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DIALOGUE AND DEBATE: SYMPOSIUM ON LAW, CONFLICT AND TRANSFORMATION – THE WORK OF CHRISTIAN JOERGES

Varieties of economic constitutionalism and the alternative of conflicts-law constitutionalism: observations on the conceptual history of the law of the integration project

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Abstract

This article pursues re-constructive and explanatory objectives which are embedded in a theoretical and normative agenda. The introduction specifies its beginnings including biographical notes. The following conceptual history of the law of the integration project distinguishes three stages in which three distinct varieties of economic constitutionalism have been pursued, which all remained defective when measured against the commitments to democracy, social justice, and the rule of law. These defects deepened in the managerial responses to the financial crisis of 2008. Throughout the article, a counter vision of conflicts-law constitutionalism is developed step by step. The final section of the article seeks a theoretical backing for this counter vision in Lisa Herzog's theory of 'democratic institutionalism'. The epilogue sketches out how the project will continue.

Keywords: economic constitutionalism; technocratic governance; deliberative supranationalism; conflicts-law constitutionalism; diagonal conflict constellations

1. Introduction: Biographical notes

This article summarises my work on the legal conceptualisation of European integration over a time span of four decades. It re-constructs the beginnings, the development, and the prospects and perspectives with both explanatory and normative ambitions. 'Democracy enhancing conflicts-law constitutionalism' is the title which characterises its present state. The stages to the development of this notion will be explained and defended step-by-step. The step undertaken in this introduction deals with some contingent, yet biographical pre-dispositions and their anything but accidental impact. 'We are not the masters of the theories to which we find ourselves in thrall', notes the first sentence of the Preface about our beginnings[1]; but, with hindsight, we understand more. My starting points are hence three scholars who have exerted an influence of lasting importance on my academic endeavours.

[1]C Joerges, *Conflict and Transformation – Essays on European Law and Policy* (Bloomsbury 2022) vii.

A. Rudolf Wiethölter

Rudolf Wiethölter is the first to be mentioned. I took up my studies at the law faculty of the Goethe University in Frankfurt am Main in the winter term of 1962. Everything was new, but hardly anything seemed particularly interesting[2] – that is, until 1963, when, out of the blue for us students, a certain Rudolf Wiethölter accepted his *Ruf* to the Frankfurt alma mater. I well remember an embarrassed smile under his professorial gown during his first ceremonial appearance. It took us a while to realise that a *Zeitenwende* was now under way. Wiethölter's teaching was different and demanding. He talked about the history of German legal traditions, criticised the state/society dichotomy, revealed discrepancies between the presentation (*Darstellung*) and the generation (*Herstellung*) of judgements; he even commented on the Nazi past of renowned legal scholars. A key to his interests and messages is his disciplinary background, namely, private international law (PIL), at the time a flourishing, institutionally extremely well-established field. 'PIL is the queen of all legal disciplines', Wiethölter made us believe in his seminars, when reviewing centuries of intellectual efforts, contrasting paradigms, complex doctrinal exercises, and analysing topical conflict constellations. What was so fascinating is also paradoxical. Germany's understanding of private international law (PIL) had been conceptualised in Savigny's magisterial treatise of 1848 as a – in its substance – transnational project.[3] Its codification in the Civil Code of 1900 meant that its provisions were now commands of positive national legislation, whereas a paradox had been enacted. The constellations that PIL had to address were transnational. If law was committed to justice, it had to design a law beyond the nation state.[4] The affinities and differences with European law should already be apparent here.[5]

B. Jürgen Habermas

Before explaining my discontent and moving on to my idea of conflicts-law constitutionalism, I must first comment upon a second master-thinker of whose presence in Frankfurt I was, at the time, not yet aware, to wit, Jürgen Habermas.[6]

I was fortunate enough to get an invitation to the Institute for International and Foreign Trade Law at the Georgetown Law Center in Washington DC[7] right after my first *Staatsexamen* in August 1966 to pursue my PhD project there. These were the times of the Vietnam War. These 'times they [were] a-changing',[8] however, also in the Federal Republic. Upon my return in the autumn of 1967, I was confronted with the advent of the student revolution and its heated political

[2]The article by Dieter Simon, '. . . ein gewisser Wiethölter: Fünf akademische Bilderbogen zum Selbstbemalen'; published a good number of years later in 22 (1989) *Kritische Justiz* 131, captures the atmosphere at the time brilliantly. For a recent evaluation, see D Siciliano's blog post 'Critical theory of the Frankfurter lawyer Rudolf Wiethölter', available at <https://journaloflawandsociety.co.uk/blog/critical-theory-of-law-of-the-frankfurter-lawyer-rudolf-wiethoelter> accessed 1 February 2025. The text is, in view of the revival of Antisemitism in Germany, of depressing topicality.

[3]FC von Savigny, *System des heutigen Römischen Rechts*. Vol 8 (Veit 1849); [A Treatise on the Conflict of Laws, Vol 8 (T & T Clark 1869)].

[4]Wiethölter's PhD was about this issue: *Einseitige Kollisionsnormen als Grundlage des Internationalen Privatrechts* (de Gruyter 1956), reprint 2017.

[5]See further below Section 2.A.

[6]Not to be aware of Habermas may seem odd now, but was anything but unusual among law students in the years preceding the turmoil of the 1968s. Habermas had, since 1961, been an extraordinary professor of philosophy in Heidelberg; his classic (*Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* [*The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Harvard University Press 1989] was published only in 1962 and he succeeded Max Horkheimer in Frankfurt only in 1964. But Habermas was already a renowned intellectual of the democratic left [see S Müller-Dohm, *Habermas. A Biography* (Polity 2016) 92–112] with a wide audience in Frankfurt's vibrant academic community.

[7]H Kronstein, then the Institute's Director had obtained a professorship at the Georgetown Law School after his emigration from Germany in 1935 and accepted a *Ruf* to the Goethe University in Frankfurt in 1951, working from then on half-time at both institutions. Kronstein, auhor of seminal articles on conflict of laws, co-supervised my PhD studies.

[8]B Dylan, "The Times they are a-Changing', album and song title, CBS, 1964.

and academic debates. The Frankfurt *Institut für Sozialforschung* (Institute for Social Research) was the home of the *Kritische Theorie*. Habermas's presence there was anything but accidental; his theorising fascinated a generation in search for a new orientation. What he had to say about critical thinking, Germany's past, and the prospects of good politics in a democratic society, was precisely what I was longing for.[9] Theoretical and political affinities between my *Doktorvater* and Habermas became gradually apparent. They had a direct impact on my PhD project. The explanation of this impact on my critique of the Savignian tradition of PIL in my PhD thesis,[10] as well as the idea of European conflicts-law constitutionalism which developed more than a decade later, requires, however, an American detour.

C. Brainerd Currie

After Wiethölter's first series of seminars, it seemed obvious to choose the domain of the 'queen of all legal disciplines' for a PhD project. Wiethölter had advised me to investigate the works of Brainerd Currie, Professor at the Duke University in Durham, North Carolina, the trailblazer of the so-called American conflicts revolution. Currie had initiated this revolution in 1958,[11] and then powerfully advanced it with a collection of articles published in 1963.[12] But what was so 'revolutionary'? Currie had questioned the normative reasonableness and practicability of the American conflict of laws tradition, for so long dominated by Hugh Beale's vested rights theory. He urged conflict lawyers to take the policies pursued in legal provisions into account and to become aware of – and to respect – the 'governmental interests' which he supposed would guide judicial responses to the choice-of-law problem. Both of Currie's main messages were revolutionary, and not only in the United States. They were, by the same token, nothing less than an assault on the Savignian paradigm still dominating the mindset of the discipline in Germany.[13] This tension is obvious with respect to Currie's quest to explore the policies underlying the conflicting legal provisions, instead of determining the 'seat' of a legal relationship and pursue 'spatial' justice. 'Governmental interests', the trademark of Currie's approach, is another, and an even more vexing challenge: did he mean to encourage courts to identify with and defend the parochial interests of their citizens and their home states? Was what he has coined a *legal* category, or was this, at best, a crude sociological term which captured somehow 'what courts will do in fact'?

The importance of all this for my work on the 'American conflicts revolution' became obvious to me from Chapter XXIII of Habermas' classic,[14] entitled 'The Political Public Sphere in the Process of Transformation of the Liberal Rule of Law'.[15] It was as if the scales suddenly fell from my eyes. It was all there: a lucid analysis of the private law paradigm upon which Savigny's PIL rested; a normative critique informed by political philosophy which sought backing in political

[9]I never considered shifting my allegiance to his great opponent whom Gunther Teubner preferred from early on; I remember, instead, a lively cry of indignation on the part of the Frankfurt student movement after Suhrkamp started to publish Niklas Luhmann.

[10]*Zum Funktionswandel des Kollisionsrechts. Die 'Governmental Interest Analysis' und die 'Krise des Internationalen Privatrechts'* (Beiträge zum ausländischen und internationalen Privatrecht, Vol 38) (de Gruyter/Mohr-Siebeck 1971, reprint de Gruyter 2020).

[11]Among his faithful followers was Herma Hill Kay, Professor of Law at the University of California, Berkeley, from 1987; see her concise summary of Currie's approach in 'Remembering Brainerd Currie', (2015) University of Illinois Law Review 1961–67; for a comprehensive, albeit mostly descriptive account, see her 'A Defence of Currie's Governmental Interest Analysis' 215 Receuil des cours (1989-III), (Martinus Nijhoff 1990).

[12]B Currie, *Selected Articles on the Conflict of Laws* (Duke University Press 1963).

[13]For a recent defence, see F Rödl, 'Necessary Unity', in R Banu, M Green, and R Michaels (eds), *Oxford Philosophical Foundations of Private International Law* (Oxford University Press 2024) 41.

[14]Habermas (n 6).

[15]'The Political Public Sphere in the Process of Transformation of the Liberal Rule of Law' (later elaborated in the chapter on 'Legal Paradigms' in idem, *Between Facts and Norms. Contributions to a Discourse Theory of Law* (MIT Press 1992) 392–408.

economy with guidelines for a novel understanding of the state-society relationship and the functions of law in Germany's post-war democracy. My critique was overdue,[16] even if it was unwelcome.[17]

D. Conceptual traces

European integration is a topic which did not attract the attention of the three scholars whose influence on my own work I have underlined – for Brainerd Currie, it was *terra incognita*. Private international law is a continental term, Conflict of Laws an Anglo-Saxon notion. Wiethölter is the only one among the three to be familiar with both disciplines and their traditions. My main message, namely, the re-conceptualisation of European law as 'a new type of conflicts law' and the characterisation of this conflicts law as 'Europe's constitutional form' was a message which emerged gradually during my post-doctoral studies. It is a demanding, in some respects even irritating, message.[18] The impact of my Frankfurt advisors upon the project which I started remained important not *despite*, but *because of* their readiness to re-consider their messages. Wiethölter has ceased to intervene in topical controversies but continues his explorations of the transformative potential of law.[19] Habermas has, with utmost attention and passion, accompanied the course of the integration project – and yet re-examined and questioned the viability of core premises of his political theory.[20]

But how about Brainerd Currie, deceased at the age of 52 in 1965, who operated with his unquestionable analytical brilliance within much narrower horizons? Currie is still honoured in annual memorial lectures at Duke University. But his work has – even within the United States – gradually fallen into oblivion, occasionally even disdain; in Europe, his work is rarely even noticed.[21] A particularly stringent American critic, however, namely, Larry Kramer,[22] underlines both his own and the entire discipline's indebtedness to Currie's criticism and pleads for a

[16]For a like-minded critique, see HU Jessurun D'Oliveira, *De ruïne van een paradigma: de konfliktregel*, Inaugural lecture delivered at the University of Amsterdam on 16 February 1976 (Kluwer 1976); re-published online by Cambridge University Press, 2009. In German literature the most important backing of my argument was the conceptual history of the German tradition provided by K Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm* (Metzner 1965); see C Joerges, *Zum Funktionswandel* (n 10) 8–16.

[17]A very fortunate exception was E Rehbinder, 'Zur Politisierung des Internationalen Privatrechts' 28 (1973) *JuristenZeitung* 151–8.

[18]The reasons are manifold, the most important one being the characterisation as 'conflicts law' of a discipline dedicated to integration, harmonisation and unity. My defence of the term is to uncover a paradox, recently very lucidly explained by T Fia and IJ Murray in their 'Commodification and EU Law: A Genealogy' 2 (2023) European Law Open 372–85, when observing that I submit 'that European social regulation does ensure that non-economic issues are considered in a policy-making setting where they are subsumed within processes geared towards achieving economic efficiency' (ibid at 381). The whole point of democracy-enhancing conflicts law is indeed that conflicts *law* is to provide solutions beyond the provisions of the conflicting legal regimes; see E Steindorf n 58 below and on 'diagonal' conflicts Section 1.B, text following n 56 below.

[19]See, eg, the collection of articles in *Rechtsbrüche. Spiegelungen der Rechtskritik Rudolf Wiethölters*, 52 (4) (2019) Kritische Justiz 391.

[20]J Habermas, 'Was heißt "deliberative Demokratie"? Einwände und Missverständnisse' in *Ein neuer Strukturwandel der Öffentlichkeit und die deliberative Politik* (Suhrkamp 2022) 89–108 [A New Structural Transformation of the Public Sphere and Deliberative Politics (Wiley 2023)] and previously, J Habermas, 'Hat die Demokratie noch eine epistemische Funktion?' in idem, *Ach Europa* (Suhrkamp 2008) 177–91. This move elicited already wide attention; the Danish 'Habermas-Forum' (<www.Habermas Forum.dk> accessed 15 January 2024) listed in December 2023 some 50 reviews of the original German edition.

[21]Notable exceptions in the EU include HU Jessurun d'Oliveira (n 15) as well as J Pauwelyn and R Michaels – small wonder as the latter two taught at Duke; see their 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law' 22 (2012) Duke Journal of Comparative & International Law 349–76; see, further, R Michaels 'The New European Choice-of-Law Revolution' 82 (2008) Tulane Law Review 1607–44; idem, 'EU Law as Private International Law? Re-conceptualising the Country-of-Origin Principle as Vested Rights Theory' (ZERP-Diskussionspapier 5/2006) Bremen 2006, and K Knop, R Michaels and A Riles, 'Foreword: Transdisciplinary Conflict of Laws' 71 (2008) Law and Contemporary Problems 1–18.

[22]See, eg, L Kramer, 'More Notes on Methods and Objectives in the Conflict of Laws' 24 (1991) Cornell International Law Quarterly 245–78. His objections, summarised at 247 include '(1) the initial presumption of forum law; (2) the state's power to

re-orientation, rather than a principled rejection. This will be how we make use of Currie's work. One general observation is only seemingly trivial. Currie's methodology

> suggests that choice-of-law problems are not limited to cases with multistate contacts but may arise in wholly domestic cases as well. A conflict of laws, after all, is just that-a clash of legal rules, not legal systems-and such clashes may arise among the laws of a single system ... [However, in multistate constellations courts must] rather than simply accommodating the need for coherence within a single legal system ... worry about accommodating the objectives of independent sovereigns.

'[G]eneralising the thinking used in the conflict of laws' is precisely what Gunther Teubner has characterised as Wiethölter's methodological legacy.[23] The viability of this insight for European law will, however, be underlined only occasionally.[24] But Currie's provocative thesis about the undecidability of 'true conflicts' will be discussed more thoroughly in the context of the conflict over fiscal and monetary competences in the EU.[25]

2. European Law *is* Conflicts Law in all but name

I elaborated my critique of the Savignian tradition in a couple of articles,[26] but then, after the establishment of the Centre for European Law and Politics at Bremen University in 1982, started to explore the discrepancies and affinities between European Law and the dominating traditions of German Private International Law (PIL) and American Conflict of Laws (CoL) respectively. This, however, cannot be done comprehensively. My re-construction focuses on four approaches, namely, the 'Integration through Law' paradigm (A), the counter-vision of 'deliberative supranationalism' (B), and the conceptualisation of the EU as a 'regulatory state' (C), and the turn to 'executive managerialism' after the financial crisis (D).

A. The ITL paradigm as Economic Constitutionalism

The suggestion to read European law as PIL (or CoL respectively) may not be obvious but suggests itself.[27] PIL is dedicated to the co-ordination of diverse legal systems. European law does the same. The difficulties of this equation stem from the conceptual background of the two disciplines. The commitment of the Savignian tradition of PIL to 'spatial justice' ['private international law justice'] cannot provide plausible criteria for the mitigation between diverging policy orientations,[28] let alone for

define its own interests; (3) the idea that the renvoi is no longer a problem; (4) the existence of "unprovided-for" cases; and (5) the resolution of true conflicts by applying forum law'.

[23]G Teubner, 'Dealing with paradoxes of law: Derrida, Luhmann, Wiethölter', in idem, *Critical Theory and Legal Autopoiesis. The Case for Societal Constitutionalism* (Manchester University Press 2001) 59–83 at 81 n 5 (with references to works of Amstutz, Joerges, Ladeur, Walz).

[24]See the comments on the *Centros* judgement in the text following n 46.

[25]Below Section 2.D.

[26]'Die klassische Konzeption des Internationalen Privatrechts und das Recht des unlauteren Wettbewerbs' 36 (1972) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 421–91; 'Das Rechtssystem der transnationalen Handelsschiedsgerichtsbarkeit' 138 (1974) *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 549–68; 'Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts' 43 (1979) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 6–79.

[27]The neglect of this topic may be due to the disciplinary devide of public law and private law departments in Germany's faculties with European law residing in the former and PIL in the latter. It is then hardly accidental that it was R Michaels, at the time still Professor at Duke, who drew attention to the American-European affinities in his 'The New European Choice-of-Law Revolution' (above n 21) . See also his 'EU Law as Private International Law?' (above n 21).

[28]The so-called 'international economic conflict of laws' (*Wirtschaftskollisionsrecht)* remained one-sidedly restricted to determining the international sphere of application of regulatory law.

the vast array of regulatory policies which create so-called non-tariff barriers to trade.[29] All efforts to cope with such barriers must consider not only diverging policies but also the economic implications of their abolition.[30] These issues will be taken up in the following section. And it was precisely this vexing query that returned in the integration project, albeit in a new constellation.

Europe hosts a multitude of legal systems with significant, historically, and politically, deeply rooted varieties. In constellations with contacts to different jurisdictions, we are faced with legal provisions which pursue democratically legitimated policies. Which one is to prevail? Once we mandate European law with the power to evaluate and decide this query, we realise that European law *is* conflicts law. The project of establishing a European Economic Community had hence to cope with precisely the same obstacles as post-classical German PIL and Anglo-Saxon CoL. This was not the perception, however, which dominated the European responses found in the 'foundational period' by an ingenious European Court of Justice (ECJ) and doctrinally elaborated in the integration-through-law project (ITL).

This project had a touch of genius: the direct effect of economic freedoms, the supremacy of European law, pre-emption, the empowerment of the citizens of the Community to bring their home states to the forum of the ECJ, the guardianship of the ECJ over the uniform interpretation, crowned by the understanding of this doctrinal complex as the Community's 'constitutional charter'. Law is the 'object' of integration politics and operates as its 'agent' – this is how Joseph Weiler and Renaud Dehousse, both later Presidents of the European University Institute, were to summarise these messages.[31] What I observed was nevertheless irritating and even shocking, namely, the clandestine affinity with the Savignian tradition of PIL. Just like PIL, ITL constructed a transnational legal framework which was to operate without taking the socio-economic diversity of the jurisdictions which it sought to integrate into account. It failed to address, let alone conceptualise, 'the economic' in the EEC,[32] and, last but not least, to care about the democratic credentials of its programmatic.

The Frankfurt law faculty knew better. Already in the early post-war years, its private law departments were dominated by Ordoliberal scholarship with such renowned representatives as Walter Hallstein, Franz Böhm, Ernst-Joachim Mestmäcker, and Kurt Biedenkopf – the *crème de la crème* of German Ordoliberalism. They all understood and were delighted: the European project, as it was operated by the ECJ and the protagonists of the ITL project, provided a stringent framing

[29]See, for a systematic discussion, C Godt and C Joerges, 'Free Trade: The Erosion of National and the Birth of Transnational Governance', in S Leibfried and M Zürn (eds), *Transformation of the State* (Cambridge University Press 2005) 93–117.

[30]This is the main obstacle of Europe's harmonisation policies and the basis of the 'governmental interests' of the Member States which are concerned with the well-being of their economies.

[31]R Dehousse and JHH Weiler, 'The Legal Dimension', in W Wallace (ed), *The Dynamics of European Integration* (Pinter 1990) 242–60.

[32]It seems so obvious: 'The integration of the Member States and the consequential renunciation of sovereignty set the scene for the creation of a "Law" which would dictate the substantive process and the substantive results of integration. This "Law" is at its core "*economic*" constitutional law since integration should be based upon open markets and should aim for the creation of one common market; at the same time, this "Law" is economic "*constitutional*" law as it envisages that the opening up of markets should follow through the competitive process and that this common market should constitute a system of undistorted competition', C Joerges, 'The Market Without the State? States Without a Market? Two Articles on the Law of the European Economy,' EUI Working Paper LAW 96/2, 6, available at <http://eiop.or.at/eiop/pdf/1997-019.pdf> accessed 1 February 2025; German original: 'Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik' in R Wildenmann (ed), *Staatswerdung Europas? Optionen einer Europäischen Union* (Nomos 1991) 225–68]. However, it was to take decades before European constitutionalism became aware of the obvious; see N Walker, 'Where's the "E" in Constitution? A European Puzzle', in A Skordas, G Halmai, and L Mardikian (eds), *Economic Constitutionalism in a Turbulent World* (Edward Elgar 2023) 11–37. Beyond the polemics against the so-called 'ordoliberalisation of Europe' [see, for many, MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021)], the ordoliberal conceptualisation was rarely discussed in Anglo-Saxon legal scholarship; but see T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016) 102, and, more recently, A Orford, *International Law and the Politics of History* (Cambridge University Press 2021) 265–82.

for the type of *economic* constitutionalism devoid of democratic credentials which they had, in vain, sought to impute into the Basic Law of the Federal Republic.

Why was it that the promotion of economic constitutionalism with its supranational 'constitutional charter' was so stunningly successful? My seemingly paradoxical suggestion: ITL owes this success to the camouflaging of its ideological basis. Suffice it here to underline some trivial economic considerations: integration proceeds through the elimination of legal differences; the lessening of legal diversity helps to overcome barriers to trade. It is therefore a command of economic reason to overcome legal diversity. There is, hence, an implicit economic rationality in the ITL agenda: uniformity is good in itself, because it will promote cross-border trade; diversity is bad in itself, however, since it is an obstacle to free trade. The ITL orthodoxy provided, to cite Katharina Pistor's notion,[33] the legal coding of European integration as market-building and market-governance. ITL imposed the straitjacket of *unity via uniformity* on the integration project. The supremacy doctrine was to ensure the enforceability of this conceptual framework.

B. The Member States' democracy-deficit and the counter-vision of 'Deliberative Supranationalism'

The idea of economic constitutionalism, Karl Polanyi would have objected, is but a 'stark Utopia'.[34] Society would, however, have found ways to protect itself. His understanding of capitalism as a process of commodification and countermoves of societal self-protection deserves the attention of Europeanists and constitutional theorists likewise.[35] In the present context, some mundane pragmatic observations will do: European market-building was accompanied by steadily rising concerns with 'non-tariff barriers to trade' – obvious indicators of political concerns with the operation of markets.[36] Ulrich Beck's seminal study on the 'risk society'[37] provided enlightening analyses of the need for regulatory taming and correction. The need to accompany the promotion of an integrated ('single') European food market by some pan-European regulatory scheme was simply irresistible.

Comitology

The infamous 'comitology system', in operation since the early 1960s, was the form in which these regulatory activities were from very early on institutionalised.[38] This mysterious phenomenon did not fit into the notions which the exponents of the turn to regulatory politics and the transformation of Europe into a 'regulatory state' proclaimed,[39] let alone into those of the master-thinker of European law. Comitology, JHH Weiler commented, is a 'new sub-atomic particle, a neutrino or a quark', a 'second revolution', a 'normative disaster'.[40] The language is somewhat unusual, but the substance of the analysis is not. The concert of voices which articulates governmental and economic interests, health issues, and cultural concerns in a market of such enormous proportions is well captured in Weiler's

[33]K Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton University Press 2019); for an authentic brief summary, see idem, 'The Code of Capital: Core Themes' 11 (2021) Accounting, Economics and Law: A Convivium 2–7.

[34]To cite his angriest comment: 'Our thesis is that the idea of a self-adjusting market implied a stark Utopia. Such an institution 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. Inevitably, society took measures to protect itself . . . ', K Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (Beacon Press 2001, 2nd ed. with a Foreword by J Stiglitz and an Introduction by F Block) at 3.

[35]G Teubner, 'A Constitutional Moment? The Logics of "Hitting the Bottom"' in idem, *Critical Theory and Legal Autopoiesis. The Case for Societal Constitutionalism* (Manchester University Press 2019) 175–212, 192 f.

[36]See Joerges and Godt, 'Free Trade: The Erosion of National and the Birth of Transnational Governance', n 29 above 93–117.

[37]U Beck, *Risk Society: Towards a New Modernity* (Sage Publications 1992).

[38]See, for a comprehensive summary, E Vos, 'The Rise of Committees' 3 (1997) European Law Journal 210–29 and her restatement in 'Fifty Years of European Integration, 45 Years of Comitology' in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (T.M.C. Asser 2009) 3–56.

[39]In his enormous *œuvre*, comitology is never mentioned; indeed, it does not fit into his concept of a 'regulatory state'.

[40]JHH Weiler, 'Epilogue: "Comitology" as Revolution – Infranationalism and Democracy' in C Joerges and E Vos (eds), *EU Committees, Social Regulation, Law and Politics* (Hart Publishing 1999) 339–49.

account. What else is to be expected in an 'internal market' of ever more and ever more interdependent economies?[41] Can we expect to find out how a 'democratic epistemic infrastructure' of this kind of polity would look like? We will turn to this query in Section 3.A. Our interim conclusion is that, so far, no one has been able to instruct us about the institutional setting that would - within the doctrinal framework of ITL, as JHH Weiler has designed it - ensure the defence of the 'fundamental constitutional value of accountable political decision-making'.[42]

Conceptual queries

In the further elaboration of our approach, we have differentiated between the legitimacy of European regulatory interventions ('conflicts law of the first dimension') and the co-operative organisation of Europeanised regulatory responses ('conflicts law of the second dimension', ie, the transformation of co-operative activities into a transnational regime), with comitology presenting the best-known example. To the vexing problems of this second dimension, we will return.[43] They do not affect the validity of our defence of the 'first dimension of conflicts law', which we introduced back in 1997 with a somewhat bombastic statement.

> The legitimacy of supranational constraints imposed upon the sovereignty of constitutional states can in principle be easily understood. Extra-territorial effects of national policies may be intended; indeed they are real and unavoidable in an economically and socially interdependent community. This raises the question of how can a constitutional state legitimise the burden it unilaterally imposes upon its neighbours? 'No taxation without representation' - this principle can claim universal validity; the very idea of democratic constitutionalism requires that constitutional states apply this principle against themselves. A supranational constitutional charter therefore does not need to represent a new 'state'. Nor does supranationalism require that democracies concede a right to vote to non-nationals. What it does require is that the interests and concerns of non-nationals should be considered even within the national polity. In this sense, supranationalism does convey *political* rights and not just economic freedoms to Community citizens. Supranationalism is therefore to be understood as a fundamentally *democratic* concept. 'Supremacy' of European law can and should be read as giving voice to 'foreign' concerns and imposing corresponding constraints upon Member States. What supremacy requires, then, is the identification of rules and principles ensuring the co-existence of different constituencies and the compatibility of these constituencies' objectives with the common concerns they share. Community law is to lay down a legal framework which structures political deliberation about exactly these issues. It is a constitutional mandate of the ECJ to protect such legal structures and principles and to resolve controversies surrounding their contents.[44]

Alexander Somek has characterised our theorem of external effects as the 'darling dogma of bourgeois Europeanists', criticising it as nothing but a camouflage of economic neo-liberalism.[45] In particular, the infamous *Centros* judgement,[46] he submitted, 'is the epitome' of how this

[41]See C Joerges, 'Good Governance through Comitology?' in C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing 1999) 311–38 at 332 ff.

[42]See text following n 38 above.

[43]See text accompanying n 46 ff.

[44]C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' 3 (3) (1997) European Law Journal 273–299. [slightly modified version: 'Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector' 4 (4) (1997) Journal of European Public Policy 609–25].

[45]A Somek, 'The Darling Dogma of Bourgeois Europeanists' 21 (2014) European Law Journal 688–722 at 670.

[46]Case C-212/97, *Centros Ltd* v *Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459; ECLI:EU:C:1999:126.

neo-liberal drift comes about.[47] Somek's reading of *Centros* is widely shared,[48] yet mistaken. The ECJ had very good reasons to question the wisdom of the oddities of Danish company law traditions. But the ECJ did not strike down the Danish law. The Court left it instead to the Danish legislative process to correct this or not.[49] To generalise this defence: the whole point of deliberative supranationalism is to resolve the tensions between European market integration and the regulatory concerns of the Member States. This implies, of course, that economic actors, when operating outside their home states, remain subject to *Europe's* regulatory politics. If taken literally, Somek's point amounts to a rejection of co-operative problem-solving in interdependent economies and societies, the conceptual *proprium* of conflicts-law constitutionalism.[50]

A second point, also raised by Somek, seems more interesting and troublesome. Even if we subscribe to the Habermasian insistence that the citizens in a democracy must be able to understand the laws they are exposed to as the outcome of political processes in which they had a say, we should not conclude that every affected outsider is entitled to be involved.[51] Taken literally, the principle would indeed amount to 'giving virtually everyone everywhere a vote on virtually everything decided anywhere'.[52] This is an *argumentum ad absurdum* which should not be taken seriously.[53] The 'all-subjected' principle reminds us, just as Habermas has it, that the exercise of public rule in a democracy presupposes and requires that these subjects must be able to understand themselves as citizens of a *democracy*. The protagonists of deliberative supranationalism underline the exposure of the citizens of the Union to a multitude of political authorities; the European Union continues to be an ensemble of Member States, which all define their own policies and interests; each of them remains exposed to the activities of its neighbours and exposes these neighbours to the external effects of its own activities. In this Union, with its interdependencies and regulatory needs, the European level of governance must be prepared and entitled to determine the limits of the regulatory autonomy of the Member States and to frame the resolution of their conflicts - this is what the project of 'deliberative supranationalism' has suggested.

So far, we have only addressed the irrefutable need to subject the functioning of markets in the European integration project to regulatory supervision. However, two further queries must be dealt with: one concerns the epistemic *quality* of regulatory activities; the second is their *co-ordination* among politically - still, in essential respects - autonomous states and further

[47]A Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement' 16 (2010) European Law Journal 315, 331.

[48]See, eg, J Mulder, '(Re) Conceptualising a Social Market Economy for the EU Internal Market' 15 (2) (2019) Utrecht Law Review 16–31 at 18 n 9 with pertinent references.

[49]See B Trefil, 'European Company Law: Comments and Meta-comments on Centros' 2 (2001) German Law Journal 2 (18); id, 'Die Niederlassungsfreiheit für Gesellschaften in der Rechtsprechung des EuGH und ihre Auswirkungen auf nationales Recht' EUI Working Paper Law LAW 2003/09; for a critique of the German doctrinal traditions of company law, see E Schanze and A Jüttner, 'Die Entscheidung für Pluralität: Kollisionsrecht und Gesellschaftsrecht nach der EuGH-Entscheidung Inspire Art,' 2003 *Die Aktiengesellschaft* 661.71; C Joerges and C Schmid, 'Towards Proceduralization of Private Law in the European Multi-Level System' in A Hartkamp et al (eds), *Towards a European Civil Code*, 4th ed (Wolters Kluwer 2011) 277–310 at 298–301.

[50]Somek's main conceptual source is the constitutional theory of JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980). Ely's critiqe of Curries constitutionsal views was based on a misreading of his argument, argues HH Kay in her ' Defence of Currie's Governmental Interest Analysis' (n 11) 134–54 which is focused on Ely's article 'Choice of Law and the State's Interest in Protecting Its Own' 23 (1981) William & Mary Law Review 173–217; we can let this controversy rest; see in the *Addendum* below text following n 98. See further Section 3.B.

[51]J Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' 29 (6) (2001) Political Theory 766–81 at 788.

[52]R Goodin, 'Enfranchising All-Affected Interests, and its Alternatives' 35 (1) (2007) Philosophy and Public Affairs 40–68 at 68.

[53]But see S Näsström, 'The Challenge of the All-Affected Principle' 59 (1) (2011) Political Studies 116–34; her contraposition of the 'all-affected' principle which protects the interests of outsiders (non-citizens) extends this with an 'all-subjected' principle which reminds us, just as Habermas has it, that the exercise of public rule in a democracy presupposes that these subjects must be able to understand themselves as citizens of a democracy. This is why we can leave it to the philosophers to settle this type of query among themselves.

transnationally operating actors. We postpone this analysis to Section 3.A. and first refine our definition of European conflict constellations.

Refinement No. 1: Deliberative Supranationalism II

A first refinement of the analysis of comitology simply underlined the potential of comitology to transform the 'Community of European Constitutional States' into a real and visible 'European polity', characterised by 'infranational' processes, interactions between diffuse units, and the formation of transnational interests and networks. In our discussions on comitology, we concluded that the foundational Joerges and Neyer article had failed to underline the transformation of co-operative activities into a transnational regime, characterised as 'Deliberative Supranationalism II'.[54]

Refinement No. 2: The idea of a three-dimensional Conflicts Law Constitutionalism

A subsequent refinement was the 'idea of a three-dimensional conflicts law'.[55] This elaboration clarified the distinctions between horizontal, vertical, and diagonal conflicts.[56] 'Horizontal conflicts' in non-harmonised legal fields are the domain of PIL; 'vertical conflicts' are the innovation generated by the supremacy doctrine; and 'diagonal conflicts' will be observed wherever regimes at different levels that apply to different aspects of a given case make contradictory demands.[57] In all of these constellations, most obviously in the third, the very fact that Europe respects the (semi-)autonomy of the Member States militates against some inherent primacy of one of the conflicting rules and, instead, in favour of some reconciliatory substantive solution.[58] The parallel with comitology is obvious. More importantly, however, the 'third dimension' was a response to the transformations of the structures of the European system of governance. One of these is the turn to social regulation, which had its predecessor in comitology, but now led to genuine transnational modes of governance, in particular, the establishment of ever more European agencies.[59] The second was the 'turn to governance' with its extensive involvement of non-governmental actors in regulatory politics pursuant to which the law must adjust to forms

[54]See C Joerges and IJ Sand, 'Constitutionalism and Transnational Governance', unpublished typescript, EUI Florence 2001.

[55]C Joerges, 'The Idea of a Three-dimensional Conflicts Law as Constitutional Form' in C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart 2011) 413–56.

[56]This has not too often been taken seriously in legal scholarship (but see G Teubner, *Verfassungsfragmente. Gesellschaftlicher Konstitutionalismus in der Globalisierung* (Suhrkamp 2012) 232–35 [*Constitutional Fragments* (Oxford University Press 2012), Chapter 6], and only occasionally been noticed in political science; see R Mayntz, 'The Architecture of Multi-Level Governance of Economic Sectors', MPIfG Discussion Paper 13/2007 23–4.

[57]See C Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective' 3 (1997) European Law Journal 378–406 at 398–400; C Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Law. The example of book price fixing' 8 (1) (2020) European Review of Private Law 155–72.

[58]It is worth noting that Ernst Steindorff, in my view, Germany's most creative mind of European law scholarship in his generation and at the same time a renowned PIL scholar, had advocated all this back in 1958 in his habilitation thesis where he defended the turn to '*Sachnormen*' (substantive norms) within PIL as an alternative to the selection of one of the rules in conflict; see his *Sachnormen im internationalen Privatrecht* (Klostermann 1958); these are, as F Rödl and C Joerges have noted, 'material norms' which 'do not appear as material norms of a super-ordinate federal legal level, but which functionally remain collision norms as 'material norms in the conflict of laws'; see our 'Reconceptualising the Constitution of Europe's Post-national Constellation – by Dint of Conflicts Law' in I Lianos and O Odudu (eds), *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press 2012) 381–400 at 393; Steindorff's idea has experienced an elaborated rebirth recently, see P Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012); see the discussion by L Viellechner, 'Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law' 6 (2) (2015) Transnational Legal Theory 312–32 at 314, 322 ff; idem, 'The Constitution of Transnational Governance Arrangements: Karl Polanyi's Double Movement in the Transformation of Law' in C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing 2011) 435–564 at 439 ff, 458 ff.

[59]Comprehensively documented and studied in the research network TARN, orchestrated in Maastricht by E Vos <https://www.maastrichtuniversity.nl/research/mcel/mcel-projects/academic-research-network-eu-agencies-institutional-innovation-tarn> accessed 1 February 2025.

of self-regulation. In both the second *and* the third dimension, expert knowledge and epistemic communities are paramount.[60] It is this feature and its implications upon which the following section will focus. Suffice it for now to note that the so broadly acclaimed turn to 'new modes of governance', suffered, notwithstanding its supposed functional necessities, from irresolvable tensions between its institutional innovations and the Union's commitment to the rule of law and the very idea of law-mediated, politically accountable rule.[61]

C. G Majone's Conceptualisation of the EU as a 'Regulatory State'

The analyses of the European food market and its governance through the comitology system in the projects organised by Jürgen Neyer and me[62] were, admittedly, euphemistic. Our notion of 'deliberative supranationalism' was by no means an empirically stringently tested theory. What we defended was a *normative perspective* within which the operation of the most important sector of the European economy could be evaluated, and, with the help of transnational legal regimes, eventually corrected. However, the regulatory potential of the comitology system - as we have defended it - was overburdened for mundane reasons; the governance of the steadily expanding food market with its competing economic concerns created an enormous workload and required the evaluation of complex risk configurations.[63] What we had quite successfully documented was the validity of Polanyi's insights in the 'social embeddedness of markets' – the food market illustrates perfectly that the economy is a polity.[64] What we had failed to offer, however, was a regulatory perspective of manageable proportions.

It is hardly accidental that such a perspective was defended when the overburdening of the comitology and our approach had become obvious. It was Giandomenico Majone who developed such a much- needed alternative stringently and successfully. Majone had become familiar with American regulatory practices and academic research before he arrived at the European University Institute in 1986, where he initiated intense studies on European regulatory politics. Throughout his work, Majone underlined two characteristics of his regulatory philosophy.[65] The first one: 'social regulation' was not constraining, but, on the contrary, *improving* market functioning. Non-majoritarian institutions, preferably agencies, had to be entrusted with pertinent regulatory tasks. They had to understand their mission as an essentially *technocratic* exercise dedicated to promoting a modernised notion of economic efficiency. The second one: Europe's 'social regulation' had to be insulated against distributional politics, and, hence, was to be strictly

[60]Worth re-reading is JHH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' 64 (2004) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547–62, 552, where he identified a new 'geological' formation: 'International law as Transaction, international law as Community, and international law as Regulation', each relying on a specific form of normativity and legitimacy.

[61]See the discussion of the 'new modes of governance', once the darling theory of progressive European law scholarship, in C Joerges, 'Integration through De-Legalisation?' 33 (3) (2008) European Law Review 291–312.

[62]See n 44 above, and C Joerges, A Bücker, J Neyer and S Schlacke, 'Social Regulation through European Committees: An Interdisciplinary Agenda and Two Fields of Research', in RH Pedler and GF Schaefer, *Shaping European Law and Policy: The Role of Committees and Comitology in the Policy Process* (European Institute of Public Administration 1996) 39–58; C Joerges and J Neyer, 'Politics, Risk Management, World Trade Organization Governance and the Limits of Legalisation' 30 (2003) Science and Public Policy 219–25; idem, 'Deliberativer Supranationalismus in der Krise', in O Flügel-Martinsen, D Gaus, T Hitzel-Cassagnes, and F Martinsen (eds), *Deliberative Kritik - Kritik der Deliberation. Festschrift für Rainer Schmalz-Bruns* (Springer VS 2014) 353–72.

[63]See for an update and deepening of our critique J Falke, 'Comitology after Lisbon: What is Left of Comitology as we have Praised it?' in C Joerges and C Glinsky (eds), *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance* (Hart Publishing 2014) 271–91; for a thorough discussion of the term 'managerialism', see Th Kikauer, 'What is managerialism?' 41 (4–8) (2015) Critical Sociology 1103–19.

[64]See on this thesis C Joerges, B Stråth and P Wagner, *The Economy as Polity: The Political Constitution of Contemporary Capitalism* (University College London Press 2005).

[65]See C Joerges, '"Der Philosoph als wahrer Rechtslehrer". Review Article on Giandomenico Majone', Regulating Europe (1996) 5 (2) (1999) European Law Journal 147–53.

distinguished from the social politics of welfare states. Such politics, Majone insisted, would require majoritarian democratic backing, which was beyond the legitimacy of the European Union. His regulatory state can, hence, be characterised as a second version of 'economic constitutionalism'.[66]

The merits of Majone's work and its impact cannot be discussed in detail here. It must suffice to underline two specifics which are incompatible with the theoretical orientations defended in this article. The first is Majone's technocratic guise. His understanding of 'efficiency' pays tribute to the transformation of market economies in the risk society. It is nevertheless not sufficient to legitimate transnational governance through non-majoritarian agencies. The comitology system with its three types of committees has adequately mirrored the requirements of democratic governance, namely, a synthesising of political debates, epistemic findings, and social concerns. This point will be taken up below in the discussion of Lisa Herzog's 'democratic institutionalism'.[67] The irony and paradox inherent in that observation, is that it provides a theoretical rescue of Majone's under-specified reliance on 'efficiency'. Polanyi's insistence on the social embeddedness of markets implies that they do not regulate themselves but require continuous managerial activities.[68] 'Social regulation', as understood by Majone, is, hence, precisely because of its indeterminacy, compatible with Polanyi's critique of the market Utopia.

D. The disintegration of European Law through a third variety of Economic Constitutionalism

For a while, the view was widely held that the adoption of a common European currency would be a logical step towards the consummation of the integration project: 'one market, one money'[69] – this slogan used by the European Commission was signalling Europe's 'culture of unlimited optimism',[70] which had accompanied the establishment of the EMU for some years. Our perceptions today have become markedly different. After the financial crisis political and academic attention changed profoundly. An intense multidisciplinary debate among economists, lawyers, political scientists, sociologists, and historians sought to explore the reasons for the failings of the EMU and the conditions of its survival. Historian Tony Judt, author of a comprehensive history of postwar Europe,[71] summarised his misgivings in a brief and lucid Op-Ed in the New York Times:

> Melding the economies of countries as different as Austria and Britain, France and Portugal, Sweden and Greece (not to mention Poland or Hungary) is both impossible and unwise: contrasting social and economic practices are born of longstanding political and cultural differences that cannot be obliterated with the wave of a magic monetary wand.[72]

We refrain from restating these debates[73] and focus instead on the explanatory and normative potential of the conflicts-law approach. The observations that follow focus and build upon this

[66]For a recent restatement see his 'European Integration and its Modes: Function vs. Territory', TARN Working Paper No. 2/2016, available at SSRN <https://ssrn.com/abstract=2778612> accessed 1 February 2025.

[67]Section 3.B.

[68]See C Joerges, 'Why European Legal Scholarship should Become Aware of Karl Polanyi: The "Great Transformation" and the Integration Project' I (4) (2023) European Law Open (2023) 1067–79, 1072 f.

[69]See the confident announcement of the European Commission, 'One market, one money. An evaluation of the potential benefits and costs of forming an economic and monetary union', European Commission (europa.eu) and its attendant justification at <https://ec.europa.eu/economy_finance/publications/pages/publication7454_en.pdf> accessed 1 February 2025.

[70]See G Majone, 'The Deeper Euro-crisis or: The Collapse of the EU Political Culture of Total Optimism', EUI Department of Law Research Paper No. 2015/10.

[71]*Postwar: A History of Europe since 1945* (Penguin Books 2005).

[72]T Judt, 'Continental Rift', Op-Ed in the New York Times of 5 June 1997.

[73]Out of my own writing, see, eg: 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation', 15 (2014) German Law Journal 985–1028; 'Three Transformations of Europe and the Search for a Way Out of

conceptual framework. In this perspective, the controversy between the European and the German Court is concerned with a 'diagonal conflict'.[74] This is a conflict constellation characterised by the institutionalisation of irreconcilable competences, of contradictory constitutional provision: to wit, monetary policy had become an exclusive EU competence only on paper, because the Treaty of Maastricht had not done away with the competences of the Member States in the fields of fiscal and economic policy. This is to say, the European legislative process had given its blessing to irreconcilable claims. It was then unavoidable that the EU sought to defend its new powers with the help of the orthodox supremacy doctrine.

The ensuing intense and often bitter legal controversies concern a core problem of the European project, namely, the tension between the quest for a strengthening of the integration process and project, on the one hand, and the defence of the democratic credentials of nation-state governance, on the other. It is not accidental that Germany's Constitutional Court was involved so prominently in these controversies; the country wielded – at the time – very considerable 'power of the purse'.

A first telling involvement was triggered by the rescue package for Greece;[75] the second, more spectacular, involvement to be discussed here concerned the 'first reference ever' of the German Court to the CJEU.[76] Implicit in this focus and narrowing down of our discussion is a strong thesis: our claim is that they document a *disintegration* of the integration process and its law, with the German Constitutional Court defending German interests against the duty of solidarity in an interdependent political union, on the one hand, and the CJEU with a deficient insistence on the supremacy of European law, on the other.

The rescue package for Greece before the Bundesverfassungsgericht[77]

In its judgement of 7 September 2011,[78] the FCC approved the admissibility of a complaint lodged by Dr Peter Gauweiler et al against the assumed challenge to the 'permanent budgetary autonomy of the German Bundestag', granting, however, a wide margin of discretion to the German government in the evaluation of budgetary risks.[79] The Court's approval of admissibility was markedly softened here by the proviso that it would suffice that the Bundestag remained involved in the decision-making process.[80] This proviso signalled some intra-European political comity. The legal principles, however, which the FCC invoked, sent different

its Crisis' in C Joerges and C Glinski (eds), *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance* (Hart Publishing 2014) 25–46; '"Where the Law Runs Out": The Overburdening of Law and Constitutional Adjudication by the Financial Crisis and Europe's New Modes of Economic Governance' in: S Garben, I Govaere, and P Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing 2019) 168. It is worth noting that E-J Mestmäcker, the leading scholar of the ordoliberal tradition, has diagnosed an existential threat to the idea of a rule bound exercise of economic policy much earlier, namely after the German flirtation with Keynesion macro-economics, noting that the 'judicial system cannot be wiser than contemporary economics in judging macroeconomic relationships'; see his seminal article: 'Power, Law and Economic Constitution' 11 (1973) The German Economic Review 177–92, esp at 187, 190–91.

[74]See the explanation in the text following n 56 above.

[75]BVerfG, 2 BvR 987/10 [2011]. FCC, Judgement of 7 September 2011, 2 BvR 987/10-2 BvR 1485/10-2 BvR 1099/10 – aid measures for Greece and against the Euro rescue package; available at <https://www.bverfg.de/e/rs20110907_2bvr098710.html> accessed 1 February 2025.

[76]Case C-62/14 *Peter Gauweiler and others* v *Deutscher Bundestag* ECLI:EU:C:2015:400.

[77]The following remarks draw on : C Joerges, 'Der Berg kreißte - gebar er eine Maus? Europa vor dem Bundesverfassungsgericht' 65 (2012) *WSI-Mitteilungen* 560; H Deters, 'National Constitutional Jurisprudence in a Post-National Europe: The ESM Ruling of the German Federal Constitutional Court and the Disavowal of Conflict' 19 (2) (2013) European Law Journal 204–18, and M Everson, 'An Exercise in Legal Honesty: Rewriting the Court of Justice and the *Bundesverfassungsgericht*' 21 (4) (2015) European Law Journal 474–99 ('Germany cannot, in its relations, with the EU contract with "slaves". It cannot enter into partnership with anything other than fully sovereign states' at 497).

[78]BverfG (n 75).

[79]Ibid., para 131.

[80]Ibid., para 146.

messages. The Bundestag must, in its budgetary autonomy, be 'free of other directedness', and 'remain[s] permanently "the master of its decisions"'.[81] Nowhere is there mention in the judgement of the budgetary autonomy of Greece or a sign of readiness to consider tensions between Germany's budgetary autonomy and its commitments to the integration project, let alone solidarity with another Member State. But maybe this does not matter, if we accept that the principles invoked are not to be taken seriously.

The second judgement on the aid for Greece[82] sends somewhat more disquieting signals. As usual, they are embedded in very lengthy explorations of the arguments presented by the parties, scholarly comments, and other legal literature. The Court's core concern is again with budgetary autonomy. The democratic importance of budgetary sovereignty is, however, not understood as a *common* European constitutional legacy, respect for which is demanded by Article 4 (2) TEU. The Court seeks to protect the democratic rights of German citizens, and nowhere does it consider how this affects the non-German citizens of the Union. The irony of all this is that, in an interdependent Europeanised economy, such unilateral actions make no economic sense.

The OMT-Saga: Karlsruhe's 'First Reference Ever'[83] and the Luxembourg Rebuttal[84]

This legendary controversy was triggered by the promise of the former ECB President Mario Draghi given in London on 12 September 2012 on the readiness of the ECB to defend the common currency with a specific programme.[85] This programme was announced on 2 August and formalised on 6 September.[86] The guardians of Germany's stability philosophy were alarmed. The usual suspects, all named in the English translation of the reference,[87] turned to Karlsruhe. They asked the FCC to declare the continued purchase of unlimited quantities of distressed Eurozone countries' government bonds under the OMT programme – and likewise the omission of the Federal Government to bring an action against the ECB – to be illegal. With this programme, they argued, the ECB had overstepped its monetary policy mandate, as defined in Articles 119 and 127 TFEU, disregarded the prohibition of state financing of Article 123, and interfered with the 'market logic' of the Treaty.

All of this impressed the German Court, but much less so, the European authorities. Advocate General Cruz Villalòn made his views known on 14 January 2015.[88] His Opinion anticipated the ruling of the CJEU. Two decisive steps of his argument:

- The monetary policy competence is not defined in substantive terms but must be understood by its objectives.[89] What these require is often difficult to ascertain. The law must hence content itself with whether the measures taken belong 'to the category of instruments which the law provides for carrying out monetary policy'.[90]

[81] Ibid., para 127.

[82] BVerfG, Judgement of 12 September 2012 – 2 BvR 1390/12, available at <https://www.bundesverfassungsgericht.de/e/rs20120912_2bvr139012en.html> accessed 1 February 2025.

[83] BVerfG, case 2 BvR 2728/13 et al, OMT, order of 14 Jan. 2014, BVerfGE 134, 366, <http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html> accessed 1 February 2025.

[84] Case C-62/14 *Gauweiler and Others* v *Deutscher Bundestag (OMT)* ECLI:EU:C:2015:400.

[85] 'Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough'. *Verbatim* at: <www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> 484 and 467 ff, accessed 1 February 2025.

[86] Technical features of Outright Monetary Transactions (europa.eu), available at <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 1 February 2025.

[87] BverfG (n 83) and then, of course, in the Opinion of AG Cruz Villalón ECLI:EU:C:2015:7 and in the *Gauweiler* judgement of the CJEU (n 84).

[88] Opinion in Case C-62/14 (n 87).

[89] Ibid, para 127.

[90] Ibid, para 130.

- In the exercise of the mandate so defined, the ECB enjoys broad discretion because, for one, monetary policy is 'a highly technical terrain' and the mastering of this terrain, 'which, according to the Treaties, devolves solely upon the ECB'.[91]

It follows from this reasoning, which the Grand Chamber of the Court endorsed in its judgement of 16 June 2015,[92] that the complaints which the FCC had forwarded in its reference were unfounded.[93]

The contrast of this decidedly European framing of the argumentation with Germany's deplorable parochialism is, of course, noteworthy. A not so praiseworthy picture emerges when we look at the European holdings through the lenses of the conflicts-law approach. One objection has already been underlined.[94] The Court and its Advocate General have taken recourse to the supremacy doctrine in a 'diagonal conflict constellation' where this doctrine is not applicable. Equally important and problematic is the effort to exclude de facto the exercise of monetary policy from external, in particular judicial, control. Monetary policy is characterised as a 'highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB'.[95] This assertion contains a threefold provocation. First, there is no field of expertise free of contestation; second, 'expertise' is only one domain of knowledge which policymakers must consider, and third, there is no political layer which could claim to have a say about epistemic contestation. The ECB's expertise is, by definition, no candidate. To add a fourth irritation: the law not only decides about the assignment of expertise to the ECB, but the law also protects through the supremacy doctrine the Bank's autonomy.

Addendum

Our critique of the OMT judgement of the CJEU is concerned with the *quality* of its reasoning. We do not submit a substantive alternative and our suggestions in the concluding epilogue will again focus on methodological and theoretical considerations. One reason for this restraint is addressed in the references to the legacy of the American conflicts scholar Brainerd Currie in the introductory section.[96] Currie's most provocative contribution to the discipline was his 'undecidability' thesis, the assertion that the task of weighing and deciding 'true conflicts' between the governmental interests of democratically-legitimated polities 'is not one to be performed by a court'.[97] Currie's radical negativism is, of course, very rarely shared in European and American scholarship. But the problem lies with us. 'Judicial restraint' is the best-known heading for it in constitutional theory,[98] complemented in European constitutional law after the OMT judgement often by the quest for 'judicial cooperation',[99] and in PIL and CoL ever since by the 'comity doctrine'.

[91] Ibid, para 111.

[92] Gauweiler (n 84) in particular paras 41 and 74.

[93] Ibid.

[94] See text following n 56 above.

[95] Opinion in Case C-62/14 (n 87) para 111.

[96] Section 1.C.

[97] B Currie, 'Notes on Methods and Objectives in the Conflict of Laws' (1959) Duke Law Journal 171–81, 176.

[98] Still noteworthy are the analyses of the late American constitutional theorist Larry Kramer, who explicitly rejected Currie's views on 'true conflicts' (see n 21 above) but based his plea for judicial restraint in constitutional law upon historical research and constitutional concerns; see L Kramer, 'Judicial Supremacy and the End of Judicial Restraint' 100 (3) (2012) California Law Review 621–34; the American debates have found little resonance in European law scholarship: but see D Grimms critique of the views of L Kramer and the like-minded M Tushnet: 'Neue Radikalkritik an der Verfassungsgerichtsbarkeit' 59 (3) (2020) *Der Staat* 321–53.

[99] See, eg, M Wendel, 'Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012' 14 (1) (2013) German Law Journal 21–52; idem, 'Exceeding

Tellingly, the undecidability query has been addressed in the dissenting opinions by two justices of the Second Senate of the FCC in its much-criticised reference order,[100] Lübbe-Wolff and Gerhardt. Lübbe-Wolff underlined the weight of responsibility which the German Court would have to shoulder and pleaded for the inadmissibility of the complaint. In a follow-up article to her dissent, she underlined the often-clandestine ways of Courts to co-operate and defended this type of 'diplomacy'.[101]

We take all this as an indication of a discontent with the OMT judgement that does not concern its result but the conceptual frame of its reasoning. This is the concern the concluding section will pursue further.

3. 'History doesn't repeat itself but it often rhymes'[102] – an epilogue

This epilogue will summarise our re-constructions in the preceding sections and substantiate what they tell us about the state of the Union; it will not present a political recipe or blueprint of a new form of institutional architecture. It will instead seek to clarify the understanding of the process of integration and the lessons to be learnt from the preceding deliberations.

A. Economic Constitutionalism

The most visible feature of this process is an increase in the sheer size of the EU, which implies the deepening of its socio-political and cultural diversity. 'United in diversity', the – in our view – fortunate motto of the otherwise not so fortunate Constitutional Treaty of 2004[103] is a signifier of both an unusual realism and a well-known optimism. In the light of our re-construction, the Treaty motto does not adequately mirror what the integration process promoted so successfully, namely, an economic constitutionalism, which 'we, the peoples of Europe' have never endorsed as our common institutionalised mode of governance. The notion of economic constitutionalism was known only in the Federal Republic with its headquarters in Freiburg im Breisgau whereas elsewhere 'the economic' was a poor relation at best.[104] This is, of course, only a half-truth. The dominating strand of macroeconomic thought in the nation states of post-war (Western) Europe had been Keynesianism;[105] yet this option was, for obvious reasons, not on the agenda of the architects of the Rome Treaty and the EEC, who proceeded with their vision of an 'Economic Community' in the belief that this European frame would be compatible with the establishment of

Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 10 (2) (2014) European Constitutional Law Review 162–307.

[100]FCC, Case 2 BvR 2728/13 et al *OMT*, order of 14 Jan. 2014 (see n 85), dissenting opinions of Justices Lübbe-Wolff and Gerhardt.

[101]See G Lübbe-Wolff, „'Diplomatisierung des Rechts.' Rechtskolumne 71 (872) (2017) Merkur 57–65.

[102]Attributed to Mark Twain, albeit with uncertain credentials.

[103]Article I-8 Draft Constitutional Treaty, OJ C 310 of 16.12.2004. I understand this kind of comity, to use the PIL/CoL notion as a softened version of the undecidability thesis (see the text accompanying n 97 ff). Similar, and conceptually better elaborated are suggestions to re-define the functions of law and assign tasks to it 'below' a strict legal control of the ECB. One such suggestion is to strengthen the 'accountability' of the ECB (see M Dawson, A Maricut-Akbik and A Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' 25 (2019) European Law Journal 75–93). Another one is the idea of a legal duty of the ECB to provide 'reasons' for its politics. J Mendes defends the adequacy of this mode of control on the basis of her characterisation of the power of the ECB as 'constitutive', ie as a specific *potestas* over matters involving monetary policy that explains the conundrum of its special treatment (see J Mendes, 'Constitutive Powers and Justification: the Duty to Give Reasons in EU Monetary Policy', in M Dawson et al (eds) *Towards Substantive Accountability in EU Economic Governance* (Cambridge University Press 2023) 288–315). Is this but a definitional response to the concerns with the empowerment of an unelected body over democratic core competences of all the states 'whose currency is the Euro'? The explanation offered for this legal potential seems reminiscent of the power of the legendary Baron von Münchhausen to pull himself out of the mire by his own bootstraps.

[104]See Walker (n 32).

[105]A Milward, *The European Rescue of the Nation State*, 2nd ed. (Routledge 1999) 21–118.

welfare states in the Member States.[106] These beginnings are to be kept in mind in the evaluation of the conceptual history which we have analysed. Keynesianism and the welfare state remained a common legacy in the background of the EEC and was at the foreground of the internal politics of the Member States.

Our re-construction of the conceptual history of the law of the European integration project in the proceeding sections with 'economic constitutionalism' as a recurrent theme in the different stages of the integration process is hence only a half true and incomplete story. The varieties of economic constitutionalism, as we have re-constructed them, are significant alterations which responded to the changes in the framework conditions to which the integration process had to respond. None of the three varieties of economic constitutionalism which we have identified has ever determined the agenda or the course of the integration process comprehensively. And, at every stage, the silenced legacy re-surfaced again and again in different guises.

The most instructive manifestation of these sometimes overt, more often subcutaneous, re-configurations of the conflict constellations is the comitology system.[107] We have characterised its operation as 'deliberative supranationalism' and defended it as nothing less than a democratic countermove, then diagnosed its erosion, thereafter, noted its transformation into a new version of economic constitutionalism labelled, this time, the 'regulatory state'. This, we argued, was a move of exemplary importance which taught us that even the core category of all the versions of economic constitutionalism, to wit, economic efficiency, can become susceptible to societal needs. The third version of economic constitutionalism, however, has institutionalised a more rigid type of economic constitutionalism than ever was, in that it empowered unelected authorities to determine what economic reason allegedly required.

B. Democratic institutionalism

At this point, it is time to undertake a somewhat daring exercise. Rather than exploring the prospects of the countless efforts to tame – in particular – the powers of Europe's 'overmighty citizen',[108] we will conclude our analyses with a sketch of Lisa Herzog's theory of 'democratic institutionalism'.[109] Nowhere, neither in her recent monograph nor in her earlier work, did Herzog engage explicitly in analyses of the conceptual framing of European market-building and regulatory politics. Her theorising concerns the operation of market governance in general and offers instructive insights into the factual limits and normative shortcomings of economic constitutionalism, as well as for the requirements of democratic European governance.

A particularly illuminating part of Herzog's argument is her critique of FA von Hayek's assertion that markets are unique in their capacity to collect, process, and co-ordinate knowledge that is dispersed in society.[110] This is only a half-truth, she objects: the knowledge which markets can discover and communicate is not the knowledge that courts and other public authorities need or actually make use of when they have to assess the performance of complex economic orders and evaluate competitive processes.[111] 'Citizen Knowledge' has become the key category in the latest development of her

[106]See, eg, S Giubboni, *Diritto del lavoro europeo. Una introduzione critica* (Wolters Kluwer 2017) passim; F Rödl, 'Arbeitsverfassung', in A von Bogdandy and J Bast (eds), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge*, 2nd ed (CH Beck 2009) 855–904.

[107]See Section 2.B.

[108]P Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2018) 391 ff.

[109]L Herzog, *Citizen Knowledge*: *Markets, Experts, and the Infrastructure of Democracy* (Oxford University Press 2023) 122–42.

[110]FA von Hayek, 'The Use of Knowledge in Society' 35 (4) (1945) American Economic Review 519–30.

[111]This argument was first submitted in her 'Markt oder Profession? Die Politik zweier Wissenslogiken' 46 (2) (2018) Leviathan 189–211; see, thereafter, her analyses of financial markets (L Herzog (ed), *Just Financial Markets? Finance in a Just Society* (Oxford University Press 2017) 'Introduction', 1–38 at 10, 20 ff, and 'Can Income in Financial Markets be Deserved? A Justice-based Critique', 103–24.

approach. This notion seeks to capture the importance and the functions of knowledge in the politics of democracies more comprehensively than Hayek's recourse to the operation of markets. The notion indicates that democratic policies must, and, in fact, do, rely on categorically *different types of knowledge*: the knowledge provided by the 'discoveries' generated in market processes; the debates within expert communities; and their evaluation in pertinent deliberations.[112]

The distinction between the three types of knowledge is, in my view, irrefutable. We have already underlined above that G Majone's 'modernising' of the notion of efficiency with its openness to the regulatory concerns of the risk society loosened the grip of the straightjacket of the orthodox defences of market governance.[113] The enormous success of Majone's quest for a European 'regulatory state' is certainly attributable to the convergence of his concepts with demands in civil society and the awareness in (circles of) the European Commission that the strengthening of social regulation would support the legitimacy of European governance. Unsurprisingly, in my view, essential points of Herzog's reasoning mirror the institutionalised practices of the comitology system.[114] Majone and the broad range of research he instigated did, of course, not know about Herzog's 'three types of knowledge'. It is worth underlining, however, that the old comitology system with its *trias* of regulatory, scientific, and social committees mirrors quite faithfully what, according to Herzog, constitutes 'citizen knowledge', the processes which she has re-constructed – including the exchanges and interactions with civil society. Decisive in legal and constitutional terms is the understanding of the three modes of knowledge as indispensable elements of *democratic* will-formation in an 'epistemically well-ordered' (democratic) society, and, in more general terms, in a theory of 'democratic institutionalism'.[115] One further important point: 'good' ordering requires a synthesising of the three types of knowledge where they diverge or do complement each other. Herzog's response to the resolution of such conflicts is that 'deliberation is the only approach we have for integrating vastly different bodies of knowledge'[116] and is best suited 'for dealing with complex, multifaceted problems, or situations in which there are conflicts of interests'.[117] Her further response is that where a synthesis cannot be reached, it is politics which must have the final say.[118]

Comitologists will be delighted with such suggestions. These come close not only to an optimistic reading of the comitology process, but they also seem in line with the role of politics in the complex mechanisms of conflict resolution institutionalised therein.[119] One further query, however, remains. Herzog focuses on the epistemic infrastructure of consolidated national democracies. For nation states, we can quite safely assume that citizens will (or can) understand the legal requirements which they are expected to observe in the last instance as an outcome of democratic processes in which they were involved. The EU, however, is an ensemble of such societies, each with its own institutional specifics and practices. The composition and status of the organisations which feed expert bodies and civil society organisations, is anything but uniform. Once we have become aware of 'the political' in 'the epistemic', we cannot, without further ado, equate comitology processes with exchanges in 'epistemically well-ordered' democracies. This is because exchanges within Europe's comitology are due to the multi-national composition of this system and are not categorically different from those between the Member States. What a

[112] *Citizen Knowledge*, n 109 above; see, in the present context, first and for all Ch 3.3 on deliberation (pp 61–71).

[113] See Section 2.C text following n 67.

[114] E Vos's comprehensive studies provide ample illustration; suffice it here point to a section of her first book: *Institutional Frameworks of Community Health & Safety Regulation: Committees, Agencies and Private Bodies* (Hart Publishing 1999) 88–109.

[115] Herzog (n 109) Ch 3.5 (83 ff) and 6 (82 ff).

[116] Ibid., Ch 3.3 (64).

[117] Ibid.

[118] Ibid., Ch 2.5 (48 ff).

[119] With many subtleties explained in E Vos, *Institutional Frameworks*, n 114 above, 140–87.

synthesising of knowledge requires must hence not be equated with the ordering of the varieties of knowledge within democratic societies. Herzog, however, submits that 'countries that are run according to truly democratic principles are more likely to be cooperative players on the international scale than others. In that sense, strengthening democracy "at home" can also be a way of contributing to justice and democracy on a global scale'.[120]

Herzog is cautious, but not cautious enough. The diversity within the legal framing of the transnational composition of 'citizen knowledge' is an obstacle which must be dampening such hopes. In the operation of comitology, the distributive implications of social regulation proved to be stumbling blocks for deliberative problem-solving. Even within epistemic communities one observes national preformation of judgements which obstruct a transnational consensus. Where European policymaking is centralised in European agencies, or to take the most important case, the ECB, it seems at least theoretically obvious what democratic will-formation requires, namely, the readiness of these actors to take the socio-economic and political diversity of the EU into account in the design of their policies. The legally endorsed power of these unelected bodies should not provide a shield against objections supported by external experts, political demands raised by national bureaucracies or in civil society; it will often enough be either impossible or clearly unwise to shrug off these concerns as mere social noise.

The ordinary day-to-day business of European integration presents equally intricate problems. A key to their understanding is the category of 'diagonal conflicts' to which we resorted in the discussion of the tensions between European monetary policy, on the one hand, and the powers of the Member States in fiscal and economic policy, on the other.[121] 'Diagonal conflicts' are by no means exceptional. The ever-growing interdependence of European economies and societies, on the one hand, and the steadily growing body of law ensuring the 'social embeddedness' of the economy, on the other, is bound to generate ever more instances in which a European legal act needs – at national level – some co-ordination or fine-tuning with non-harmonised requirements.[122] It is specific to 'diagonal' conflict constellations, so we have already noted,[123] that they will require 'unprovided for' responses by judicial and administrative bodies. This observation is of more general importance. To recall again Lisa Herzog's critique of Hayek's conceptualisation of competitive processes:[124] these processes can never be conceptualised as rational choices or efficiency-driven activities. They can more adequately be understood as co-operative endeavours of economic actors, civil society and the judiciary with a productive potential, which creates a 'spontaneous economy'. To put this slightly differently: 'The economy *is* a polity' – a socially embedded one, as I subsequently underlined.[125] We can even envisage a further move and recall what Polanyi once expected our societies to have gained after the downfall of Nazism and Fascism, that is, the 'liberty to organise national life at will' which should foster the strengthening of co-operation as a response to national diversity.[126] Ulrich Preuß has read this expectation as a constitutive dimension of the integration process suggesting that

> . . . only through transnational co-operation, can under conditions of interdependency the domination of others be transformed into legitimated rule. In that understanding the

[120]Herzog (n 109) Ch 6.2, p 126 n 27.

[121]Section 2.D.

[122]See UK Preuß, 'Souveränität im Verfassungsstaat' in L Viellechner (ed), *Demokratischer Konstitutionalismus. Dieter Grimms Verständnis von Staat und Verfassung* (Nomos 2021), 71–96.

[123]Section 2.B, text following n 56.

[124]Herzog (n 109).

[125]C Joerges, B Stråth, and P Wagner, *The Economy as Polity: The Political Constitution of Contemporary Capitalism* (University College London Press 2005); C Joerges, 'Why European Legal Scholarship should Become Aware of Karl Polanyi' (above n 68).

[126]K Polanyi, *The Great Transformation* (n 34) 253–4.

> integration project, if properly institutionalised, is not democratically deficient but a necessary pre-condition of democratic rule within constitutional democracies.[127]

There remains, *hélas*, to consider whether there are reliable grounds to understand the phenomena which we have highlighted as a democratic alternative to economic constitutionalism. This is an evaluation which is much more difficult to defend than the characterisation of nation state democracies as 'epistemically well-ordered' societies. And yet, so far, we have observed, at every stage of the integration process, a co-evolution of democratic countermoves to economic constitutionalism. The reach of its refined managerial version will remain limited. Monetary policy, as the enormously strong economics department of the ECB continues to elaborate it, cannot insulate itself from the outside world. It did not only respond to the socio-economic diversity but is also considering how to respond to societal, in particular, environmental concerns.[128]

Europe's dis-unity and variety, which is still backed by democratically legitimated polities, is a normative asset, a pluralism which must not be 'overcome' by ever more uniformity, but might, instead, help to promote fair outcomes. '*Veränderungsvernunft*' is how Rudolf Wiethölter characterised this kind of concern with one of his untranslatable concepts.[129] Let us take it more lightly: we will have to live under the shadow of the ECB tower in the Sonnemannstraße in the Ostend of Frankfurt am Main. There is, nonetheless, considerable potential in the European project *beyond* the reach of monetary policy and the false promises of marketisation and technocratic supremacy. An essential element of these suggestions is the re-construction of problem-solving through law as a 'discovery procedure of practice' in diagonal conflicts and in both the second and the third dimensions of conflicts law, the assumption, hence, that legal responses cannot rely on ready-made rules; instead, such responses must be creative innovations. In their re-construction, we cannot separate European law-making and national processes; on the contrary, we must analyse their interaction. This methodological reminder is of substantive importance: neither a supranational state nor a defence of the nation state can be a legitimate *finalité* of the integration process. This kind of Europeanisation may remain a *collage* of co-operative problem-solving, a *Flickenteppich*, a patchwork quilt – albeit one through which we may learn – step by step – that co-operative problem-solving is a promising means at our disposal. And for the time-being, we may have to content ourselves with that.[130]

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[127]UK Preuß, 'Gibt es eine völkerrechtliche Demokratietheorie?' in HM Heinig, and JP Terhechte (eds), *Postnationale Demokratie, Postdemokratie, Neoetatismus* (Mohr Siebeck 2013) 169, author's translation.

[128]See prominently, M Ioannidis, SJ Hläsková and C Zilioli, 'The Mandate of the ECB: Legal Considerations in the ECB's Monetary Policy Strategy Review' (September 2021). ECB Occasional Paper No. 2021276, available at SSRN: <https://ssrn.com/abstract=3928298> or <http://dx.doi.org/10.2139/ssrn.3928298> accessed 1 February 2025.

[129]See D Wielsch, 'Anwalt werdenden Rechts' in C Joerges and P Zumbansen (eds), *Politische Rechtstheorie Revisited. Rudolf Wiethölter zum 100. Semester,* ZERP Diskussionspapier 1/2013, Bremen 2013, 115–26, 116.

[130]This outlook is admittedly cautious in its ambitions but by no means defeatist. I have started with this defense of the normative potential of the microcosmos of law production and protection in legal controversies in a critique of FA von Hayeks 'competition as a discovery procedure' (see C Joerges, 'Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples', in T Daintith and G Teubner (eds), *Contract and Organization* (de Gruyter 1986) 142–63, returned to it in many studies of law generation in the integration process [such as 'What is left of the European Economic Constitution? A Melancholic Eulogy' 30 (2005) European Law Review 461–89].

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