had won the tender for a school building on the outskirts of Stockholm. Laval posted several dozen workers from Latvia to work on the Swedish building sites. In obtaining the tender, Bygg (Laval's Swedish subsidiary) had profited from the wage level in Latvia, which was considerably below that of Sweden (and remained considerably lower even under the terms of a two collective agreements that Laval had signed with the buildings sector's trade unions in Latvia). Under Swedish law, the wage level agreed upon in collective bargaining is not binding upon outsiders. But the trade unions can take actions which aim at the imposition of Swedish wages. This they did with such determination that Laval gave up.

The debate on the two cases has already reached European-wide dimensions. "It is a bracing reminder to EU lawyers of the power of political and economic context to influence legal doctrine," notes Brian Bercusson,[80] "that the new Member States making submissions were unanimous on one side of the arguments on issues of fundamental legal doctrine (horizontal direct effect, discrimination, proportionality) and the old Member States vvirtually unanimous on the other." The conflict is bitter indeed. To understand the normatively sensitive economic and social implications of the two cases, it is sufficient to rephrase the freedom of establishment as the right to dislocate enterprises to low-cost countries and the freedom to provide services in high-cost markets at the conditions of low-cost jurisdictions. Such practices impose burdens on the workforce in the high-cost countries and offer new opportunities to the workforce in

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[76] For an explanation of the term, see Section 3, *infra.*

[77] The following deliberations are preliminary. They owe much to discussions with Florian Rödl (Bremen/Florence). For more detailed analyses, see B. Bercusson, note 56. above; N. Reich, 'Gemeinschaftliche Verkehrsfreiheiten versus Nationales Arbeitskampfrecht', (2007) 18 *Europäische Zeitschriift für Wirtschaftsrecht*, 391-396; M. Weiss, 'Europa im Spannungsfeld zwischen Marktfreiheiten und Arbeitnehmerschutz', Manuscript Frankfurt a.M.. 2007 (on file with author).

[78] Case C-438/05, *Viking Line Abp OU Viking Line Eesti* v *The International Transport Workers' Federation, The Finnish Seamen's Union.*

[79] Case C-341/05, *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundet, Avdelning 1, Svenska Elektrikerforbundet*.

[80] Note 56, above, at 305.

low-cost countries. Is not this exactly what a common market is all about, many commentators ask? What should be specific about services and labour? How can Old Europe talk about "social dumping" in services and labour, while it is profiting from the open boarders of Eastern Europe for the export of its products. Is it fair to impose European-wide high standards of product safety, safety at work and environmental protection and then foreclose market access where service providers could profit from the competitive advantages of the lower wage levels in Eastern Europe?

There is more at stake in these cases, most importantly, constitutional issues at both European and nation state level which cannot be addressed adequately in terms of fairness between the parties of the present conflicts or the treatment of the accession countries in generals. It is these issues from which the following analysis will depart (1). These constitutional deliberations will then serve as a framework for a series of comments on the opinions delivered by Advocate Generals Maduro and Mengozzi (2). Through both steps of the argument, it should become apparent that European law, is unable to provide normatively valid answers to the problems with which it is confronted. The ECJ cannot refuse to respond. But the Court could exercise judicial self restraint (3).

The decoupling of the social from the economic constitution and the co-originality thesis

Back to the beginnings of this essay: Democratic governance, modern European *Sozialstaatlichkeit*, we have argued,[81] reaches out "Economy and Society"; it comprises the promise that citizens can understand themselves as the authors of the economic and social order they live in, that they are therefore entitled to take a meaningful vote on competing political programmes and to authorise politically accountable bodies to act accordingly. These expectations have deep historical roots, in Western Europe at least,[82] and they define the core sociological feature of democratic political systems.[83] One way of rephrasing this observation in terms of constitutional theory and social philosophy is the co-originality thesis of Jürgen Habermas' constitutional theory:[84] The law of constitutional democracies enables private autonomy by shielding and protecting decentralised decisions "of self-interested individuals in morally neutralised spheres of action".[85] On the other hand, and beyond this functional dimension, modern law has to fulfil an additional requirement: "it must also satisfy the precarious conditions of a social integration that ultimately takes place through the achievements of mutual understanding on the part of communicatively acting subjects, that is, through the acceptability of validity claims."[86] When elaborating these ideals, Habermas clearly presupposed a constitutional state, in which private and public autonomy co-exist. The

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[81] *Ibid.*

[82] Section B.I.

[83] See note 3, *supra*.

[84] *Between Facts and Norms* (note 55), at 82 et seq.; see, for an elaboration, R. Nickel, 'Private and Public Autonomy Revisited: Habermas' Concept of Co-Originality in Times of Globalization and the Militant Security State," (Ms. EUI Florence 2006, on file with author).

[85] *Between Facts and Norms* (previous note), at 83.

[86] *Ibid.*

European constellation in which we find ourselves has, with the progress of the integration project, gradually led to a decoupling of both spheres and a destruction of their interdependence, which this theory did not foresee and which was factually not problematical at its beginning and?/or during the "golden age" of the European welfare states.[87] By now, however, the tensions between Europeanisation and democratic *Sozialstaatlichkeit* have become obvious and Europe is facing difficult choices (1) The option to re-establish some fully-fledged *Sozialstaatlichkeit* at European level is not really available. The historical, sociological and political obstacle to such a vision is the diversity and complexity of European *Sozialstaatlichkeit*;[88] its legal obstacle is the lack of pertinent European competences which is, in the case of a European labour constitution, plainly visible in Article 137 (5) TEU, which provides that "the provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs". (2) The most drastic alternative is to complete the European economic constitution, to assign supranational validity to it, and thus forget about *Sozialstaatlichkeit* as Europe's constitutional vocation. This, however, is *not* about to happen,[89] and would, if openly promoted, destroy Europe's legitimacy. (3) Europe cannot but search for a Third Way. The re-conceptualisation of European law in conflict-of-laws perspectives is such an alternative. We do, of course, not claim that this alternative would orient – somewhat clandestinely – the praxis in Europe. We do, however, claim that it is instructive to look at arguments like those submitted by AGs Maduro and Mengozzi in *Viking* and *Laval* from such a perspective.

Responses to Viking and Laval

The need to search for a third way is becoming readily apparent when one looks at the traces of the two alternatives considered in the two opinions.

(1) Both AGs point to the emergence of a social policy at European level, but also underline its limits.[90] Only in AG Maduro's opinion can one find an effort to base the solution of the case on social policy commitments valid at both European and national level. The pertinent passage is worth citing in full:

> "Although the Treaty establishes the common market, it does not turn a blind eye to the workers who are adversely affected by its negative traits. On the contrary, the European economic order is firmly anchored in a social contract: workers throughout Europe must accept the recurring negative consequences that are inherent to the common market's creation of increasing prosperity, in exchange for which society must commit itself to the general improvement of their living and working conditions, and to the provision of economic support to those workers who, as a consequence of market forces, come into difficulties".[91]

What AG Maduro seems to promote here is nothing less than a framework of solidarity which would ensure compensation for the losers in the integration process. His

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[87] See Leibfried & Zürn, note 4, *supra*

[88] See F.W. Scharpf, 'The European Social Model: Coping with Diversity', (2002) 40 *Journal of Common Market Studies*, 645-670.

[89] See Ch. Joerges, 'What is left', note 14, *supra*.

[90] See Maduro, *Viking,* para 13 *et seq.*; Mengozzi, *Laval,* para. 51 *et seq.*

[91] See Maduro, *Viking,* para 13 *et seq.;* Mengozzi, *Laval,* para. 51 *et seq*.

observations seem normatively highly plausible.[92] They are, however, without a binding legal basis; they are also hardly compatible with AG Maduro's interpretation of Europe's commitment to a common market, to which we will turn in the next sub-section.

Further elements of a European labour constitution can be detected in the acknowledgement of "fundamental social rights" as the basis of the collective actions taken by the unions. The legal status of these rights remains, however, weak. They are not understood as ensuring the exercise of some "countervailing power" by the unions and their members, but are subjected to legal restraints. Here, the views of both AGs diverge. AG Mengozzi, having asserted "that the right to resort to collective action to defend trade union members' interests is a fundamental right [and] is therefore not merely a 'general principle of labour law'",[93] subjects the exercise of this right to a "proportionality" requirement.[94] This requirement does not preclude *a priori* that service providers from another Member State are compelled to pay the same wages as their Swedish competitors. AG Mengozzi explicitly acknowledges the guest state's "objectives of protecting workers and combating social dumping".[95] Such defences are potentially disproportionate, however, where the host state's wage level serves to ensure a degree of protection which the guests do not need because they enjoy an equivalent or essentially similar protection "under legislation and/or collective agreements in the Member State where the service provider is established".[96] This suggestion cannot be interpreted as an element of a European social constitution, however. What AG Mengozzi seems to defend is the chance of foreign service providers to profit from the lower wage levels in their home country, *i.e.*, to profit from the same competitive advantage as the exporters of products. Such an equation of the export of services/labour and of products would, however, neglect the specific *social functions* of labour law, in particular, of collective labour law and the governance structures within which wage level and the social costs of production are determined. The importation of products affects these factors only indirectly, whereas an "importation" of foreign wage levels amounts to a direct intervention into the social fabric of the domestic society.

AG Maduro comes closer than his colleague to acknowledging the social functions of collective labour rights, where he characterises them as "essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract".[97] But he strictly differentiates when it comes to the exercise of such rights. The actions of trade unions remain compatible with Community law if they are taken *prior* to the relocation; *after* relocation, however, such actions become illegal where they "prevent an undertaking that has moved elsewhere from lawfully

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[92] A parallel problematic are the distributive implications of product and process standards which are systematically neglected in the discussion of European social regulation; see K. Zurek, 'Social Implications of Europeanisation of Risk Regulation: Theoretical Framework for Analysis of the Problem in the Case of Food Safety, Manuscript Exeter/Florence 2007 (on file with author).

[93] Mengozzi, *Laval,* para. 78.

[94] Mengozzi, *Laval,* para.s. 76, 253 et seq.

[95] Mengozzi, *Laval,* para.s 293, 281.

[96] Mengozzi, *Laval,* para. 264.

[97] Maduro, *Viking,* para. 60.

providing its services in the Member States in which it was previously established".[98] This is not simply some formalistic distinction, but based upon AG Maduro's understanding of the social and normative functions of the common market. The properly functioning common market, he argues, will attain the Community's social policy objectives; there is, therefore, no sound reason to exempt measures of social policy from the regular market building mechanisms.[99] In this view, Scharpf's decoupling thesis is as unfounded as Habermas' distinction between private autonomy and political rights.[100] In AG Maduro's view, the national economies of the Member States of the European Union are by now, so-to-speak, "embedded" in one common market. On such a basis, one can conclude that a "collective action that has the effect of partitioning the labour market and that impedes the hiring of seafarers from certain Member States in order to protect the jobs of seafarers in other Member States would strike at the heart of the principle of non-discrimination on which the common market is founded".[101] To read this argument as a rejection of the views of Scharpf and Habermas is not to confirm its validity. If there is no transnational legal framework of collective labour law (*Arbeitskampfrecht*) in place,[102] we cannot – without further ado – conclude that the freedoms guaranteed by the Treaty would trump national labour law.

(2) It seems clear to me that such a position would *not* be defended by the founding fathers of German Ordo-liberalism. It was, after all, Walter Eucken himself who had underlined the interdependence of the economic, legal and political order.[103] Franz Böhm, his juristic companion over the decades, held the same views.[104] To be sure, one will hardly find explicit Ordo-liberal warnings against an erosion of the social dimension of the *soziale Marktwirtschaft* by the opening of national borders to free European and international trade simply because such risks were not visible in the formative phase of the *soziale Marktwirtschaft*, in the early years of the integration project, and not even in the era of "embedded liberalism".[105] Only the second generation of Ordo-liberals held different views; their Hayekian turn, however, had very limited practical impact.[106]

It is therefore not surprising that the both AGs subscribe to the idea of the supremacy of European freedoms over national labour law and social policy only half-heartedly. In AG Maduro's opinion, one can, however, find pertinent methodological and substantive

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[98] Maduro, *Viking,* para. 67.

[99] Maduro, *Viking,* para. 23.

[100] See Sections E.II.1 and B.I., above.

[101] Maduro, *Viking,* para. 62.

[102] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services ((OJ 1997 L 18, 1) is not a substitute fopr such a European "labour constitution", that Directive and the principle it lays down -- posted workers enjoy during their work abroad minimum standards that are in force, as well as minimum standards that have been achieved through universally applicable collective agreements, in the Member State to which they are posted -- can be best understood in a conflict-of-laws; see (3) below.

[103] See note 9, above.

[104] See, for example, 'Der Rechtsstaat und der soziale Wohlfahrtsstaat' (1953), in: *id.*, *Reden und Schriften,* (Karlsruhe, C.F. Müller, 1960), 82-156.

[105] See G. Ruggie, 'International regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order, (1982) 36 *International Organizations*, 379-415.

[106] See Ch. Joerges, 'What is left?' (note 14, above), at 473 *et seq.*

considerations. Interestingly, the AG determines the meaning of the freedom of establishment (Article 43) and of the freedom of services (Article 49) on the basis of an interpretation of the function of these provisions:

> "Together with the provisions on competition, the provisions on freedom of movement are part of a coherent set of rules, the purpose of which is … to ensure, as between Member States, the free movement of goods, services, persons and capital under conditions of fair competition.
>
> The rules on freedom of movement and the rules on competition achieve this purpose principally by granting rights to market participants. Essentially, they protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market. The existence of that opportunity is the crucial element in the pursuit of allocative efficiency in the Community as a whole. Without the rules on freedom of movement and competition, it would be impossible to achieve the Community's fundamental aim of having a functioning common market."[107]

The predominance of "functions" over "institutions" is the core idea of classical Ordo-liberalism.[108] Franz Böhm explained this thesis and its implications many times, most stringently, in my view, in his seminal 1948 critique of the German *Reichsgericht* for its legalisation of cartels in the late 19th century.[109] This use of the freedom of contract, Böhm explained, was illegal; it destroyed the competitive *ordo* within which commercial freedom and the freedom of contract are to fulfil their economic and social function. It seems worth noting that this type of reasoning has affinities with Habermas' interpretation of private autonomy as a fundamental right which is to enable citizens to govern their own affairs. To be sure, Habermas[110] relies on political rights where Böhm invokes antitrust policies to ensure a "good order". Neither of them would, however, resort to the famous *Drittwirkungs*-doctrine which the German *Bundesverfassungs-gericht* pronounced in is *Lüth* judgment of 1958[111] AG Maduro is following what has become a strong development when he advocates transposing this doctrine to European level.[112] Such a move is questionable for three interdependent reasons: first, the doctrine was not meant to protect the realm of the private over the political; quite to the contrary, the doctrine destroys conventional formalism in private law and "politicises" formerly "private" relationships; second, it presupposes soon provides the basis of an "objective order of values", a poor theoretical basis in pluralist societies and even more so in the

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[107] Maduro, *Viking,* para.s 32, 33.

[108] See Wegmann (note 9, above) at 374 *et seq.*

[109] F. Böhm, 'Das Reichsgericht und die Kartelle. Eine wirtschaftsverfassungsrechtliche Kritik an dem Urteil des RG. vom 4. Februar 1897, RGZ. 38/155'. (1948) 1 ORDO, 197-213. [reprinted in E.-J. Mestmäcker, (ed.), *.Reden und Schriften über die Ordnung einer freien Gesellschaft, einer freien Wirtschaft und über die Wiedergutmachung*, (Karlsruhe: C.F. Müller. 1960), 69-81].

[110] *Between Facts and Norms* (note 55), at 84 *et seq,* also 313 *et seq*.

[111] *Entscheidungen des Bundesverfassungsgerichts* 7, 198; see for a historical reconstruction Th. Henne, 'Von 0 auf Lüth in 6 1/2 Jahren', in: *id.* & A. Riedlinger (eds.), *Das Lüth-Urteil aus (rechts-)historischer Sicht. Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts*, (Berlin: Berliner Wissenschafts-Verlag, 2005), 199 *et seq*.; for the dominat view in German jurisprudence, see C.-W. Canaris, 'Grundrechte und Privatrecht', (1984) 184 *Archiv für die civilistische Praxis*, 201-246; *id.*, *Grundrechte und Privatrecht: Eine Zwischenbilanz*, (Berlin/New York: W. de Gruyter, 1999), 30 *et seq.*

[112] Maduro, *Viking,* para.s 35 *et seq.*

European Union; third, when understood as a control of labour and social law, it contributes to the decoupling of the economic and societal orders and exerts a socially disintegrative effect.

The AGs may not have seen these difficulties. But they do avoid them in important respects. AG Maduro's distinction between collective action before and after the relocation of undertakings is significant here. This distinction presupposes what the AG underlines several times, namely, the political autonomy of Member States in the social sphere:

> "Even in cases that fall within their scope, the provisions on freedom of movement do not replace domestic law as the relevant normative framework for the assessment of conflicts between private actors. Instead, Member States are free to regulate private conduct as long as they respect the boundaries set by Community law."[113]

His proviso that this political autonomy notwithstanding, namely that collective action organised by trade unions must not have "the effect of partitioning the labour market" so as to impede "the hiring of seafarers from certain Member States in order to protect the jobs of seafarers in other Member States",[114] I am inclined to read this passage as an effort to reconcile national autonomy with Community objectives,[115] and even a step towards a conflict-of-laws perspective, as will be explained in the next paragraph (3).

AG Mengozzi seems, at first sight, even more respectful of national law. The proportionality principle which he suggests imposing on the exercise of the right to take collective action is a general principle of law; this he finds hardly problematical since "the Constitutions of the Member States examined above all recognise the possibility of imposing certain restrictions on the exercise of the right to take collective action"… "I do not see", AG Mengozzi adds, "why only restrictions of a solely national origin may be imposed on the exercise of the right to take collective action".[116] It is, however, exactly the equation between the two levels of governance which would need further justification. The same hold true for the consideration "that Laval's economic activity constitutes a provision of services within the meaning of Article 49 EC and Directive 96/71".[117] With this consideration, AG Mengozzi confirms what the national court suggested. Neither that court nor the AG seem to be aware of the far-reaching implications of their consideration. What is at stake here is the legal characterisation of the activities in Sweden. This operation is the most fundamental problem of private international law (conflict of laws). To characterise labour relation as the provision of a service amounts to a replacement of labour law by contract law (and *vice versa*!). to contractual relation (service). It is commonly held in private international law (conflict of laws) that the qualification follows the *lex fori.* AG Mengozzi implicitly assumes that Community law has suspended this principle. This assumption is widespread among Community lawyers. I have characterised this position as an "orthodox

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[113] Maduro, *Viking,* para. 51.

[114] Maduro, *Viking,* para. 62.

[115] Similarly to the suggestions of F.W. Scharpf, 'Community and Autonomy, Multi-Level Policy-Making in the European Union', (1993) 1 *Journal of European Public Policy* , 219–242.

[116] Mengozzi, *Laval,* para.s 81, 82.

[117] Mengozzi, *Laval,* para 99.

suprantionalism" on many occasions[118] and find it irreconcilable with the Community's order of competences.

(3) Could a conflict-of-law approach provide more convincing responses. In this perspective, diversity is not only the "motto of the Union",[119] but also a *factum brutum*, to which there is no satisfactory solution. The legal differences in the cases under consideration are not so unusual. The boarder-lines between contract law and labour law are not uniform in Europe's jurisdictions; collective labour law differs in many respects. But these differences explain the intensity of the conflict only partially. The real problem stems from the economic and social implications of the legal regime that is to govern the outcome of these cases. The East European parties to the conflict have massive interest in obtaining access to the West European service and labour markets. The West Europeans who have not been ready to support the accession of new Member States by significant transfer payments and do not seem inclined – as AG Maduro suggests – to commit themselves to "the provision of economic support to those workers who, as a consequence of market forces, come into difficulties".[120] This is the *factum brutum*. Can the law compensate this type of failure?

As I have indicated, one can identify elements of a conflict-of-laws approach in both opinions. Both Advocate Generals seem to search for solutions which mitigate between the openness of national economies and legitimate regulatory concerns. But their suggestions have clear practical and normative weaknesses. There may be the possibility that the kind of pressure that AG Maduro suggests imposing on the West Europeans will trigger the kind of compensatory action that he feels is adequate. It is not unconceivable that national courts will find ways of interpreting the proportionality requirements that AG Mengozzi has proposed in socially acceptable way. What cannot be ruled out, however, is the use of Community law, which would destruct the accomplishments of *Sozialstaatlichkeit.* It seems inevitable that such consequences would further populist opposition against the European project – and there is no guarantee that the advantages in the accession states would compensate for such costs.

"True conflicts" and the judicial function.

Conflicts brought before a Court must be decided upon; the parties to the conflict are entitled to receive such a decision. This seems to be but a common place. But is this expectation really so unproblematical? The American conflict-of-laws scholar Brainerd Currie defended a different position. In cases of true conflicts, conflicts-of-laws decisions are, in the last instance, political exercises, he argued:[121]

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[118] Cf., recently, 'Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws', in: B. Kohler-Koch & B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Unio*n, (Lanham, MD: Rowman & Littlefield, 2007), 311-327. at 316 *et seq.*

[119] Art. I-8 of the Treaty on a Constitution for Europe, OJ C310/1, 16/12/2004.

[120] Maduro, *Viking,* para. 59.

[121] Conflicts cases are true "if the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy…"; B. Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function', (1958), in *idem, Selected Essays*, (Durham NC: Duke U P, 1963), 188-282, at 272.

> "[C]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary: … the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress."[122]

Brainerd Currie was writing for a federal system. Even in such a system, he asserted, the "politicisation" of modern law (its social functions) has transformed the choice-of-law problem into a delicate task which courts are ill-equipped and not legitimated to perform in situations where the "governmental interests" of the concerned states are in conflict. This is not a suggestion that Europe could live with. Europe has to tolerate legal differences; it must not tolerate discriminating practices. But it also needs to remain aware of its diversity, of social, economic and cultural differences. In the present type of conflict, the judges of the Union need to consider that the European level of governance is "higher" only in limited fields. The ECJ is not a constitutional court with comprehensive competences. It is not legitimated to reorganise the interdependence of Europe's social and economic constitutions, let alone to replace the variety of European social models by a uniform Hayekian *Rechtsstaat.* It should refrain from "weighing" the values of *Sozialstaatlichkeit* against the value of free market access. The ultimate reason for such restraint would be judicial respect for the dignity of national constitutional compromises.[123] The objectives of the integration project would not be jeopardised, and the pressure on the Member States of the EU to ensure the compatibility of their labour constitutions with their commitment to open markets would hardly be diminished significantly.

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[122] B. Currie, *ibid.*

[123] N. Luhmann, in the most intriguing of his critiques of the legal theory of Habermas ["Quod omnes tangit…Anmerkungen zur Rechtstheorie von Jürgen Habermas", (1993) 12 *Rechtshistorisches Journal*, 36-56; = (1996) 17 *Cardozo L. Rev.* 883], has argued that courts do not have such choices and must refrain from taking a decision when confronted with unresolved political and social conflicts. The doctrine of *forum non conveniens*, rules on the limitation of jurisdictions, the political question doctrine, the "*Wesentlichkeits-Doktrin"*, the conflicts over the limits of the competences of the ECJ all show the contrary. An exercise of judicial restraint is not a refusal to do justice, quite to the contrary. Luhmann here seems to fall victim to his unwillingness to address the normative quality of judicial decision-making.