

How is a closer union conceivable under conditions of ever more socio-economic and political diversity? Constitutionalising Europe's *unitas in pluralitate*

Christian Joerges*

Abstract

Under the impact of the financial crisis, socio-economic divergence, even among the members of the Eurozone, deepened dramatically. European crisis politics therefore sought to impose convergence through budgetary prescriptions and austerity measures. This essay raises not only normative objections; it submits that these efforts are bound to generate serious resistance. The follow-up query is whether Europe would be better advised to replace its one-size-fits-all mantra by policies tolerating diversity and fostering cooperative problem-solving. To what degree such a return to the 'united in diversity' motto of the Constitutional Treaty of 2014 would be economically beneficial is unpredictable. It seems highly likely, however, that it could help to overcome the increasing aversion against the European integration project.

1 | INTRODUCTION

The relationship between the title and the subtitle of this essay requires some explanatory remarks. The main title may imply an unfortunate dichotomy. In European studies, socio-economic, cultural and political diversity are widely perceived as an obstacle to integration, and hence as something that should be overcome on the road to an 'ever closer union'. This, however, is by no means the message of these pages. Quite to the contrary, we suggest that the Union would be well advised to live *with* diversity, that diversity can be a politically sound and economically beneficial alternative to the kind of convergence which the integration through law agenda of the formative period of the integration process and the crisis politics of the past decade have pursued so rigorously. But our thesis has a prominent precursor, albeit one that remained an unspecified proclamation. 'United in Diversity' was the fortunate motto of the ill-fated Draft Constitutional Treaty of 2004. The motto did not make it into the Treaty of Lisbon. This does not mean that it is outdated. The times Europe is going through are so hard that we cannot shy away from rethinking the

*Professor em. for Law and Society, Hertie School of Governance, Berlin; Co-Director, Centre of European Law and Politics, Bremen; and Hertie School of Governance, Berlin.

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project, from re-considering its foundations, from citing Germany's greatest poet in a translation through which the beauty of his language gets lost, 'what holds Europe together at its innermost'. What could that be? Is our highest commitment to ensure 'the financial stability of the euro area as a whole ... and of the Union itself'?¹ Jan-Werner Müller² has recently recalled Ernst-Wolfgang Böckenförde's famous transferral of Goethe's query into the parlance of constitutionalism: secularised democracies, he submitted, live on normative resources, which they cannot generate themselves.³ What if we bring this dictum to the peoples of Europe? A tentative and somewhat enigmatic conclusion will be submitted in the final remarks. The argumentation leading to that conclusion are more mundane. We will take four steps:

1. The first is an explication: a substantive understanding of 'the economic', which is informed by the economic sociology of Karl Polanyi.
2. Against this background, Section 3 will proceed to a critique of 'one-size-fits-all' integration strategies.
3. Section 4 will criticise the efforts of Europe's crisis politics to impose convergence on the economies of the Union.
4. 'United in Diversity', the aforementioned motto of the Constitutional Treaty of 2004, is read as an alternative vision, which Section 5 will substantiate.

We return to the question 'What could hold Europe together at its innermost?' in the epilogue.

2 | 'THE ECONOMIC' IN ECONOMIC SOCIOLOGY

'European economic law' is a discipline of huge proportions which explores meticulously every angle of the legal provisions which concern the European economy, the integration process, and governance arrangements that this process has generated. Why should there be a reason to re-consider these activities in the light of Polanyi's economic sociology? The surplus of such an exercise stems from conceptual deficiencies of the prevailing views in both law and economics and their understanding of markets or, rather, 'the economic'. The deficiency, which has, in this author's view, to be cured, is the insulation of economic processes from their embeddedness in society. This insulation is, to paraphrase another Polanyian notion, 'fictitious'. To be sure, it is by now common knowledge that the operation of markets, presupposes the establishment of institutional frameworks; we are equally well aware of many microeconomic and macroeconomic policies supporting or correcting the functioning of the economy. And yet, in the prevailing conceptualisations, the economy is portrayed as machinery, which is distinct from political and societal spheres, from *Staat und Gesellschaft*. In particular, markets are understood as autonomous, self-regulating entities. The contrast is striking: 'A self-regulating market', so Polanyi has famously stated, 'could not exist for any length of time without annihilating the human and natural substance of society; it would have physically destroyed man and transformed his surroundings into a wilderness'.⁴ I do not try to dig deeper but conclude with the summarising

¹Judgment of 27 November 2012 in *Pringle v. Ireland*, C-370/12, EU:C:2012:756, para. 5.

²Jan-Werner Müller, 'Was hält Demokratien zusammen?', *Neue Zürcher Zeitung*, 26 August 2017, available at: <https://www.nzz.ch/feuilleton/das-boeckenfoerde-diktum-was-haelt-demokratien-zusammen-ld.1312681>.

³Ernst-Wolfgang Böckenförde, 'Die Entstehung des Staates als Vorgang der Säkularisation', in id., *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht* (Suhrkamp, 1975), 42–64.

⁴Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001) (with Foreword by Joseph Stiglitz and Introduction by Fred Block), 3.

submission that the economy 'is' a polity,⁵ that its sustainability depends, to paraphrase Böckenförde, on social and moral resources which it cannot generate autonomously.

3 | IMPLICATIONS AND OPTIONS

How should such an understanding of the economy as polity affect our views of European economic integration? I refrain from a systematic elaboration but take instead a shortcut. Karl Polanyi's *Great Transformation* is concerned with the emergence of 'market societies', where 'instead of the economy embedded in social relations, social relations are embedded in the economy'.⁶ Writing at the end of the Great War, Polanyi had witnessed the destruction of liberal economic ordering by Fascism and Nazism. However, by now, at the end of the Second World War, the rebirth of alternative counter-movements was in sight and nurtured hopes of a better national and international future: alternatives to the Fascist transformation, namely, social counter-movements which would undermine the working of the market system. His somewhat enigmatic views are difficult to decipher. '*The Great Transformation* can legitimately be read either as an anti-capitalist manifesto or as a social democratic bedtime story'.⁷ Be that as it may, my shortcut is a passage in which Polanyi considers that:

*with the disappearance of the automatic mechanism of the gold standard, governments will find it possible to [...] tolerate willingly that other nations shape their domestic institutions according to their inclinations, thus transcending the pernicious nineteenth century dogma of the necessary uniformity of domestic regimes within the orbit of world economy. Out of the ruins of the Old World, cornerstones of the New can be seen to emerge: economic collaboration of governments and the liberty to organize national life at will.*⁸

Was this just wishful thinking? The passage was written at a time when Keynes and the like-minded American economist and politician Harry Dexter White were working towards the post-war settlement of Bretton Woods. There were reasons to envisage a better future. Polanyi's considerations deserve attention for three additional and interrelated reasons. For one, he re-states his foundational argument that the capitalist market economy is not an evolutionary given but a political product—'*laissez-faire* was planned'⁹—which requires institutional backing and continuous political management. To put it slightly differently, 'the political' is inherent in 'the economic'; market economies 'are polities'.¹⁰ A second insight of topical importance follows from this: capitalist market economies will exhibit varieties which mirror a variety of political preferences, historical experiences, and socio-economic configurations. This is what we can expect, and should respect, once our societies have gained the 'liberty to organise national life at will'. The third point is only alluded to in half a sentence. It is an implication of the new freedom. Polanyi predicts and advocates 'collaboration'; diversity, we can assume, is there to stay.

Let me postpone the discussion of this somewhat vague prospect and hope, and underline first its more substantiated basis and background. Since the 'varieties of capitalism' studies were initiated by Peter A. Hall and David Soskice in 2011,¹¹ it has become common knowledge that the operation of market economies is

⁵Christian Joerges, Bo Stråth and Peter Wagner, *The Economy as Polity: The Political Constitution of Contemporary Capitalism* (UCL Press, 2005).

⁶Polanyi, above, n. 4, 57.

⁷Gareth Dale, *Karl Polanyi. A Life on the Left* (Columbia University Press, 2016), 286.

⁸Polanyi, above, n. 4, 253–254.

⁹'...planning was not', *ibid.*, at 147.

¹⁰For a very dense re-construction, see Fred Block, 'Towards a New Understanding of Economic Modernity', in Christian Joerges et al. (eds), above, n. 5, 3–16.

¹¹Peter A. Hall and David Soskice *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

anything but uniform. Their institutional configurations vary, instead, significantly. The co-ordinated market economies of northern Europe and the Anglo-Saxon liberal market economies have become paradigmatic examples; mixed market economies have been more recently identified in Southern Europe.¹² The discovery by Lucio Baccaro and others of 'Growth Models and Distributive Dynamics' has diversified the landscape further.¹³ A cobbler like myself should stick to his last. What I find most noteworthy, and what the varieties studies neglect, is Polanyi's characterisation of economic ordering as a *political and societal process*.¹⁴ This is a dimension which another forerunner of the varieties studies, namely, Walter Eucken, left aside when he conceded that the 'characteristics of national competitive orders ... manifest differently, for example, in Germany, Belgium, or the United States'.¹⁵ This political-process dimension, however, is a legal essential. We need to understand the normative fabric of our economic orders as an *acquis sociale*, which is, of course, subject to changes, but nonetheless deserves to be protected against illegitimate intrusions. A strong indicator of the importance of this point is the fierce controversy that it has provoked between Wolfgang Streeck and Jürgen Habermas. Streeck opts for a defence of the nation-state and its institutions against a deepening of economic integration.¹⁶ Habermas's critique is that this is a nostalgic option, a hideaway in the sovereign powerlessness of the overrun nation (*eine 'nostalgische Option für eine Einigung in der souveränen Ohnmacht der überrollten Nation'*).¹⁷ I cite a recent re-statement of Streeck:

*[W]hat I would suggest to call the *acquires démocratiques* of the national demois in Europe ... importantly comprises a wide range of political-economic institutions that provide for democratic corrections of market outcomes—for democracy as social democracy.*¹⁸

I must admit that I find Streeck more Habermasian than Habermas himself. I read his defence of the national constellation as the plea to take deliberative democracy seriously. This plea is, of course, linked to sociological premises and political assessments. Streeck simply does not believe that a European social democracy is a conceivable option. But are we really entrapped in the dichotomy?

Back to Polanyi, however. The passage that I have cited is not about output legitimacy, let alone economic efficiency. Polanyi's appeal to the liberty of societies is, instead, concerned with ideational and cultural dimensions of 'the economic'. His argument takes seriously, or is at least open to, what the varieties of capitalism studies tend to neglect. Precisely for this reason his position seems so topical. Ideational, cultural, historical aspects are an indispensable element of an adequate understanding of 'the economic'. A whole new sub-discipline ('cultural political

¹²Anke Hassel, 'Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe' LEQS Paper No. 76/2014, available at SSRN: <https://ssrn.com/abstract=2426198>. In much more detail and with many provisos, see Gareth Dale, 'Double Movements and Pendular Forces: Polanyian Perspectives on the Neoliberal Age', (2012) 60 *Current Sociology*, 3–27; id., 'Social Democracy, Embeddedness and Decommodification: On the Conceptual Innovations and Intellectual Affiliations of Karl Polanyi', (2010) 15 *New Political Economy*, 369–393.

¹³See Lucio Baccaro and Chiara Benassi, 'Throwing Out the Ballast: Growth Models and the Liberalization of German Industrial Relations', (2017) 15 *Socio-Economic Review*, 85–115.

¹⁴Much later elaborated in Karl Polanyi, 'The Economy as Instituted Process' [1957], in: Mark Granovetter and Richard Swedberg (eds), *The Sociology of Economic Life*, 2nd ed. (Westview Press, 2001), 31–50.

¹⁵Walter Eucken, 'What is a Competitive Order?' [1952], in Thoms Biebricher and Frieder S. Vogelmann (eds), *The Birth of Austerity: German Ordoliberalism and Contemporary Neoliberalism* (Rowman and Littlefield, 2017), 99–108, at 100.

¹⁶Wolfgang Streeck, 'Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas', (2014) 21 *Constellations*, 213–221.

¹⁷Jürgen Habermas, 'Demokratie oder Kapitalismus. Vom Elend der nationalstaatlichen Fragmentierung in einer kapitalistisch integrierten Weltgesellschaft', (2013) 5 *Blätter für deutsche und internationale Politik*, 59–70 ('Nostalgische Kleinstaaterei', 62).

¹⁸Wolfgang Streeck, *How Will Capitalism End?* (Verso Books, 2016), 198, n. 20; cf., in a surprisingly similar vein, Karl-Heinz Ladeur, 'Conflicts Law as Europe's Constitutional Form' ... and the Conflict of Social Norms as its Infrastructure', in Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance: Conflicts-Law Constitutionalism and Authoritarian Managerialism* (Hart Publishing, 2013), 383–396.

economy') focusing on this dimension is emerging.¹⁹ This seems particularly important in view of the deep diversities within the European space. The works of economic historians such as Werner Abelshausen and the path-breaking comparative law studies of Gunther Teubner share this view and add that 'cultures' tend to be remarkably resistant to imposed change.²⁰ Both underline that interventions into the respective social and institutional fabric of European economies can hardly be subtle and sufficiently fine-tuned to accomplish the desired re-orientation.²¹

4 | THE STATE OF THE UNION AFTER A DECADE OF CRISIS POLITICS

The normative value of diversity does not inform us how this value might be established and preserved. Before entering into such uncharted waters and evaluating the risks of such an endeavour, we have to consider the state of the Union after a decade of crisis politics. The event from which we depart is the establishment of the EMU in the Maastricht Treaty. This is by no means to camouflage earlier unfortunate decisions and developments.²² But it nevertheless seems obvious that the specific patterns of the crisis have been shaped by this Treaty.

4.1 | An ill-designed Treaty

This Treaty has produced a hybrid, an odd merger of ordo-liberal principles and French endeavours to ensure some political governance of the economy. Germany was successful with the defence of its stability philosophy through substantive principles and statutory norms; France established a counterweight in the procedural norms of the General ECB Council.²³ Our focus here will be the tension between the conferral of exclusive powers in the—albeit undefined—field of monetary policy administered by a bank with unprecedented autonomy and the reservation of economic and fiscal policies by the Member States. This dichotomy was not wilful or accidental, but simply mirrored the concern of the Member States for 'the power of the purse'. The ensuing dilemmas were predictable. Already in 1992, the socio-economic diversity within the Union and within the Eurozone was considerable, and it deepened continuously. The implications can be derived from the insights into the socio-economic, political and cultural variety sketched out in the previous section. European monetary policy is uniform, but it is confronted with an ever-deeper variety of national configurations. 'One size fits none'—Henrik Enderlein's *barzelletta* captures this well.²⁴ The difficulties of macroeconomic steering are exacerbated by the deeply engraved cultural diversities which render the Eurozone-wide communality of policy implementation illusory.

Hence, in a sense, the Maastricht regime embodied a kernel of wisdom. Article 119 TFEU provided for no more than 'the adoption of an economic policy which is based on the close coordination of Member States' economic policies' as substantiated in Article 121 TFEU. This instrument was a *lex imperfecta*. The same holds true for the Stability and Growth Pact of 1997. By the same token, however, this wisdom was not strong enough to prevent what was going to happen.

¹⁹See Bob Jessop and Ngai-Ling Sum, *Towards a Cultural Political Economy. Putting Culture in its Place in Political Economy* (Edward Elgar Publishing, 2013); id., 'Cultural Political Economy: Logics of Discovery, Epistemic Fallacies, the Complexity of Emergence, and the Potential of the Cultural Turn', (2010) 15 *New Political Economy*, 445–451.

²⁰Werner Abelshausen, *Kulturkampf: Der deutsche Weg in die neue Wirtschaft und die amerikanische Herausforderung* (Kadmos, 2003); Werner Abelshausen, David Gilgen, and Andreas Leutzsich 'Kultur, Wirtschaft, Kulturen der Weltwirtschaft', in Werner Abelshausen, David Gilgen and Andreas Leutzsich (eds.), *Kulturen der Weltwirtschaft* (Vandenhoeck and Ruprecht, 2012), 9–29; Gunther Teubner, 'Legal Irritants: Good Faith in British Law Or How Unifying Law Ends Up in New Differences', (1998) 61 *Modern Law Review*, 11–32.

²¹Hassel, above, n. 12.

²²See Giandomnico Mahone, *Rethinking the Union of Europe post-Crisis—Has Integration Gone Too Far?* (Cambridge University Press, 2014), *passim*.

²³In a similar vein, see Sergio Fabbrini, 'The Euro Crisis and its Constitutional Implications', in Sergio Champeau, Carlos Closa, Daniel Innerarity and Miguel Poiares Maduro (eds.), *The Future of Europe. Democracy, Legitimacy and Justice After the Euro Crisis* (Rowman and Littlefield, 2015), 19–36.

²⁴Henrik Enderlein, 'One Size Fits None', (2005) 16 *Central Banking*, 24–28.

The tensions under the thin 'constitutional' veneer of the Maastricht Treaty remained latent for a couple of years. As we know, post-2007, the success of the early years of the EMU was only due to good economic luck and constant political bargaining. The real life of the constitutional compromise was a *praxis* of muddling. Under the conditions of the common currency, the socio-economic diversity within the Eurozone was deepening irresistibly. After the financial and the sovereign debt crises, this diversity was to become an explosive constellation. We have experienced highly differential growth and inflation rates, cyclical divergences. We have learned about the reasons and mechanisms of these disastrous developments. Under the EMU, responses to these problems were not available. The fundamental design failure and constitutional deficit of this regime is the lack of a political infrastructure and institutional framework in which democratic political contestation could continue and legitimate a completion or improvement of the imperfect edifice that had been established.²⁵

4.2 | Two dead-end alleys

My whole thesis depends on the explanation of this dilemmatic constellation. What went wrong? My message is anything but comforting: Europe had no chance! Let us consider the two options the designers of the Treaty had in mind.

The first option can be understood as a version of economic constitutionalism. It is characterised by the lack of a legitimated political authority. No such transnational political authority was needed if, and, if so, because financial markets can be expected to supervise the performance of the Member States. The famous no bail-out clause of Article 125 of the Lisbon Treaty made it illegal for one Member to assume the debts of another. We were thus protected against moral hazard. Or were we? The weakest link in this chain of arguments is the reliance on financial markets. To be sure, von Hayek has tried to make us believe that markets are unique in their capacity to collect, process and coordinate knowledge which is dispersed in society.²⁶ But, as Lisa Herzog has objected with particular clarity,²⁷ the knowledge which markets can communicate is not the knowledge we need when we have to assess the performance of complex economic orders. Hayek's wonderful conceptualisation of 'competition as a discovery procedure'²⁸ will not deliver what we need to know. Such asymmetries, we have been assuaged, will be compensated by highly professionalised ratings agencies which produce and offer such advice under competitive conditions. This, again, is all too wishful thinking. The famous three big ratings agencies embody expert knowledge but not the ethics of the classical professions. Can we expect expertise to accomplish what markets fail to do? This is a complex story in general. In the case of the ratings agencies, however, I can simply refer to Mario Draghi's famous defence of the OMT programme of the ECB on 26 July 2012.²⁹ The markets got it wrong, he argued; this is why the ECB had to step in.

Draghi's 'whatever it takes' announcement leads us to the second alternative: Are public authorities to step in where private organisations are not so reliable. Again, I hear von Hayek knocking at the door. He not only praised the performance of markets so impressively back in 1945; three decades later, he complemented his argument in his Nobel Prize Lecture on the 'Pretence of Knowledge'.³⁰ The lecture is thoroughly neglected in the debates on

²⁵The story of the European responses has been told often enough. Out of my own contributions, see, e.g., 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation', (2014) 15 *German Law Journal*, 985–1028. The descriptions, analyses and discussions fill libraries; an analysis with an exceptional sensitivity for the normative, legal and political aspects of the 'rule of economics' is Klaus Tuori's 'The Eurosystem and the European Economic Constitution: A Constitutional Analysis of Common Central Banking Before and During the Crisis', PhD Thesis, Helsinki, 2017, available at: <https://helda.helsinki.fi/handle/10138/200392>.

²⁶Friedrich A. von Hayek, 'The Use of Knowledge in Society', (1945) 35 *American Economic Review*, 519–530.

²⁷Out of the works of Lisa Herzog, see Lisa Herzog, 'Markets', *Stanford Encyclopedia of Philosophy* 2013, 1–28; available at <https://plato.stanford.edu/entries/markets/>.

²⁸Friedrich A. von Hayek, 'Competition as Discovery Procedure' (*Wettbewerb als Entdeckungsverfahren*, 1968), (2002) 5 *The Quarterly Journal of Austrian Economics*, 9–23.

²⁹*Verbatim*, at: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

³⁰Friedrich A. von Hayek, 'The Pretence of Knowledge', Nobel Memorial Lecture, 11 December 1974, (1989) 79 *American Economic Review*, 3–7, available at: <http://pavroz.ru/files/hayekpretence.pdf>.

the performance of the ECB or European crisis politics. This is difficult to justify. Hayek's reserves against economic planning and steering deserve to be taken seriously. But this is again a matter which is too complex to be dealt with in passing. However, for my thesis, I can let this rest. The line of arguments that I have re-constructed upon the basis of Polanyi's economic sociology, the varieties of capitalism studies, and the insights into the importance of economic cultures are sufficiently instructive. It is, against this background, simply inconceivable that the ensemble of European economies will respond to the voices of public authorities in the same way; and it is even less likely that these authorities will be able to design and to implement sufficiently fine-tuned programmes targeted at the diversity of the constellations in the Eurozone.

4.3 | Authoritarian managerialism

It seems, against this background, but 'logical', that European crisis politics operated as it did, namely, *extra legem* and in an authoritarian managerial mode.³¹ The first to underline this dilemma was the former constitutional judge Ernst-Wolfgang Böckenförde, tellingly a confessed Schmittian.³² The treatment of law, Böckenförde explained in a comment published by the *Neue Zürcher Zeitung* in June 2010,³³ was 'outrageous' (*abenteuerlich*). And, indeed, there is much to be irritated about. A particularly intriguing characteristic of Europe's new modes of economic governance is the form of its crisis management. This managerialism is problematic for three interdependent reasons. First, through the supervision and control of macroeconomic imbalances, it disregards the principle of enumerated powers, and, by the same token, cannot respect the democratic legitimacy of national institutions, in particular, the budgetary powers of the parliaments of the states receiving assistance. Second, in its departure from the one-size-fits-all philosophy orienting European integration in general and monetary policy in particular, it nonetheless fails to achieve a variation, which might be founded in democratically legitimated choices; quite to the contrary, the individualised scrutiny of all Member States is geared to the objective of budgetary balances and seeks to impose the necessary accompanying discipline. Under the conditions of monetary unity, the Member States can only respond to pertinent requests through austerity measures: an 'internal devaluation' via reductions of wage levels and social entitlements.³⁴ Third, the machinery of the new regime with its individualised measures which are oriented only by necessarily indeterminate general clauses is regulatory in its nature, establishing a transnational executive machinery outside the realm of democratic politics and the form of accountability which the rule of law used to guarantee. Core concepts used by new economic governance cannot be defined with any precision, either by lawyers or by economists, and are therefore not justiciable.³⁵ This implies that rule-of-law and legal protection requirements are being suspended.³⁶ This type of de-legalisation is accompanied by assessments of Member State performance, which cannot but operate in a highly discretionary manner.

The most drastic illustrations were provided by the Six-pack and the Two-pack Regulations, which seek to prevent and/or to correct excessive macroeconomic imbalances. As Fritz Scharpf has pointed out, the very logic of

³¹Christian Joerges and Maria Weimer, 'A Crisis of Executive Managerialism in the EU: No Alternative?', Maastricht Faculty of Law Working Paper No. 2012-7, available at: SSRN: <http://ssrn.com/abstract>; revised version in Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (eds.), *Critical Legal Perspectives on Global Governance: Liber Amicorum for David M Trubek* (Hart Publishing, 2014), 295-322.

³²On Böckenförde's indebtedness to Carl Schmitt, see the interview with Dieter Gosewinkel, in id. (ed.), *Wissenschaft, Politik, Verfassungsgericht. Aufsätze von Ernst-Wolfgang Böckenförde* (Suhrkamp, 2010), 359-391.

³³Ernst-Wolfgang Böckenförde, 'Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung' (Does necessity not know rules? Design flaws of the EU and the necessity of a new political decision), *Neue Zürcher Zeitung*, 21 June 2010.

³⁴See, e.g., Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis', (2013) 76 *Modern Law Review*, 817-844, at 825-7, notes 33-37.

³⁵See Dariusz Adamski, 'National Power Games and Structural Failures in the European Macroeconomic Governance', (2012) 49 *Common Market Law Review*, 1319-1364; Fritz W. Scharpf, 'Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability', in Wolfgang Streeck and Armin Schäfer (eds.), *Politics in the Age of Austerity* (Polity, 2013), 108-142, at 139.

³⁶See Michelle Everson, 'The Fault of (European) Law in (Political and Social) Economic Crisis', (2013) 24 *Law and Critique*, 107-129.

the excessive balance procedure 'dictates that it must operate without any predefined rule' and that the Commission's *ad hoc* decisions must apply to individual Member States in unique circumstances rather than to the EMU states in general. Regardless of the comparative quality of its economic expertise, the Commission lacks legitimate authority to impose highly intrusive policy choices on Member States.³⁷ Precisely, this is foreseen for an undefined range of policy areas in which the EU still lacks hard-law competences.

5 | 'UNITED IN DIVERSITY'

Critics are expected to explain what they have to offer. Such requests tend to have silencing effects. The discussion on the management of the crisis is dominated by economists and their expertise. A cobbler should stick to his last, goes a proverb in many languages. And, indeed, among both lawyers³⁸ and political scientists,³⁹ the prevailing view is that we should learn to live with the 'new normalcy'. After all, the transformations which European crisis politics has brought about have been legalised by the European Court of Justice.⁴⁰

This is a premature end. We simply cannot know how stable the new normalcy really is. What we know for sure, however, is that, the jurisprudence of the CJEU notwithstanding, the present state of the Union is threatening the legitimacy of the integration project. The implications are complex and far-reaching. It must suffice here to sketch out a series of intuitions about the socio-economic basis, the normative essentials and the constitutional form of an alternative approach. As announced in the first section, the argument departs from Polanyi's economic sociology and his quest for co-operation among political autonomous polities, then proceeds to the trilemma thesis of the Harvard political economist Dani Rodrik, moves from there to the political philosophy of the EU recently submitted by Daniel Innerarity; it concludes with the thesis that conflicts law is the proper constitutional form of the EU.

1. The first step is very short. To cite the passage from the beginning again: 'Out of the ruins of the Old World, cornerstones of the New can be seen to emerge: economic collaboration of governments *and* the liberty to organize national life at will.'⁴¹ Political autonomy should not get lost in integration but be preserved in co-operative arrangements.
2. Dani Rodrik has never cited Polanyi in his works on globalisation. But these works are infiltrated with Polyanian ideas, and Rodrik has acknowledged his indebtedness to Polanyi explicitly.⁴² For our context, his most famous theorem seems particularly instructive. In his book, *The Globalization Paradox*,⁴³ Rodrik asserts the impossibility of simultaneous pursuit of economic globalisation, democratic politics and national determination (autonomy), highlighting a trilemma in which only two goals can be paired: economic globalisation and democratic politics, or democracy and national autonomy. For Rodrik, the EU furnishes dramatic illustration of his thesis. On the one hand, the EU could transnationalise democracy through federalisation and thereby defend the advantages of the common market; at the same time, however, it would be forced to establish a common European politics to legitimise its necessary assumption of fiscal and social policy, with negative consequences for national

³⁷See Fritz W. Scharpf, above, n. 35 and id., 'Monetary Union, Fiscal Crisis and the Preemption of Democracy', MPIfG Discussion Paper 11/11, Cologne 2011.

³⁸See, prominently, Thomas Beukers, Claire Kilpatrick and Bruno De Witte, 'Constitutional Change Through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead', in id. (eds.), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press, 2017), 1–24; for a critical review of the state of the debate, see Deirdre Curtin, '“Accountable Independence” of the European Central Bank: Seeing the Logics of Transparency', (2017) 23 *European Law Journal*, 28–44.

³⁹For example, Tanja Börzel, 'Researching the EU (Studies) into Demise', (2018) 25 *Journal of European Public Policy*, 475–485.

⁴⁰Pringle, above, n. 1; judgment of 16 June 2015 in *Peter Gauweiler and others v. Deutscher Bundestag*, C-62/14, EU:C:2015:400.

⁴¹Karl Polanyi, *The Great Transformation*, above, n. 4, at 253–254 (original emphasis).

⁴²See http://rodrik.typepad.com/dani_rodriks_weblog/2017/03/a-foreword-to-kari-polanyi-levitt.html.

⁴³Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (W.W. Norton, 2011).

sovereignty. In the absence of such a denationalising will, the EU must give up the common currency and accept economic disintegration.⁴⁴ What is lacking here is Polanyi's 'Third Way': to wit, co-operation. This is the alternative referred to above.⁴⁵

3. Fortunately enough, there is an elaborated philosophical underpinning for this vision to be found in Daniel Innerarity's concept of 'inter-democracy'.⁴⁶ Two insights are particularly important for my argument. The first concerns Europe's heterogeneity which excludes all 'one-size-fits-all' recipes. Instead: 'If the EU is going to be more democratic, it will be so in the style of complex democracies. And that complexity is not only related to the diversity of its citizens but to the variety of issues about which it needs to decide, some of which may require proximity, but others that demand a certain distance.'⁴⁷ 'Inter-democracy' is his key concept: the democratisation of interdependencies must replace state-like or federal hierarchical models, he argues forcefully. And:

And indeed: the states are increasingly more incapable of democratic action because they cannot include everyone affected by their decisions in the electoral process and, on the flip side, citizens cannot influence the behaviour of those who are making decisions in their name. This is the principal democratic deficit that the European Union should rectify. Extraterritorial effects and the burdens that one state imposes on others cannot be justified by recourse to domestic democratic procedures and require another type of legitimacy. That is why we can affirm that the fact that national actors keep outside interests in mind may improve the representation of *true* domestic interests, since they are no longer circumscribed by the state arena either. In this sense, we might think that the EU helps strengthen the democratic authority of the member states, to the extent to which it can serve as a measure to manage externalities in an efficient fashion.⁴⁸

The so-called principle of external effects has such ardent critics as Alexander Somek,⁴⁹ and such prominent defenders as Jürgen Habermas.⁵⁰ Jürgen Neyer and I first submitted it back in 1997 in an essay on European comitology.⁵¹ The basic premise and intuition is very simple: it is a core premise of theories of democracy, most notably of Habermas's discourse theory of law and democracy that we, the citizens, must be able to understand ourselves as the authors of the legal provisions with which we are expected to comply. Under conditions of Europeanisation and globalisation and ever growing interdependences, this is no longer conceivable. To cite Habermas himself: 'Nation-states ... encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in

⁴⁴Dani Rodrik, 'The Future of European Democracy', ms. (Princeton, NJ, 2014), available at: <https://www.sss.ias.edu/files/pdfs/Rodrik/Commentary/Future-of-Democracy-in-Europe.pdf>.

⁴⁵See Section 3. Rodrik's recent *Straight Talk on Trade. Ideas for a Sane World Economy* (Princeton University Press, 2017), has a chapter with an update on Europe (pp. 48–78). Therein Rodrik repeats: 'If European democracies are to regain their health, economic integration and political integration cannot remain out of sync. Either political integration catches up with economic integration or economic integration needs to be scaled back (at 76). There are, however, signals of a re-orientation. The in my view most promising of these is in line with his more general ideas about globalisation. Globalisation requirements must remain consistent with democratic delegation; they must 'enhance democratic deliberation domestically' (at 65). On such affinities with the conflicts-law approach, see, more systematically, Fabian Bohnenberger and Christian Joerges, 'A Conflicts-Law Response to the Precarious Legitimacy of Transnational Trade Governance', in Moshe Hirsch and Andrew Lang (eds.), *Research Handbook on the Sociology of International Law* (Edward Elgar Publishing, forthcoming). Available at: SSRN: <https://ssrn.com/abstract=3009914>.

⁴⁶Daniel Innerarity, *Democracy in Europe. A Political Philosophy of the EU* (Palgrave Macmillan, 2018).

⁴⁷See 'Introduction: Understanding European Complexity', in *ibid.*, at 7.

⁴⁸See Chapter 4 ('What Should Be Democratized? The Peculiarity of Democracy in Europe', in *ibid.*, at 73.

⁴⁹Alexander Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement', (2010) 16 *European Law Journal*, 315–344; id., 'The Argument from Transnational Effects II: Establishing Transnational Democracy', (2010) 16 *European Law Journal*, 375–394.

⁵⁰See Jürgen Habermas, 'Does the Constitutionalization of International Law still have a Chance' (translated by Cirian Cronin), in Jürgen Habermas, *The Divided West* (Polity, 2006), 113–193.

⁵¹Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', (1997) 3 *European Law Journal*, 273–299.

the expanding horizon of a world society that is increasingly self-programming, even at the cultural level⁵² It is difficult to reject these insights. The implications are, of course, controversial. Among the three just-named alternatives—state-building, down-scaling of integration, co-operation—I opt for the third. In the European case, we can build on European law's potential to compensate for the legitimacy deficits of national rule. European law can derive its own legitimacy from this function: its mandate is to implement the commitments of the Member States towards each other by two legal claims, namely, the requirement to take the interests and concerns of their neighbours into account when designing national policies, and by imposing a duty to co-operate. The very notion of co-operation indicates that this kind of rule cannot be some 'command and control' exercise but must rely on the deliberative quality of co-operative interactions. Two important implications should be underlined: first, there is no in-built guarantee that such co-operative efforts will, in the end, be successful; but such limitations need not be damaging *per se*; quite to the contrary, they may document mutual respect of essential, yet distinct, values and commitments of the other (the *ordre public* in the parlance of conflict of laws and private international law). The second implication is more drastic: socio-economic, institutional, political and cultural diversity is particularly strong and difficult to overcome. This, however, is by no means a plea for inactivity; it is, instead, a reminder that we have to distinguish 'justice within' consolidated polities, on the one hand, and 'justice between' them, on the other—and that we have to work in both spheres.⁵³ Last, but not least, in view of the objections raised above against the discretionary mode of crisis governance, it should be underlined that the conflicts approach seeks to defend the idea of law-mediated legitimacy of public rule

6 | EPILOGUE

How much realism is in this 'united in diversity' vision? It is to be conceded that this perspective is a response to the social deficits of Europe's crisis politics and the normative fragility of its present constitutional constellation. The *praxis* which this vision envisages certainly depends, to invoke Böckenförde's famous dictum again,⁵⁴ on cultural and normative resources which cannot be produced wilfully or by some political or legislative fiat. European integration research used to be aware of such dependencies and has sought to identify them. As, for example, Joseph Weiler, in his insightful first reflection on supranationalism and intergovernmentalism, has underlined, the supremacy of European law was anything other than self-sustaining; instead, acceptance for its operation was held in precarious equilibrium, and dependent upon continuous political processes of intergovernmentalism and continuing commitment to the defence of the community spirit.⁵⁵ 'Fin-de siècle Europe' with its appeal to peace, prosperity and supranationalism was a similar, only slightly more mundane, suggestion.⁵⁶ 'Political Messianism' is a more desperate, crisis-driven version.⁵⁷ Lawyers with their normative sensibilities are by no means the only ones who try to spell out what might hold together societies in general and Europe in particular. To take the two 'Polanyians' referred to before: *laissez faire* liberalism, Polanyi has argued, is but a 'stark utopia'; it will provoke, and be accompanied by, protective counter-movements.⁵⁸ Dani Rodrik's trilemma theorem suggests that 'deep economic integration' among

⁵²Habermas, above, n. 50, at 176.

⁵³Christian Joerges, 'Social Justice in an Ever More Diverse Union', in Frank Vandenbroucke, Catherine Barnard and Geert De Baere (eds.), *A European Social Union after the Crisis* (Cambridge University Press, 2017), 92–119; available at: SSRN: <http://ssrn.com/abstract=2697440>.

⁵⁴Ernst-Wolfgang Böckenförde, 'Die Entstehung des Staates', above, n. 3.

⁵⁵Joseph H.H. Weiler, 'The Community System: The Dual Character of Supranationalism', (1981) 1 *Yearbook of European Law*, 257–306.

⁵⁶Joseph H.H. Weiler, 'Fin-de-Siècle Europe', in Renaud Dehousse (ed.), *Europe after Maastricht: an Ever Closer Union?* (C.H. Beck, 1994), 203–216.

⁵⁷Joseph H.H. Weiler, 'Europe in Crisis—On "Political Messianism", "Legitimacy" and the "Rule of Law"', (2012) *Singapore Journal of Legal Studies*, 248–268; available at: SSRN: <https://ssrn.com/abstract=2255263>.

⁵⁸Polanyi, above, n. 4, at 3.

constitutional democracies will sooner, rather than later, have to be either complemented by political union or downscaled. Can legal scholarship remain for long forgetful about the *proprium* of law? Can political science⁵⁹ refuse to consider whether the 'new normalcy' of the rule of economics, to take up Habermas's formula, 'deserves recognition'? Will Europe's constitutional courts continue to follow the lead of the CJEU when they are told that 'the financial stability of the euro area as a whole ... and of the Union itself' is a commitment that trumps the essentials of their constitutional traditions? Will such messages incentivise the peoples of Europe to oppose populist demagogism?

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⁵⁹Tellingly, political scientists who do not share the prevailing normative complacency in their own discipline, search for support in legal academia—with limited success; see Christian Kreuder-Sonnen, 'Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance', (2016) 54 *Journal of Common Market Studies*, 1350–1366; id., 'An Authoritarian Turn in Europe and European Studies?', (2018) 25 *Journal of European Public Policy*, 452–464.