The constitutional structures of the national political economy: barrier to or precondition for European integration?

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1. Diagonal legal conflicts in the realm of state aids law

The problem of co-ordination of economic with welfare (or social) policies within the European Union is well documented.[1]In a nutshell, the problem is one of mismatch, or the different level at which each set of policies is pursued, as well asthe subsequent difficulty of national/supranational policy co-ordination. Post conclusion of the Lisbon Treaty, the EU's social competence still remains weak in relation to its economic role; meanwhile member states continue to bear primary responsibility for the formulation and management of socially-redistributive mechanisms. Member states remain jealous of their interventionist competence and the EU is still denied meaningful revenue raising powers in order to enable its own co-ordinated social intervention. Accordingly, conflict cannot but arise – for highly topical example – between the fiscal probity demanded by, say, the 'Growth and Stability Pact' at supranational level and socially-corrective interventionist demands arising at national level.

So far, so conventional: yet, from the legal point of view, this obvious lack of economic and social co-ordination is also merely the tip of a 'mismatch iceberg' between the deep *constitutional* commitments of the member states to democratically-legitimated or redistributive 'economic policies' (both withinindustrial policies and within market regulation), and a body of European Union law whose object and legitimacy is – according to the European Court of Justice – increasingly anchored within pursuit of the efficiency paradigms of economic rationality and, more particularly, the concomitant assumption that socially-redistributive goalscan *only*be pursued within a distinct and identifiable 'social budget'. In an apparently stark contrast to the political consensus since the 1980s that an efficient, market-oriented, economic policy can and should be prosecuted in strict isolation from social goals, many national constitutions stubbornly retain their post-war commitment to a comprehensive politically-interventionist economic competence, or toa structural– that is, *constitutionally-secured* –'political economy'. For many a national constitution, it is still a commonplace for market regulation or industrial policy to be governed by a political competence that encompasses socially-distributive goals.

[1]See only, F.Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, MPIfG Working Paper 02/8, July 2002.

At one level, such residual constitutional commitments prove highly disruptive within European law as the application of the European legal economic competence to national regulatory provisions can give rise to wholly unexpected conflict with the complex constitutional provisions of the member states. Within the legal world, one particular phenomenon is thus one of diagonal conflicts[2] between European economic provisions in one policy area and national constitutional provisions governing a very different economic regime. For example, this article addresses the case of *Rüffert*, decided by the ECJ in 2009,[3]in which European judges sought to adjust the public procurement regime of German *Länder* to the then Article 49 commitment of the EU Treaty to freedom of services, and in particular to the free movement of workers across national borders within a services regime (now Article 56 TFEU). In this case, and having considered the matter outside the provisions of EU state aids law, the ECJ was thus to find itself in potential conflict with the powerful German Constitutional Court (*Bundesverfassungsgericht*), and more particularly that Court's earlier treatment of the same material within a national constitutional state aids framework which privileges a politically interventionist discretion above economically rationalising arguments.

At yet another level, however, the residual constitutional commitment to the national political economy also poses a far greater challenge to European law. Certainly, from the point of view of the ECJ, and in the pragmatic light of challenges made to this model at the national level (see below), it is surely tempting to view such national constitutional peculiarities as the swansong of the post-war constitutional settlement, and to happily set them aside in line with the motto 'the structural flesh may be weak, but the political will (for economic rationality) is strong'. Nonetheless, when set in the parallel context of the *Bundesverfassungsgericht*'s judgment on the compatibility of the Lisbon Treaty with the German Constitution (*BundesverfG*, 2BVE 2/08), it becomes readily apparent that what might be dismissed as an outdated national commitment to the securing of a national political economy is also an expression of intricate legal and constitutional considerations on the *democratic* legitimacy of the conduct of economic and social policy. In turn, such conflict thus also reflects a potential mismatch between the understandings of constitutional legitimacy now maintained at national and European level; a mismatch which must surely be overcome if we are ever to secure continuing legal integration.

[2]See, Ch.Joerges, 'The Challenges Of Europeanization In The Realm Of Private Law: A Plea For A New Legal Discipline*, (2004)14 *Duke Journal of Comparative & International Law* 149.
[3] Case 346/06 (Judgment of 3 April 2008).

2. Legal regimes in conflict: freedom of services versus state aids provision

The European case of *Rüffert* (Case 346/06) is noteworthy for a variety of reasons, not the least of which is the fact that the ECJ chose to tackle the troublesome issue of the public procurement policies pursued by the German state of Lower Saxony without reference to the EU public procurement regime; a regime which was then governed by EU Directive 93/37/EC,but which has since been amended by Directive 2004/18/EC.

This was in stark contrast to the approach taken by the Court's Advocate General. Confronted with a law maintained by the Lower Saxony legislature ('*Landesvergabegesetz*'), which required all public procurement contracts tendered within the state to be concluded in conformity with local collective bargaining agreements on wage rates, AG Bot chose to reject the challenge made to the law by Mr Rüffert, a solicitor who was acting as an agent for non-German workers,and who wished to tender for public contracts outside the terms of local bargaining agreements. Mr Rüffert placed his reliance on EU provisions on the free movement of services across national borders and accordingly argued that such local bargaining agreements were 'disproportionately' more favourable to home than host workers – that is local German rather than non-German 'contracted' European workers – since they exceeded the minimum wage rate established by a federal German bargaining agreement (the *TV Mindestlohn*). For Bot, however, the correct governing regime was that of public procurement rather than freedom to provide services. Article 23 of Directive 93/37/EC stated that public procurement contracts should be concluded in conformity with 'the working conditions in force in the place of employment' and thus likewise required host workers to abide by local bargaining agreements.

In addition, however, AG Bot felt that the EU's freedom of services regime would not in any case support Mr Rüffert's claim. Firstly, since Article 7 of the Rome Convention also subjected host workers to the '*loi de police*' of the host country;a measure which would also include *all* collective bargaining agreements. And secondly, since the Posted Workers Directive (97/71/EC)giving effect to the free movement of services (for contracted workers) also seemed to make provision for the recognition of local bargaining agreements. Granted, Article 3(1) of that directive stated that contracted workers should be subject to 'universally applicable' working conditions in the host state, and thus seemed to suggest that tenders should *only* be required to respect the (lower) 'universal' minimum wage as laid down in the federal *TV Mindestlohn*. Nonetheless, Article 3(7) of the same Directive similarly stated that Article 3(1) 'shall not prevent application of terms and conditions ..more favourable to workers'. Accordingly, Article 136 EC (now, Article 151 TFEU) – guaranteeing EU living standards – could now finally be called into play,in order to give precedence to Article 3(7)

above 3(1), since Directive 97/71/EC was surely also designed to improve the living standards of workers in line with the EU's normative Treaty commitment to this effect.

The ECJ itself nonetheless demurred. Ignoring all references to the Rome Convention, Directive 93/37/EC and Article 136 EC, the Justices appeared curtly to concentrate their efforts on securing the efficiency securing potential of the EU's services regime. The reference point for the Court was accordingly its own non-related recent decisions in the cases of *Viking* (Case-439/05) and *Laval* (Case C-341/05)[4] on the EU services regime and the application of the Posted Workers Directive to the movement of Eastern European workers across national borders as contracted workers.As a consequence, and in line with the rationale of *Viking*, national provision would not be allowed to deprive Article 49 EC (now, 56 TFEU)of its core purpose of allowing appropriate competition between national workforces. By the same token, however, *Laval*'s injunction that Article 3(7) of the Posted Workers Directive should not be read so as to demand that service providers in a host state may be required by law to observe provisions in excess of universal national provisions (as laid down in Article 3(1)(c)), determined that the *Landesvergabegesetz*maintained by Lower Saxony was to be considered disproportionate – an undue restriction on contracted host workers who would now only be required only to observe the terms of the federal *TV Mindestlohn*.

The ECJ's treatment of state-level public procurement policies in Germany with reference to the freedom to provide services rather than the public procurement provisions of EU law may be argued to be a reflection of the current Court's heightened commitment to the maintenance of a European legal regime, which is legitimated by its pursuit of the paradigms of economic efficiency.[5] It is, however, also striking to the exact degree that the case is also an example of 'diagonal' conflict between supranational and national competences: the case represents a clear instance of spillover from the supranational jurisprudence on freedom of services into national jurisprudence on state aids, with adjustment within one regime impacting upon another. The specific material treated within the case of *Rüffert* was one that had already created a large degree of controversy within the FederalRepublic. Above all, potential mismatches between collective bargaining policies at federal and at state level had already determined that the issue of the state procurement policies, or *Vergabegesetzen*, of the *Länder* would demand a mediating judgment on the part of the

[4] Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union* v. *Viking Line ABP, OÜ Viking Line Festi*(Judgment of 11 December 2007; Case C-341/05); *Laval un Partneri Ltd* v.*SvenskaByggnadsarbetareförbundet, SvenskaByggnadsarbetareförbundet, avd. 1, SvenskaElektrikerförbundet* (Judgment of 18 December 2007).

[5] A dedication most clearly evinced in *Viking* by AG Maduro's treatment of the case of the movement of cheaper Eastern European workers to the established states of the EU as one of 'allocative efficiency'. See, for details, Ch.Joerges&F.Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', (2009) 15:1 *European Law Journal* 1-19.

Bundesverfassunggericht. Mr Rüffert was also a representative of a powerful lobby within the Republic which considered the public procurement policies of certain individual states to be restrictive of services within Germany itself and wasalso prepared to champion the cause of economic efficiency within the national context. However, within this wholly German context, the clash between the competences of state and federation within public procurement was to be treated within the realm of German state aids law, with radically different results from those arrived at by the ECJ.

Called upon to judge the constitutionality of Berlin's *Vergabegesetz* – in substance and form identical to that of Lower Saxony's – the *Bundesverfassunggerichtchose* initially to adopt a formalistic legal approach, applying the 'letter' of the Constitution, and to approve the provisionon the basis of paragraph 97(4) GWB (Federal Competition Law) which provides that 'extensive conditions may only be imposed upon contractors where this is provided for by federal or state law'. The state of Berlin had been explicit in its promotion of public procurement policies; they were clear measures of state aid and were designed to ensure local employment, as well as maintain the level of social insurance contributions within the state of Berlin.[6]Nonetheless, the German Constitutional Court ruled that the imposition of local collective bargaining agreements upon public contractors was neither considered to be a breach of freedom of association under the constitution (9(3)GG)), nor was it deemed a breach of the freedom to exercise a profession (12(1)GG). Instead, the legislative mandate was given precedence above fundamental rights. Competition law provided for the state level regulation of public procurement. Accordingly, state level public procurement law might demand that contractors observe local collective bargaining agreements.[7]

3.Constitutional ordering and the disembedded European market

An immediate response to the diagonal conflict and spillover between supranational rights of free movement and national state aid law might, as noted, be a legal shrugging of the shoulders; an assertion that German state aids law can and should be made compatible with European free movement jurisprudence, and especially so, in view both of prevailing political commitments to government by means of economic rationality and agitation at national level for rationality on the part of economic interests.[8] However, any all too ready acceptance of the economically-rationalising

[6]The effort to maintain social insurance contributions by means of public procurement policy demonstrates the intricacies of the political regulation of the economy. At one level, such a complex effort to maintain social policies might be cited as one more argument in favour of economic efficiency. At another, however, it also demonstrates just how unexpected the impacts of spillover within Europe might be.
[7]*BundesVerfG*, 1 BvL 4/00, 11.7.2006.
[8]Interestingly, such national level agitation was also apparent in the *Laval* and *Viking* cases: the Swedish employers association was a party to *Laval*.

legitimacy of European law and its mission to overturn residual national commitments to the political economy may yet be premature, both in terms of the intricacies of legitimation of legal-constitutional pronouncement and the broader social context in which such pronouncement is made. Christian Joerges has telling pinpointed the core *lacuna* of the European project:

> The problem of the welfare state is the practical-political *bête-noire* of the European project. What is left to us when we postulate that the ability to create an economic and social order is a constitutive pre-condition for democratic legitimacy, but simultaneously recognise that the EU harmonisation of the economic and labour constitutions of the Member States is impossible, so that Europe must reckon with lasting socio-economic divergence between its constituent Member States?[9]

Clearly, the most pressing problem detailed here is that of the mismatch between Europe's economic and social competences and the potential for lasting social disadvantage which such a mismatch entails. Nonetheless, and again from the legal point of view, this pragmatic point is also underlain by concerns about the correct relationships to be maintained within the 'ordering' of constitutions, economic and social policy, democratic legitimacy and due political process. In Joerges' analysis, all are intimately linked with one another, such that the European project, if it continues – through diagonal, as well as direct conflict –to undermine established links between the economic and the social, the political and the constitutional, will also founder within its own 'legal legitimacy deficit'.

Within a German constitutional vernacular the problem is all too apparent. Under the influence of the well-known finance minister, Walter Erhardt, the post-war German Constitution was heavily influenced by 'ordo-liberal' thought, or by the legal counterpart of the Hayekian notion that the economy can be structured and protected (both from the state and from private individuals) by primary legal provisions (above all, competition law provisions). However, Germany's 'Economic Constitution', or its legally-secured dedication to the establishment of an autonomous economy – most readily apparent in the strength of its constitutional commitment to the maintenance of price stability – needs nonetheless to be set in the context of an original constitutional ordering which sets economic goals in a broader social and economic context. Germany's dedication to price stability is noteworthy and has significant consequences within the European legal and political context.[10]Nonetheless, the early proponents of ordo-liberalism in German, and most notably, the pre-war theorist, Walter Eucken, were similarly clear that social and economic orders were linked

[9]Ch.Joerges&F.Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit', see above note 5.
[10]In particular, in relation to the management of the Eurosystem.

orders within the political constitution, such that economic autonomy, efficiency and rationality were subject always to the imperative of constitutional commitment to the *Sozialstaat* and to the principle of democratic determination.[11] It was only later, in the wake of ever more powerful processes of European integration that purist ordo-liberal theorists, such as Hans Peter Ipsen and Ernst-Joachim Mestmäcker began to postulate the potential inherent to a European economic community founded in functional economic purpose and competition between constitutional orders.[12]Both theorists thus provided concomitant notions of legitimation for the emergent European Union as a 'purposive association of functional integration' or as an 'Economic Constitution' and were to have a significant impact within EU circles, including, presumably, on the self-understanding of a body of European law founded in economic rationality.[13] Yet, even these theorists began to baulk in the face of theDelors programme and the drive for the integration of a single market, which, by virtue of negative judicial integration and diagonal conflicts of spillover – clearly reproduced in the case of *Rüffert* – was to find its counterpart in the 'disembedding' of national economies from their social-political constitutional frameworks and the establishment of the 'mastery of markets over the state'.[14]

4. Constitutional commitments re-assessed: legal caution and political discretion

At national level, considerations on political, social and economic ordering within the constitution may be argued to reflect deep-seated considerations about the legitimacy of constitutional pronouncement. Following this argument, the ECJ's refusal to approach the case of *Rüffert* within the EU's own state aids regime and its creation of diagonal conflict between EU and German law may, can accordingly be suggested to be less a matter of necessary constitutional adjustment of conflicting economic orders to reflect the assumed economically rational political consensus, and more a matter of importune judicial intervention. The primary justification given for its final decision

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[11] See, for details, of the tradition, M. Wegmann, *FrüherNeoliberalismus und europäische Integration: Interdependenz der nationalen, supranationalen und internationalenOrdnung von Wirtschaft und Gesellschaft* (1932-1965), (Baden-Baden: Nomos, 2002).

[12] Most famously, H.P.Ipsen, *Europarecht*(Tübingen: Mohr-Siebeck 1972).XX

[13] That is its dedication to economic rationality as a means to legitimise the constitutional functions of European law.

[14]Mestmäcker taking extreme exception to the incursion of EU economic law into areas of national social policy, see, for example his interview, 'Dem EuGHfehlt Legitimation fürBeschränkungdirekterSteuern' (Betriebs-Berater, BB 43.2008, 20.10.2008, p16). In a similar vein, see G.Majone, *Dilemmas of European integration : the ambiguities and pitfalls of integration by stealth* (Oxford: Oxford University Press 2005). The reference to the disembedding of markets draws on the apocalyptic analysis provided by Karl Polanyi (1944), *The Great Transformation* (Beacon Press: New York 2001). The reference to the mastery of markets over the state is to Michel Foucault (*Birth of Biopolitics: Lectures at the College de France*, 1978-79, Palgrave MacMillan: London 2008).

may carry with it a hint of an attempt to establish individual justice, as the ECJ asks why more advantageous local bargaining agreements should be applied only in the public sector:

> The case-file submitted to the Court contains no evidence to support the conclusion that the protection resulting from such a rate of pay – which, moreover, as the national court also notes, exceeds the minimum rate of pay applicable pursuant to the AEntG – is necessary for a construction worker only when he is employed in the context of a public works contract but not when he is employed in the context of a private contract (paragraph 40).

However, at the same time, such an *evidential* demand for *economic proof*for legislative decision-making similarly highlights the decisive difference between national and European perceptions of the mode in which constitutional pronouncements are legitimated. At this level, the ECJ may be subjected to a degree of criticism:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law (Mr Justice Holmes, dissenting, *Lochner* v *New York* (198 U.S. 45, 25 S.Ct. 539)).

With this phrase, Justice Holmes, the well-known jurist gently reminds the turn-of-the-19th-century US Supreme Court that it is not the province of the jurist, and more particularly, the constitutional jurist, to adopt the mantel of the political economist; a mantel to which the jurist is singularly ill-suited. Above all, as the infamous case of *Lochner* itself demonstrated by placing constitutionally-secured property rights above a right to strike which had been enshrined in law by the New York legislature, the commitment of a constitutional court to its own (imperfect) economic theory may undermine political-social consensus on the appropriate constitution of society. In Holmes' view, the primary function of the constitutional jurist is one of the upholding of the democratic process. And it is here, in a final analysis, that the judgment of the *Bundesverfassungsgericht*on the issue of the *Berliner Vergabegesetz*, cannot simply be dismissed as an outdated national judicial commitment to the residual political economy.

Instead, the German Justices remain true to the antecedents of ordo-liberal theory, establishing a direct connection between economic and social ordering within the German Constitution. Peering beyond economic theory to identify the purpose of state demands that local collective bargaining agreements be respected by contracting parties within public procurement, the Court recognises the

constitutional status – under the *Sozialstaatsprinzip* – of efforts to combat unemployment (1 BvL 4/00, paragraph 88). Equally, and perhaps more importantly, however, the Constitutional Court strictly delimits its own functions and competences. Within a national constitution of intertwined social, political and economic orders, it is not for the Court to decide upon the appropriate means to achieve a given economic or social aim. Instead, 'proportionality' must be a procedural rather than substantive mechanism of constitutional review, whereby the legislator need only demonstrate that her proposed means of achieving a goal has a possibility of achieving that goal and might accordingly deploy her political discretion to bring her own economic, employment, social and political experience and aspirations to bear, in order to ensure 'the common good' (1 BvL 4/00, paragraph 92).

5. The constitutional limits to economically-efficient European integration?

Rüffert and the case of the *Berliner Vergabegesetz*, the clash of national with European state aids policy – or the assertion of European economic rights above national state aids law – thus teaches us a series of vital lessons. Firstly, we might not assume that the notion of the political economy is dead within Europe. Instead, the potential for broad economic management is structurally assured by national constitutional law. Far more importantly, however, judicial support for politically determined regulation at national level should likewise not simply be assumed to represent outmoded legal adherence to economic concepts that have now seen their day. Instead, such support is, far more, a feature of the integrated nature of the post-war national constitution, of the linking of political, social and economic orders within the national constitutional settlement in order to ensure continuing political ownership of the common good. Set in the context of the *Bundesverfassungsgericht*'s judgment on the compatibility of the Lisbon Treaty with the German Constitution, then, this determines that there may also be clear political-economic limits to the process of European integration. Where national constitutions maintain a commitment to welfare or the social state (2 BVE 2/08, paragraph 257) and where the constitutional order similarly recognises the political discretion of the national legislator to secure social welfare, then a European Union, which continues to lack a social competence (2 BVE 2/08, paragraph 258), must take care to avoid diagonal or direct conflict with the democratically-legitimated economic and social orders of the member states:

> A structural democratic deficit that would be unacceptable pursuant to Article 23 in conjunction with Article 79.3 of the Basic Law would exist if the extent of competences, the political freedom of action and the degree of independent formation of opinion on the part of

> the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for instance the legislative competences, which are essential for democratic self-determination, were exercised mainly on the level of the Union. If an imbalance between character and the extent of the sovereign powers exercised and the degree of democratic legitimisation arises in the course of the development of the European integration, it is for the Federal Republic of Germany due to its responsibility for integration, to work towards a change, and if the worst comes to the worst, even to refuse to further participate in the European Union (2 BVE 2/08, paragraph 264).

Educing from one of the most powerful of constitutional courts within the EU, the threat of discontinued participation within the European legal integration project is one that should not be taken lightly. Accordingly, a final lesson might be drawn from *Rüffert* and the case of the *Berliner Vergabegesetz*, one that is specifically tailored for the ECJ. An enduring question raised by *Rüffert* must surely be one of the question of why the Court ignored the injunctions of its own Advocate General, choosing to treat the material before it solely within the ambit of the freedom to provide services and without any consideration for the existing provisions of European state aid law, and more particularly the EU's legislative provisions on public procurement. To this exact degree then, the Court can and must be criticised: where a politically-legitimated regime for the regulation of national public procurement policies exists at European level, the legitimacy of the simple assertion of the freedom to provide services above this regime must and just as surely can be questioned. To the degree that the European legal order also maintains a public procurement regime which seemingly allows for a measure of politically-directed economic policy-making at EU level, the EU Treaties are also founded within the notion of constitutional ordering; an ordering of the economic, the social and the political by constitutional law. It is perhaps possible to conceive of a constitutional jurisdiction and a constitutional legitimacy which derives solely from the pursuit of economic efficiency.[15] Nonetheless, the treaties of the European Union would not seem to constitute such a jurisdiction. The ECJ need not have created a diagonal conflict between the EU's services regime economic rights and national state aids law; need not have bitten deeply into the German constitutional order and need not have further disembedded the European market.

Certainly, were the ECJ to relativize its dedication to the pursuit of economic efficiency, it would itself also be faced with a potential European mismatch between state aids policy and services provision. However, given the imperative of respect for due political process within the 'ordered' constitutional jurisdiction, the ECJ is surely, at the very least, required to adjust the reach of the

[15]For example, in the economics and law tradition, see above all, the works of Richard Posner (e.g.,*Economic Analysis of Law*, 7th ed., (Aspen: New York 2007)).

principles which it itself laid down in its *Laval* and *Viking* jurisprudence with regard to the application of EU public procurement provisions.

To this extent, the residual national constitutional commitment to the political economy may indeed be regarded to be a barrier to European legal integration, at least as regards the full application of the principles laid down in *Laval* and *Viking*. However, where the European legal order is also founded within a notion of constitutional legitimacy which mirrors that established at national level, it may similarly be argued that a rededication of the jurisprudence of the ECJ to the maintenance of due political process is also a vital pre-condition for continuing European legal integration. At the same time, however, such a conclusion does not obviate the political aspiration for the pursuit of economic efficiency. It merely requires that such efficiency be pursued through political rather than legal process.