Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism

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DRAFT

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Introductory Remark

With this paper I am trying to amend what I have presented at various occasions as the 'conflicts-law approach' to European law[1] and to present this approach as constructive response to the concerns of this workshop. Since I cannot assume that everybody is aware what 'conflicts-law constitutionalism' is about and seeks to accomplish, I will have to at least sketch out what I have written often enough. But I will postpone this exercise to the third and concluding part of my intervention and in these introductory remarks simply underline why, at least in my own understanding, this approach is an effort to rewrite and to re-conceptualise the project of Europe's 'integration trough law' (I). The main section of the paper will deal with the socio-economic reasons

[1] See, recently, Christian Joerges, 'Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form' LSE 'Europe in Question' Discussion Paper Series (LEQS), No. 28, London: European Institute, London School of Economics 2010, at 37 ff., available at http://www.sfb597.uni-bremen.de/pages/pubApBeschreibung.php?SPRACHE=de&ID=189, forthcoming in Andrea Greppi & Rainer Nickel (eds),*The Changing Role of Law in the Age of Supra- and Transnational Governance*, (Baden-Baden: Nomos 2011), chapter 5.

militating for the kind of re-conceptualisation I am advocating. The framework for the analyses in that section will be Karl Polanyi's economic sociology (II). On that basis I will return to the conflicts-law approach (III).

I. The legacy of the 'Integration-through-Law' Project

'Integration through Law' has been the trademark of the European project since the early 80s. It designates one of Europe's great accomplishments, namely the taming of the Weberian *Nationalstaat* and its commitment to national economic and political power by a supranational legal order und the transformation of state of nature among the Member States of the Union into a Kantian *Rechtszustand* with legally binding commitments.[2] The role of law as it was envisaged in the formative period of the EU was not meant to des-empower politics, however. In Joseph Weiler's famous conceptualisation of the European constellation, legal supranantionalism was complemented and accompanied by political bargaining processes.[3] As I read his argument, the relation between law and politics is not written some constitution stone but can be more adequately characterised as a precarious equilibrium with no built-in stabilising mechanism.

During the dynamic development of the integration project since the mid-80s the relation between Law and 'the Political' was continuously re-defined and re-institutionalised. The tragic of this process and the present state of the Union is the weakness of Politics in the Union which so many protagonist of the European project seek to compensate by juridical techniques which tend to overburden the law and its legitimating potential. This misconceived reliance on law can be observed in the legalisation of monetary policy, in the European responses to the quest for social justice and a 'European social model' and, most recently, in the new debates on nuclear energy in which the European treaties are being invoked as barriers against new energy politics. This threefold *problématique* will be discussed in the following section.

II. Europe's 'Socio-economic Malaise' and Karl Polanyi's Economic Sociology

Karl Polanyi's reconstruction of the core instability of industrial capitalism lays heavy emphasis on the role played within capitalist society by three 'fictitious commodities': money, labour and land. These three fictitious commodities denote 'goods' which nonetheless predate and transcend 'the market', and whose subsequent 'commodification' not only provokes crises within and around capitalism, but also proves to be an impetus for counter-movements to the market.[4] In view of the by now chronic instability within European monetary and economic union, the steady erosion of

[2] See Joerges, *ibid.,*section I.

[3] Joseph H H Weiler, 'The Community system: the dual character of supranationalism', (1981) 1 *Yearbook of European Law*, pp 257–306.

[4] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (Boston MA: Beacon Press, [1944] 2001); cited from the German translation (*The Great Transformation. Politische und ökonomische Ursprünge von Gesellschaften und Wirtschaftssystemen* [1944], Frankfurt a.M.: Suhrkamp, 1978), p 107. English original and page sides to be provided.

national labour and/or social constitutions, as well as continuing conflicts in the area of energy policy, Polanyi's theses and conclusions appear to have gained a depressing degree of general topicality. The following analysis, however, limits itself within this paradigm to the European 'integration through law project', and to the question of what European law has and is experiencing, and what it, itself, has precipitated.

1. De-legalisation

The contours of economic and monetary union were laid down in the 1992 Maastricht Treaty. This was without doubt a political project; albeit one that was to be shielded strictly from the influence of daily politics and entrusted to the medium of law instead. The reasons for this are to be found 'without' or outside the law. From the early 1970s onwards and following its own post-ordoliberal 'Kenysian moment' – which was legally anchored within its 1967 stability law (*Stabilitätsgesetz*)[5] – Germany had pursued a monetarist programme encompassing an institutional constellation that was readily reproduced at European level: the primacy of fiscal policy and establishment of an economic policy dedicated to realisation of the 'magical quadrant' – price stability, high employment, balance of payments and appropriate economic growth – were to be secured by virtue of the primacy of monetary policy and its anti-inflationary dedication to price stability. This vision was to be well served by means of establishment of an independent central bank far removed from all political influence and placed firmly outside the institutional structures of the Union. In the meantime, Giandomenico Majone has denounced this construction as a 'constitutional monstrosity';[6] nonetheless, as Fritz Scharpf has summarised the *Bundesrepublik* was not badly served by this re-arrangement.[7] We should remember that Great Britain, the evangelising force for economic change within Europe, followed far more radical programmes at home, but refused to dispense with Sterling.[8] What then led to the more general European commitment to monetary union? Following Polanyi's analysis, the 19th century market economy did not come into being 'on its own account' but was, instead, a product of the planned realisation of the functional institutions, upon which it relied in order to be able to operate.[9] *Cum grano salis*, the same might also be said for the ending of the welfare/social consensus in the 1970s. The old arrangement was declared to be no longer tenable and a fundamental re-orientation of economic and social policy was set in motion.[10] Europe made ready use of the new *zeitgeist*; initially with the intensification of Jacques Delors' 'Single Market programme', within which the institutionalisation of economic rationality became a theme to the tune of which all political dealings were forced to dance.[11] The 'monetarist' Monetary Union, together with its accompanying Stability Pact[12] were to follow this model.

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[5] Christian Joerges, 'The Idea of a Three-dimensional Conflicts Law as Constitutional Form', in Christian Joerges & Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law,* (Oxford: Hart Publishing, 2011), Chapter 15.

[6] Giandomenico Majone, *Europe as the Would-be World Power: The EU at Fifty* (Cambridge University Press: Cambridge 2010), pp 34 *et seq*, see also p 162.

[7] Fritz W. Scharpf, 'Monetary Union, Fiscal Crisis, and the Pre-emption of Democracy', MPIfG Dscussion Paper 11/11 (MPIfG: Cologne 2011), p 5.

[8] Maurice Glasman, *Unnecessary Suffering. Managing Market Utopia* (London-New York, Verso, 1996) pp 96 *et seq*.

[9] Polanyi (1978) (pp 187 ff.), see note 1.

[10] Glasman, *ibid.*

[11] Note that our notion of rationality is not that of autopoietic societal subsystems as in use in systems theory; terms and concepts are instead taken from, M. Rainer Lepsius, 'Institutionalisierung und

The law also availed itself of this new constellation: the institutional contours of the internal market were laid down with the aid of legal innovations[13] which allowed the law to engage with the evolution of the market in such a manner that the Union might also be deemed to be a 'regulatory state'.[14] Nonetheless, the later claim that this re-regulatory re-structuring by means of preparatory and accompanying jurisprudence encompassed a 'counter-movement' in the terms described by Polanyi[15] is clearly a false one.[16] The only *planning* that was visible within the functionalist synthesis of market and law within the internal market was one which owed its genesis to the policy of *laissez-faire*. However, it is also true that distinct 'counter-movements' were and are detectable, which, in the course of the 'perfecting' of the internal market, have sought to secure – 'through law' – arenas of social and political intervention; counter-movements to which we will return regardless of their at present not so impressive performance.[17]

Our initial concern here, however, is with the function of law within an economic and monetary union which is often seen to be the crowning moment of internal market policy and just as often conceived of as the herald of a federal conclusion of the European project.[18] Once again, the notion of 'integration through law' is often seen as one which will determine the process of the 'constitutionalisation' of Europe. At the same time, however, the German Constitutional Court retained a jurisdiction for itself in its judgment on the Maastricht Treaty, according to which the *sine qua non* for German participation within monetary union remains the material and institutional substitution of legal rules for politics.[19]

This jurisdictional assertion was made in the course of a curious chain of reasoning. The Court first addressed the arguments of the main plaintiffs, in particular the argument that the European Union possessed such wide-ranging competences that Nation States could no longer take action with

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Deinstitutionalisierung von Rationalitätskriterien', in Gerhard Göhler (ed), *Institutionenwandel* (*Leviathan* Special Issue 16/1996), (Opladen: Westdeutscher Verlag, 1997) pp 57 *et seq*; for application to Europe, see Lepsius, 'Die Europäische Union als Herrschaftsverband eigener Prägung', in Christian Joerges, Yves Mény & Joseph H H Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*, (EUI: Florence 2000) pp 203 *et seq*.

[12] Decision of the European Council on the Stability and Growth Pact, OJ C 236 of 2.8.1997 (Article 12); some details in Christian Joerges, 'What is left of the European Economic Constitution? A Melancholic Eulogy', (2005) 30 *European Law Review*, pp 461-489 at 474 *et seq.* and Christian Joerges & Michelle Everson, 'Law, economics and politics in the constitutionalization of Europe', in Erik O. Eriksen, Johan E. Fossum and Agustin J. Menéndez (eds), *Developing a Constitution for Europe*, (London-New York: Routledge 2004), pp 162-179. In the Treaty of Lisbon see Article 126 and Protocol No 12.

[13] Details in Christian Joerges *et al*., *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Nomos: Baden-Baden 1988), pp 305 *et seq*,. (English version in (2010) 6 *Hanse Law Review*, available at www.hanselawreview.org.

[14] On this concept, Giandomenico Majone, 'The European Community as a Regulatory State', *Collected Courses of the Academy of European Law 1994-V/1* (Den Haag-Boston-London, Martinus Nijhof, 1996) pp 321 *et seq*.

[15] James Caporaso, 'Polanyi in Brussels: European Institutions and the Embedding of Markets in Society', RECON Online Working Paper 2008/01, Oslo (ARENA) 2008.

[16] Martin Höpner & Armin Schäfer, 'Polanyi in Brussels? Embeddedness and the Three Dimensions of European Economic Integration', MPIfG Discussion Paper 10/ 8 (MPIfG: Cologne 2010).

[17] See Section III 2 below.

[18] See, Giandomenico Majone, *The EU in Comparative Context: Regional Integration and Political transaction Costs* (Cambridge, Cambridge University Press, 2011 forthcoming) chapter 5 (Paradoxes of Monetary Union).

[19] On the following see early comments by Christian Joerges, 'States without a Market: Comments on the German Constitutional Court's Maastricht-Judgment and a Plea for Interdisciplinary Discourses', NISER Working Paper (NISER: Utrecht 1996) (available at http://eiop.or.at/eiop/texte/1997-020.htm).

regard to their own 'fundamental' tasks. Such a situation, so it was argued, endangered the future of *democratic statehood*. This de-democratisation argument was conceived of with specific regard to monetary policy. The Court nonetheless countered, arguing that law had endowed monetary union with a democratic political structure of its own. Insofar as they were compatible with legal structures, law had made of ordo-liberal and monetarist theorems instruments of 'its own', or had given them a 'democratised' legal form: economic integration, so it was maintained, was an autonomous and apolitical process, which might and must take place beyond the reach of member state influence. By virtue of a constitutional commitment to price stability and rules that guarded against inappropriate budgetary deficits, monetary union was correctly structured. Accordingly, all doubts about the democratic legitimacy of economic integration could be denied. This was, without doubt a surprising conclusion: a greater degree of surprise, however, might have been caused by the fact that German public lawyers took little or no notice of the economic-political reasoning of their own Constitutional Court.[20]

The sustainability and acceptability of this legal construct was, however, to prove to be of short duration.[21] Germany, France, the Netherlands, as well as others, failed to respect the rules of the stability pact. The Commission's much vaunted efforts to take action against deficits dwindled into nothing. Why did all of this happen? Why would it all get so much worse? Why is the Union now experiencing an emergency moment of its own, a moment of derogation from Article 122(2) TFEU and provision of 'inappropriate' solidarity payments,[22] a moment in which the ECB has been forced to disregard its own statutes,[23] a moment in which national parliaments have been required to schedule emergency sitting, and a moment in which Greece has been forced to learn that its sovereignty has now been limited? As yet, no explanatory academic reference has been made to Polanyi and his analysis of the 'good' of money:[24] nonetheless, it now seems more than appropriate to recall his classification of money as a 'fictitious good'[25], as well as his identification of the risks of destruction to the functional conditions for market economies that are to be found within a broader society. The legal constitution of monetary union within the EU 'Europeanised' ordoliberal-

[20] By contrast, critique focussed on the characterisation of the Union as an 'association of states' (*Staatenverbund*), its notification of its future refusal to enforce any legacl acts of the Union made beyond the limits of its competences, and, above all, its definition of democracy as a means whereby a 'relatively homogeneous people' (*Staatsvolk*) might give expression to all those facets that bind it – 'emotionally, socially and politically' together. The tone for critique was largely given by Weiler, see Joseph H H Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', 1 (1995) *European Law Journal*, pp 219-258.

[21] For more detail on the following, see, Christian Joerges, 'What is left of the European Economic Constitution', (note 9 above), at 204 *et seq*.

[22] The German Constitutional Court deliberated on solidarity payment to Greece and the European solidarity funds on 9th June 2011 (*Griechenlandhilfe* & *Euro-Rettungsschirm*), see press release Number 37/211. An highly instructive justification for the constitutional complaint by Dietrich Murswiek on behalf of the plaintiff, Gauweiler, can be accessed at http://www.jura.uni-freiburg.de/institute/ioeffr3/forschung/gutachten; for a contrasting perspective, Christian Calliess, 'Perspektiven des Euro zwischen Solidarität und Recht – Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms' (2011) *ZEuS*, pp 213-281.

[23] Martin Seidel, 'Der Euro Schutzschild oder Falle?', ZEI Working Paper B01/2010, Bonn 2010.

[24] See, for example, Marc Amstutz, 'Eroding Boundaries: on Financial Crisis and an Evolutionary Concept of Regulatory reform', in Poul Kjaer & Gunther Teubner (eds), *The Financial Crisis in Constitutional Perspective* (Oxford, Oxford University Press, 2011), pp 223-266, at 233.

[25] ‚Geld 'ist nur ein Symbol für Kaufkraft, das in der Regel überhaupt nicht produziert, sondern durch den Mechanismus des Bankwesens oder der Staatsfinanzen in die Walt gesetzt wird', Polanyi (1978), p – see note 1.

monetarist conceptions; the law, however, could not hope ever to substitute for the necessary historical evolution of matchingly Europeanised social preconditions for successful monetary operation. Majone founds his conclusion that the ECB is a 'constitutional monstrosity' in the fact that the Bank is required to pursue its prescribed aim of monetary stability within a political vacuum and might not make adjustments for socio-economic disparities within the Union.[26] As Scharpf adds, the institutionalised inability to do anything other than react to instability and imbalance with intensified austerity programmes, not only threatens the well-being of European citizens, but also endangers social acceptance for the Union.[27]

2. De-socialisation

''Labour" is simply a word for a human occupation, which belongs to life as such..'.[28] Labour can only be exposed to the vicissitudes of the market, or the 'storms of this devilish mechanism', for short periods of time.[29] Polayni prognostisized 'counter-movements' and found them in the 19th Century in the 'entire web of measures and rules' with which society 'sought to protect itself against the inherent dangers of a self-regulatory market system'.[30] Following WWII, he identified counter-movements within the welfare state programmes which were also designed to prevent the return of the recent fascist past.[31] Certainly, during a period of 'embedded liberalism'[32], the European Economic Community and the national welfare/social state were at first to co-exist peaceably and this notwithstanding the fact that the EEC was conceived of as an exclusively economic project and the sphere of the 'social' was consequently considered to be a purely national matter. This situation was nonetheless not to be sustainable as Europe of the 1980s chose to diagnose its economic ills as sclerosis and institutionalised the programme for completion of the internal market in such a manner that this programme would become the binding reference point for politics.[33] Such consequences were, at the time, anything other than obvious. The internal market programme and, above all, its constitution as a 'regulative state' were not meant to reproduce the battle cry against redistributive politics that had been sounded at national level; rather, much faith was invested in Delors – above all, in his place within French socialism – and the subsequent hope was that the integration project would also develop a stronger 'social dimension' which would lay the foundation for a *European* social model.[34]

The eastern enlargement process, however, had such a fundamental impact upon the European constellation, that unstinting efforts to intensify the integration project in order to augment its

[26] See Majone, note 3 above and in more detail in note 15 above..
[27] Scharpf, note 4 above
[28] Polanyi (1978: 107); as Glasman, note 5 above, at 4, puts it: 'Labour is the activity through which people combine their knowledge and energy in order to reproduce their culture and satisfy their needs'.
[29] Polanyi (1978, p 109).
[30] Polanyi (1978, p 112).
[31] Polanyi (1978, p 297). For prominent confirmation, see, Tony Judt, *Postwar: A History of Europe since 1945* (New York: Penguin Press, 2005) pp 791 *et seq* and *Ill Fares the Land* (New York, Penguin Press, 2010) pp 127 *et seq*.
[32] Gerald S. Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', in 36 (1982) *International Organization*, pp 375-415.
[33] See Majone, note 3 above; Scharpf, note 4 above & Glassman, note 5 above.
[34] See, for more detail, Christian Joerges, 'Will the welfare state survive European integration? On the exhaustion of the legal conceptualisations of the integration project from the foundational period and the search for a new paradigm', in (2011) 4 *European Journal of Social Law*, pp 4-19, at 10.

legitimacy similarly proved to be counterproductive, merely reproducing the by now sclerotic European model. Enlargement brought with it intensified socio-economic disparities within Europe. By the same token, then, political efforts to deepen integration – noticeably by means of the promise of a European constitution – were also forced to renew their commitment to a 'European social model'. At the same time, however, it became readily that Europe's 'social dimension' would not function as an equivalent for any one of the national models, and much less would it result in the synthesis of national social models. Even following Maastricht, Amsterdam and Lisbon, Europe still lacked the necessary social competences; a fact which was much less an accident and much more a result and expression of socio-economic disparities and historical and political divergence.[35] A far more sensible approach might thus have been one which admitted that political room for manoeuvre was highly limited, one which re-modelled Europe's social agenda as a simple compatibility agenda, minimising conflicts between national social constitutions and the openness of European markets, or even one which left the social question for another more propitious political moment. This was not to be: enlargement of the European space instead heightened promises of increased European wealth. Massive redistribution along the lines of the German reunification model was not an option. The sole strategy that was available was a market-oriented one.

This strategy was pursued with vigour by the European Commission, together with interested parties in old and new Europe, and – as ever – found its powerful expression within the legal medium. The *Viking*, *Laval* and *Rüffert* judgments[36] are the most characteristic and discussed legal elements of this strategy: 'Article 43 EC is to be interpreted to the effect that collective action … which seeks to induce a private undertaking … to enter into a collective work agreement with a trade union … constitutes a restriction within the meaning of that article' (*Viking*); 'Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union … to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers' (*Laval* (111)); 'Directive 96/71, interpreted in the light of Article 49 EC, precludes an authority of a Member State …. from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which … agree …. to pay their employees … at least the remuneration prescribed by the collective agreement in force at the place where those services are performed' (*Rüffert* (43)). This is not simply tortuous English. Instead, it is no less and no more than the judicial toppling of the post-war *acquis* of the common European labour law constitution.[37]

Is the ECJ 'allowed to' refashion the national labour law constitution? Why did this happen? The answer is simple: the Union has proved itself incapable of supplementing its market constitution with a labour and social constitution because its new (eastern) members view market rights as guaranteeing their own development potential; because welfare state jurisprudence has been eroded in the old (western) member states, European law has swung into action. Law and case law

[35] See, Florian Rödl, 'Die Idee demokratischer und sozialer Union im Verfassungsrecht der EU', Manuscript, Frankfurt a.M., 2010 (available from the author).

[36] C-438/05, *International Transport Workers' Federation*, *Finnish Seamen's Union v Viking Line ABP*, *OÜ Viking Line Eesti*, [2007] ECR I-10779; C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet*, *Svenska Byggnadsarbetareförbundets avdelning 1*, *Byggettan und Svenska Elektrikerförbundet*, [2007], ECR I-11767; C-346/06, *Rechtsanwalt Dr. Dirk Rüffert* v *Land Niedersachsen*, [2008], ECR I-01989.

[37] Amongst a wealth of comment, the clearest formulation is to be found in Antoine Lyon-Caen, 'Droit communautaire du marché v.s. Europe sociale', in *Symposium des Bundesminsteriums für Arbeit und Soziales*, Berlin, 26.6.2008, www.cgsp-irw.be/fr/documentation/europe-sociale.html.

played a decisive part in the integration through law project and its constitutionalisation. The acceptance of the project derived from the fact that this newly made law might be understood as a common European project situated far beyond traditional political schisms. With its recent jurisprudence, however, the CJEU has now prised open national constitutions and alienated the national constitutional jurisdiction without, however, being able to offer anything in return other than a neo-liberal European perspective. European law has become political – and with this has undermined the normative integrity of the 'integration through law' project.[38]

3. Disenfranchisement

'Land, by the same token, is simply another word for the nature that is not produced by man'.[39] It is natural for us to translate the fictitious commodity of 'land' into the term, 'environment', and to denote the concept of environmental protection to be one of those measures designed to prevent the ineluctable commodification of this resource. For this reason, too, resort to Polayni and his theses proves to be anything other than artificial: the transformation of atomic energy into the market good of electricity has a fundamental impact upon nature and life. Supranational regulation of 'protection' within the Union is one of the greatest achievements of the integration project. Yet, atomic energy is excluded from this achievement. Disdaining titular use of the ugly term 'atomic energy', the Euratom Treaty of 1957[40] nonetheless emphasised in its preamble that 'nuclear energy is an indispensible aid for the development and invigoration of the market and for peaceful advance'. Declaring itself to be 'determined to create the conditions for the establishment of a powerful nuclear energy industry,' the Treaty similarly left the decision for or against the use of this form of energy to individual nation states. The Lisbon Treaty has not deviated from this position, instead re-iterating in Article 194(2) that: 'each member state has the right to determine the conditions for the use of its own energy resources, to choose between different energy resources and to determine the general structure for its energy provision'.

This is misleading since, in common with many other environmental risks, the dangers posed by nuclear energy cannot be contained within national borders. If we believe that democratic constitutions guarantee the right of citizens to act as the last instance of decision in relation to legal acts that impact upon them, then the cross-border risks of atomic energy might be argued to embody a structural deficit within the territorial organisation of democracy. By the same token, it may similarly be argued that it is the role of European law to compensate for this deficit and that the legitimation of this law derives from its capacity for compensation, from its ability to bridge the gap between 'participation and impact'.[41] Nuclear energy perhaps represents one of the most critical

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[38] Michelle Everson , 'From *Effet Utile* to *Effet Néolibéral*: Why is the ECJ Hazarding the Integrity of European Law?', in Christian Joerges & Tommi Ralli (eds), *European Constitutionalism without Private Law Private Law without Democracy*, RECON Report 14/2011 (Oslo, ARENA, 2011), available at pp 31-46.

[39] Polanyi (note 4 above), p. 107.

[40] Consolidated version on OJ C 84, 1 of 30.3.2010.

[41] The formula ('*zwischen Teilnahme und Betroffenheit*') is to be found in Jürgen Habermas, *Staatsbürgerschaft und nationale Identität. Überlegungen zur europäischen Zukunft* (Zürich, Erkner, 1991) at p 19, and also in Niklas Luhmann, albeit that the systems theorist uses the formula, not in order to describe a problem within democracy, but rather as a starting and reference point for the sociology of risk, *Soziologie des Risikos* (Berlin, de Gruyter, 1991). See, also, Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt a.M., Suhrkamp, 1995) pp 141 *et seq*.

areas with regard to compensatory functions: European law must surely not acquiesce to the structural democratic deficit. Yet, just as is the case with regard to the social deficit, the refusal to transfer decisional competences in the area of nuclear energy derives from insoluble interest conflicts and divergent political-normative conceptions. What can law do, what politics do within such a constellation?

The CJEU was confronted with this problem in the course of conflict between the state of Upper Austria and the Czech Republic on the operation of the nuclear power station at Temelin.[42] The conflict had a long history, stretching back to 1985,[43] and clearly demonstrated tensions between legal-institutional competences and practical-political operational pressures. As late as 2001, AG opined Jacobs that 'according to Community law', member states must be understood as retaining exclusive (or, almost exclusive) competence in technological questions of nuclear safety.[44] Following the Chernobyl disaster and the process of eastern enlargement, the old member states of the atomic community were confronted with nuclear technologies and industries to whom they did not wish to grant this degree of autonomy. An answer was sought in the 'melting process' somewhere between law and politics, and was seemingly found in a technological upgrading of Temelin which satisfied the demands of the European Commission.[45]

Nonetheless, such arbitration was to fall on the deaf ears of Upper Austria, who reacted to Temelin with an *actio negatoria* designed to proscribe the potential for cross-border ionising radiation from the plant.[46] The Czech owners of the plant countered, pointing to the legal authorisation of the plant and to paragraph 364(a)(II) of the Austrian Civil Code, which makes enabling provision for monetary compensation for damage suffered following an official authorisation.[47] At this stage, the European context becomes clear: is Austria required to recognise a Czech authorisation? Might Austria assert a successful claim that it would never have granted an authorisation since an Austrian constitutional amendment of 1999 proscribes the establishment and operation of nuclear plants?[48]

This is a complex interest conflict: Austrian and Czech law contradict one another. Europe has no explicit competence which would allow for a clear decision between an Austrian 'no' and a Czech 'yes'. Last but not least, the conflict also encompasses 'temporal dimensions', or to use the correct legal terminology – in order to describe contextual alterations in the operational environment of the Euratom Treaty – a possible *lex cessante*: to what degree might the Euratom Treaty of 1957 still be considered to be binding, given that it refers to out-of-date technical data and bases itself on laudations for nuclear energy that have since been fully discredited? The CJEU nonetheless remained unimpressed and re-iterated the European legal *acquis*: the non-discrimination principle, proscribing discrimination upon grounds of nationality, also held good in the realm of nuclear energy. The failure

[42] C-115/08, *Land Oberösterreich* v *ČEZ*, judgment of 27.10.2009, nyr.
[43] Waldemar Hummer, 'Temelín: Das Kernkraftwerk an der Grenze', in (2008) 63 *Zeitschrift für öffentliches Recht*, pp 501-557..
[44] AG Jacobs, 13th December 2001, C-29/99, *Kommission* v *Rat*..
[45] Hummer (note 40 above) at 506.
[46] § 364(2), allows for neighbouring property owners to begin action to proscribe activities which have an unusual impact across property boundaries.
[47] § 364(a), limiting actions to claims for compensation only in the case of an official authorisation.
[48] Bundesverfassungsgesetz für ein atomfreies Österreich, BGBl. I Nr. 149/1999.

to recognise the Czech authorisation had the same result as discriminatory treatment upon the grounds of nationality'.[49]

Although this was not a judgment made with explicit reference to fundamental political conflict on nuclear energy, it was nevertheless a judgment that demanded more from the opposition to this form of energy than it did from its users, since it imposed a form of 'toleration duty' upon them. The debt of the Euratom Treaty to a traditional international legal model of sovereignty – a model not impinged upon by Article 114(2) – gives rise to an enduring constellation: the whole of the Union must tolerate nuclear dangers for so long as just one member remains attached to this form of energy. This conclusion immortalises the democratic deficit that is found within the structures nation state; a deficit, the compensation of which is the most noble of tasks performed by European law – a compensatory performance that also provides one of the strongest legitimating bases for European law. The new 'Citizens Initiative' laid down in Article 11(4) TFEU might be a means whereby fundamental conflict about nuclear energy might be brought to a 'European' political arena. However, the Citizens Initiative is, in itself, a poor substitute for a European referendum, opening up instead a simple possibility that citizens might make suggestions about themes that they feel require a legal act of the Union in order to change the Treaties.[50] The exact legal impact of the Citizens Initiative remains a matter for discussion: do the formulations of Article 11(4) preclude the possibility that citizens might demand changes within primary European law, including the provisions of the Euratom Treaty? Not only the Commisssion, but also the Green Party within the European Parliament is of this opinion.[51] If citizens have been denied the right to demand legal changes, even to primary law and inclusive of the 1957 Euratom Treaty, then they have been disenfranchised.

III. Unfreezing the Law-Politics Relationship through Conflicts-Law Constitutionalism

What should be our response when we observe that the overburdening of law has so far not been sufficiently compensated for by institutional innovations? What alternatives do we have if it seems highly unlikely in view of Europe's political and socio-economic constellation that such steps will be taken in a foreseeable future? We cannot do, let alone accomplish, much in our ivory towers. Our only option is to submit ideas – and it simply seems irresponsible *not to consider* perspectives which do not depend on some big-bang. I am not going now to discuss more thoroughly than in the preceding more implicit remarks the paradigms of legal integration theory – and their exhaustion --[52] or consider the normative merits and political chances of federalist visions. I will instead restrict myself to a very brief re-statement of the conflicts-law approach, its theoretical ambitions and practical limits. Please do not expect me now to provide recipes for the threefold *problématique*

[49] Case C-115/08, para. 72.

[50] The recent Regulation 211/2011 (OJ L 65, 1 of 11.3.2011) reproduces this formulation in Article 4(2)..

[51] http://www.greens-efa.eu/fileadmin/dam/Documents/Publications/2011-03-15%20ECI%20Broschuere%20fin%20for%20internet.pdf; see also Markus Krajewski, 'Legal Framework of a European Citizens' Initiative for a European Right to Water', Bremen-Erlangen, 2010; Christian Joerges, 'The timeliness of direct democracy in the EU', conference contribution to 'The European Citizens' Initiative: How to get it started', Brussels, 29 June 2011 (The Greens/European Free Alliance in the EP), manuscript available from the author; more recently, Sebastian Wolf, 'Euratom, the European Court of Justice, and the Limits of Nuclear Integration in Europe', (2011) 12:8 *German Law Journal*, pp 1637-1658.

[52] See Joerges, 'Will the welfare state survive European integration?, note 34 above.

discussed in the previous section. That would be pure hubris and far beyond the lawyer's – and the law's! -- potential and vocation. The idea of 'conflicts-law constitutionalism' is not about the delivery of so-called 'solutions'. It is instead about a re-configuration of the law and politics relation, which seeks to save the project of 'integration through law' and the idea of law-mediated legitimacy, albeit in an alternative, radical proceduralisation of the category of law.

1. Conflicts-law Constitutionalism

The premises of the approach can be simply summarised: the Member States of the European Union are no longer autonomous. They are, in many ways, inter-dependent, and hence depend upon co-operation. It seems safe to assume that this co-operation will not lead to the establishment of socio-economic homogeneity and/or a strong federal entity in the foreseeable future. It seems in view of the histories of European democracies, and their uneven potential and/or willingness to pursue objectives of distributional justice, to respond to economic and financial instabilities, and to cope with environmental challenges highly unlikely that the Europeans will converge in their political perspectives, and, in view of the enormous complexity of their social systems and the diversity of their entitlements, it is inconceivable that they will institutionalise a pan-European welfare system. The future of the European project seems to depend upon the construction and institutionalisation of a 'third way' between or beyond the defence of the nation state, on the one hand, and federalist ambitions, on the other.

If there is a kernel of truth in these premises, we should refrain from conceptualising and portraying European law as an ever growing and ever more comprehensive body of rules and principles of progressively richer normative qualities. What European law has, instead, to learn, especially when it comes to Europe's social dimension, is to live with its diversity and to take the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty seriously. 'Unity in Diversity'[53] is hence Europe's true vocation and, so we suggest, it is one that can be realised through a new type of conflicts law understood as Europe's constitutional form. This suggestion has its technical complexities. Its core analytical assumptions and normative messages, however, are transparent: the idea of a European conflicts law departs from the sociological observations already alluded to and spells out their normative implications. Under the impact of Europeanisation and globalisation, contemporary societies experience an ever stronger schism between decision-makers and those who are impacted upon by decision-making. This schism is a normative challenge to democratic orders. Increasingly, constitutional states are unable to guarantee the inclusion of all of those persons who are impacted upon by their policies and politics within their internal decision-making processes. The democratic notion of self-legislation, however, which postulates that the addressees of a law should be able to understand themselves as its authors, demands 'the inclusion of the other'. The conflicts-law approach builds upon these observations and arguments. As a consequence of their manifold degree of inter-dependence, the Member States of the European Union are no longer in a position to guarantee the democratic legitimacy of their policies. A European law that seeks to restrain such external effects and to compensate for the failings of the national democracies, may induce its legitimacy from this compensatory function. With this, European law can, at last, free itself from the critique of its legitimacy which became ever more intriguing in the last decades. Instead of requesting the Union to cure its democracy deficit, we should understand

[53] Article I-8 Draft European Constitutional Treaty (OJ. C 310,1, of 16.12.2004).

and develop the potential of European law to compensate the structural democracy deficits of the European nation states.[54]

2. 'Wo aber Gefahr ist, wächst – Das Rettende auch'[55]

What difference does it make? This query requires, and deserves, of course, more detailed answers than can be given here even in the substantively moderate, albeit methodologically demanding perspectives of the conflicts-law approach. I will not shy away completely, however, from commenting briefly on all of the three problems which the second section has addressed.

a) Money

The failures of the whole construction of a Monetary Union, which can, by now, no longer be silenced, have led to hectic activities, opaque bargaining and a treatment of the rule of law which seemed to be far beyond the power of juridical imagination.[56] Why is it, one should first ask, that the otherwise enormously prolific academic constitutionalist community does not speak up? One of the few commentators in Germany who does and seeks to provide affirmative arguments is Christian Calliess.[57] He invokes a serious normative reason, namely, solidarity, understood as a valid legal principle and duty in the EU, to justify the apparent readiness to take the letter of the law very lightly. There are political scientists, even economists and philosophers who share this concern.[58] Solidarity is the overriding principle and duty in the name of which serious normative reason is being invoked in such pleas to take the letter of the law very lightly. The solidarity among the Member States of the EU, as it is actually practiced, may, however, have much more mundane reasons and much less laudable effects.[59] What is clearly visible is that its legal implementation will come at a price: solidarity militates in favour of helping the other, but is to be exercised with a view to accomplishing the cure for the other's failures, who must, therefore, be subjected to corrective economic governance ('*nachholende Wirtschaftsregierung*') by those who help.[60]

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[54] See, in more detail, Christian Joerges, 'Integration through Conflicts Law: On the Defence of the European Project by means of alternative conceptualisation of legal constitutionalisation", in Rainer Nickel (ed) *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification*, (Antwerp: Intersentia, 2010), pp 377-400 and 'The Idea of a Three-dimensional Conflicts Law as Constitutional Form',)note 5 above) and *idem,* 'Unity in Diversity' (note 1 above).

[55] Friedrich Hölderlin, *Patmos. Dem Landgrafen von Homburg überreichte Handschrift* (1802).

[56] Article 122(2) TFEU was so far not a widely known provision and therefore deserves to be cited: 'Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken". The financial crisis not qualified as 'natural disaster" but an 'exceptional occurrence ' beyond the control of Greece, Ireland, Portugal …

[57] Christian Calliess,Treue und Solidarität', *Frankfurter Allgemeine Zeitung*, 30 June 2011, p 6; *idem*, 'Perspektiven des Euro' note 27 above.

[58] For a critique with instructive references, see Glyn Morgan, 'Justice, Solidarity, and the Eurozone, paper presented at the RECON workshop on 'Transnational Social Justice in the European Union and its Implications for Global Justice", Amsterdam, 10-11 June 2011 (on file with author).

[59] Wolfgang Streeck, 'The Crisis in Context: Democratic Capitalism and Its Contradictions", Max Weber Lecture at the European University Institute, Florence, 20 April 2011.

[60] Calliess, note 57 above. The term recalls Jürgen Habermas, *Die nachholende Revolution*, (Frankfurt aM, Suhrkamp , 1990).

b) Labour

The recent labour law jurisprudence of the ECJ[61] suggests itself as a less dramatic acid test of the viability of the conflicts-law approach. I have discussed this jurisprudence so extensively elsewhere[62] and restrict myself here to one seemingly technical (1) and another admittedly conservative (2) remark.

(1) The most basic of all operations in cases with international dimensions is called 'characterisation'. It is an operation which corresponds to the issue of competences in European law. The conflict with which we are confronted in cases such as *Viking* concerns economic freedoms, on the one hand, and collective labour law, on the other. Antoine Lyon-Caen, in a comment on the ECJ's judgments, has lucidly accentuated the diversity of both bodies of law.

> 'Dans les sociétés d'Europe de l'Ouest, le droit du travail s'est constitué par émancipation du droit du marché, dénommé moyennant les variations terminologiques qu'il importe de ne pas oublier: liberté du commerce ici, freedom of trade ailleurs… Ce n'est pas que des règles sur le travail n'existaient pas avant cette émancipation, mais elles relevaient d'avantage d'une police du travail, partie plus ou moins autonome d'une police du ou des marchés."[63]

It follows from this diversity that the economic freedoms cannot trump collective labour law. Both sets of provisions, which are potentially applicable to the case in question, have their specific legitimacy. But rather than pleading for the supremacy of the former and defending the latter as untouchable, we should ask how the two regimes can be co-ordinated. Such a co-ordinative effort is clearly visible in the Posting of Workers Directive;[64] it also seems obvious that Article 153(5) TFEU (ex-Article 137(5)), which stipulates that 'the provisions of this Article shall not apply to pay, the right of association, the right to strike and the right to impose lock-out", can, and indeed should, be read in this light. The reference of the Treaty to national orders should be understood as a principle of respect for labour law and a pragmatic implication of the insight into the enormous difficulties to overcome the diversity of national laws by a uniform European regime.

(2) Does all this mean that the established democracies of old Europe should be entitled to protect the interests of their labour force against the newcomers from the accession states? This question does not address the issue at stake here comprehensively enough. We need to

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[61] See note 36 above.

[62] See , e.g., 'Integration through Conflicts Law', note 54 above, and Christian Joerges & Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', (2009) 15 *European Law Journal*, pp 1-19.

[63] 'In West European societies labour law was constituted as an alternative to the law of the market. It developed terminological distinctions which one must not disregard: *liberté de commerce* here, freedom of trade there… To be sure, legislation relating to work had been in place prior to that emancipatory move, but pertinent rules were meant to control work in a way which was more or less akin to laws policing the market or markets in general' (translation by the author) – thus A. Lyon-Caen, 'Droit communautaire du marché v.s. Europe sociale'. Contribution to the Symposium on *The Impact of the Case Law of the ECJ upon the Labour Law of the Member States*, Berlin 26 June 2008, organised by the Federal Ministry of Labour and Social Affairs, available at: http://www.bmas.de/portal/27028/2008__07__16__symposium__eugh__lyon-caen.html.

[64] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L 18, 1.

ask whether it is really in the long-term interest of the new Member States to bring cheap labour to old Europe and to destroy the welfarist traditions of their western and northern European neighbours; we need to consider the implications of such moves for the long-term competitiveness of the accession states and their chances for similar developments. To cite Tony Judt once more: Why should we rush 'to tear down the dikes laboriously set in place by our predecessors? Are we so sure that there are no floods to come? … To abandon the labours of a century is to betray those who came before us as well as generations yet to come'. It would be misleading to represent the social democratic *acquis* as an ideal world or an ideal past. "But among the options available to us in the present, it is better than anything else to hand."[65]

I am aware of many transformative aspects in the field and am ready to subscribe to the analysis of Ralf Dahrendorf and his followers: : The modern social conflict is categorically different from the kind of class conflict which generated labour law a long time ago.[66] And yet, I cannot see why contemporary labour and employment relationships could and should be uniform in an ever diverse European Union – and I fail to understand why the kind of liberties European law has at its disposal is a sound response to Europe's diversity.

c) Land

With respect to the debate in Europe over atomic or nuclear energy I have explained my position above at some length.[67] Let me add: Atomic energy confronts us with fundamental difficulties. It took the Germans decades of political contestation before they concluded 'after Fokushima' that their *Ausstieg* is politically opportune, economically and technologically feasible. There are many reasons for other societies not to follow that example. Atomic energy is a problem which should not be delegated to expert circles, intergovernmental bargaining or the law, not even to the European Court of Justice.[68] Energy policy needs to be embedded in legitimating political processes. Such processes are unlikely to end in European-wide uniformity. They may, however, promote mutual understanding and the readiness to take serious concerns of neighbouring societies neighbouring societies seriously. How could this be accomplished? The formation of public opinion is under way – and European law has with the new citizens initiative even a new means to further transnational communication and contestation.[69] Nice in theory, but unlikely to happen in practice? That may be so but it is nice to conclude with an optimistic outlook.

[65] Note 36 above.

[66] Ralf Dahrendorf, 'Citizenship and Social Class', in *idem*, *The Modern Social conflict : the Politics of Liberty*, (New Brunswick, NJ : Transaction Publishers, 2nd ed 2008), pp 23-48.

[67] Section II 3.

[68] See my critique of the *Temelín* judgment, Case C-115/08, *Oberösterreich v. ČEZ as*, [ECR] 2009 I-10265 in 'Unity in Diversity' (note 1 above), section VI.

[69] See Joerges, 'The timeliness of direct democracy' (note 51 above).