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# Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form

Christian Joerges

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Christian Joerges\*

## Abstract

“Unity in Diversity” was the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty. The motto did not make it into the Treaty of Lisbon. It deserves to be kept alive in a new constitutional perspective, namely the re-conceptualisation of European law as new type of conflicts law. The new type of conflicts law which the paper advocates is not concerned with selecting the proper legal system in cases with connections to various jurisdictions. It is instead meant to respond to the increasing interdependence of formerly more autonomous legal orders and to the democracy failure of constitutional states which result from the external effects of their laws and legal decisions on non-nationals. European has many means to compensate these shortcomings. It can derive its legitimacy from that compensatory potential without developing federal aspirations.

The paper illustrates this approach with the help of a topical example, namely the conflict between European economic freedoms and national industrial relations (collective labour) law. The recent jurisprudence of the ECJ in Viking, Laval, and Ruffert in which the Court established the supremacy of the freedoms over national labour law is criticised as a counter-productive deepening of Europe's constitutional asymmetry and its social deficit.

The introductory and the concluding sections generalise the perspectives of the conflicts-law approach. The introductory section takes issue with max Weber's national state. The concluding section suggests a three-dimensional differentiation of the approach which seeks to respond to the need for transnational regulation and governance.

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\* Faculty of Law

University of Bremen

Universitätsallee GW1

28359 Bremen

Germany

Email: [cjoerges@zerp.uni-bremende](mailto:cjoerges@zerp.uni-bremende)

Hertie School of Governance

Friedrichstraße 180

10117 Berlin

Germany

Email: [joerges@hertie-school.org](mailto:joerges@hertie-school.org)

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# Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form

## Introduction

“Unity in Diversity” was the fortunate motto of the ill-fated Draft Constitutional Treaty.<sup>1</sup> This motto deserves to be kept alive, despite this failure and even more so under the impression of the present all too rash claims for centralising moves outside cumbersome treaty amendment procedures. It seems even safe to say that the challenges that it articulates have become even more obvious: The Member States of the European Union are no longer autonomous but in many ways, inter-dependent and hence depend upon co-operation. And yet, this interdependence contrasts strikingly with an ever greater socio-economic diversity, new schisms between Eurozone countries and other members of the Union, conflicts between north and south, creditors and debtors. In view of the diversity in the histories of European democracies, their uneven potential and/or willingness to pursue objectives of distributional justice, their different memories of economic and financial crises, differentiating answers suggest themselves. The sustainability of the whole 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 or quasi-federalist ambitions, on the other.

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<sup>1</sup> Article I-8 Draft European Constitutional Treaty (OJ C 310/1, 16/12/2004).

Conflicts-law constitutionalism is the third way which this essay will explore and defend. This is a sociologically realist and normatively ambitious suggestion -- and certainly one which must not be misunderstood as a sceptic retreat from Europe's common project with its commitments to democracy and the rule of law. As a precautionary move, the first section will recall a classical address of Max Weber's. It will use this reference to re-construct a legacy of crucial significance and topical relevance, namely the taming of economic nationalism. Section II will deal with the legitimacy *problématique* of this project's original institutional design and discuss three significant theoretical efforts of the foundational period to cope with this challenge. Section III will then analyse the post-foundational dynamics of the integration project and argue that these developments have exhausted the analytical adequacy and normative validity of the all three theoretical concepts. Section IV will present the conflicts law approach as an alternative response to Europe's legitimacy *problématique*. *Exempla trahunt*: the recent labour law jurisprudence of the CJEU will serve to illustrate the alternative framing of the conflict constellation which the Court had assess (Section V). An Epilogue summarise its problems and perspectives.

### I. Max Weber's economic Nationalism

Max Weber inaugural address in the University of Freiburg of 1895 was to become a real classic. The address was published in under the instructive title "The National State and Economic Policy".<sup>2</sup> It has regained a fascinating, albeit disquieting, topicality for two reasons. The first concerns the object of the field study which Weber used to explain some of his more abstract

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<sup>2</sup> *Der Nationalstaat und die Volkswirtschaftspolitik*, (Freiburg i.Br.: C.A. Wagner, 1895) [citations here are from Fowkes' translation in (1980) 9 *Economy and Society*, pp. 420-449].

theoretical positions and provocative political views. The field study dealt with the reasons for, and implications of, the migration of workers. It is of stunning topicality – and the analysis which Weber delivered excels in precision and subtlety. However, Weber also used this case to explain and defend a vision of the political and economic commitments of the nation state, which is, at best, a contrast to the European vocation.

Weber drew upon the empirical work which he had undertaken in 1892, while still a *Pivatdozent* in Berlin, in the context of a major *Enquête* of the *Verein für Socialpolitik* (Association for Social Reform) on the situation of the agrarian work force in the German *Reich*. He had focused there on “the posting of workers” from Poland to the Prussian Province of West-Prussia. His analysis addressed the transformation of pre-modern of patriarchal structures into a capitalist agrarian economy, identified the pressures which this processes exerted on the landowners, described the incentive structure which fostered the import of “cheap labour” from the neighbouring regions of Poland and from the deeper East Galicia.<sup>3</sup> The capability of the Poles to endure the poor working conditions and the social situation in the new agrarian economy, so Weber observed, was fostering the gradual increase of the Polish and the decrease of the German share. The great theorist of occidental rationalism felt deeply irritated. Weber expressed his concern about the decline of “German-ness” (*Deutschtum*) in West Prussia. And, equally irritating in EU-perspectives, he called for corrective state measures: a closure of the borders to migrating workers, and the purchase of land by the state.

Even more irritating, however, is what he submits as his “subjective” position - the value judgements nurturing his political advice.

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<sup>3</sup> For See a reconstruction of Weber’s analysis in the light of ideational and societal transformation processes of his time see Ageval, “Science, Values, and the Empirical Argument in Max Weber’s Inaugural Address”, (2004) 4 *Max Weber Studies*, 157-177.

## Unity in Diversity

“And the nation State is for us not an indefinite something that one feels one can place all the higher the more its essence is shrouded in mystical gloom, but the worldly power organisation of the nation, and in this nation State is *raison d'état* for us, the ultimate value criterion on economic considerations too. It does not mean to us, as a strange misunderstanding believes: ‘state assistance’ instead of ‘self-help’, national regulation of economic life instead of the free play of economic forces, but we want through this slogan to raise the demand that for questions of German national economic policy -- including the question whether and how far the State should interfere in economic life or whether and when it ought instead to set the nation’s economic forces free to develop themselves and tear down restraints on them -- in the individual case the last and decisive vote ought to go to the economic and political power interests of our nation, and its bearer, the German State.”<sup>4</sup>

Even Weber’s audience in Freiburg was apparently upset and Weber distanced himself later from this strong language.<sup>5</sup> What motivated his polemic? Weberian sociologist and historians underline that Weber never understanding of value judgments as being changeable and always carrying an irrigational element. Neither should Weber’s reference to be interpreted as an ethnic nationalism nor should his insistence on the importance of “the economic” be equated with that of contemporary mainstream economics.<sup>6</sup> What does indeed differentiate carefully and clearly between general methodological, economical, and political orientations which will, in his view unavoidably so, inform the *Volkswirtschaftspolitik* (economic policy-making). When he diagnoses the readiness of migrant workers from Poland to accept the hardships of their new existence in the “host state”, he is, in fact, describing what we would call a “race to the bottom” and questioning

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<sup>4</sup> The translation is not taken from the source in note 2 but was done by Iain F. Fraser, Florence.

<sup>5</sup> See Max Weber’s letter to his brother Alfred, cited in Aldenhoff-Hübinger, “Max Weber’s Inaugural Address of 1895 in the Context of the Contemporary Debates in Political Economy”, (2004) 4 *Max Weber Studies*, 143-156, at 146 note 8.

<sup>6</sup> Aldenhoff, (previous note).



precisely the “willingness to starve the most” as the underlying mechanism. There is a critical dimension in Weber’s position, in particular in his rejection of any claim to “objective validity” of arguments presented in the name of economic theorising; such arguments tend to camouflage normative judgements and political choices – a cardinal sin in the eyes of Weber’s epistemology. This is not to defend the substance of Weber’s pronouncements. We have reasons to remain irritated when reading about the “role played by physical and psychological racial differences between nationalities [sic!] in their struggle for existence”.<sup>7</sup> And yet, Weber the methodology remains an important warning against spurious claims, not only of the historical school, but also of contemporary neo-classical economics<sup>8</sup> - including their all too negligent contemporary use in misleading rationalisations of the integration project as a whole and so many of its segments.

## II. The European Response to The failures of Weber’s Nation States and the *Problématique* of its Institutional Design

The project of European integration can be understood as a constructive response to the failures of the Weberian nation state, and, more generally and in broader perspectives, to Europe’s bitter experiences in the twentieth century. After 50 years of integration, however, the response conceived by our founding fathers seems incomplete and insufficient. Ever since the turn to majority-voting in the Single European Act of 1987 we are becoming aware of

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<sup>7</sup> This opening statement of the inaugural address is a core reference in the debates on Weber’s nationalism, see, for example, Palonen, “Was Max Weber a ‘Nationalist’? A Study in the Rhetoric of Conceptual Change, (2001) 1 *Max Weber Studies*, 196-214.

<sup>8</sup> See Ageval, note 3, 172-74.

tensions between the progress of integration and the Europe's democratic commitments. In the aftermath of the French and the Dutch referenda of 2005, concerns about the Union's neo-liberal tilt and the "social deficit", *i.e.*, the compatibility of its institutional design and the welfare traditions of European democracies moved to centre stage. The Irish "No" of 2008 to the Treaty of Lisbon was perceived as an erosion of the permissive consensus that had backed the progress of integration. During the present financial crisis the instability of Europe's economic constitution became apparent. All of these unresolved issues and queries seem to suggest that we have to re-consider our premises.

It would, of course, in particular under the impression of the present crisis be absurd to assume that conceptual re-orientations, which an academic legal exercise such as the one we are undertaking, could produce ready-made recipes to Europe's multi-faceted *problématique*. However, we cannot hope to find proper practical responses without any conceptual guidance. In that sense our project is ambitious. What we suggest is nothing less than a re-conceptualisation of the integration project of paradigmatic proportions. The messages of "conflicts-law constitutionalism" differ from the prevailing visions most markedly in two respects. As the recourse to the notion of conflicts law indicates, the approach assigns primacy to the resolution of conflicts arising out of Europe's diversity rather than the establishment of a unitary legal regime. Equally important, the approach takes account of the ongoing contestation about the kind of polity which the integration process is to generate. This contestation is not different in principle from the ongoing domestic contests about the proper political order – with the important difference, however, that the law of constitutional democracies provides a framework which channels political contestation, while, in contrast, the law of the integration process cannot build upon this type of legitimating

framework. This is why we submit that our type of re-thinking and counter-visions is in line and supported by the deeper structures of the European political and social fabric. It is also by no means as idiosyncratic as its title may sound. There are affinities with, *e.g.*, Joseph Weiler’s juxtaposition of “Europe as unity” v. “Europe as community”,<sup>9</sup> and Kalypso Nicolaïdes’ vision of a European “*demoi-cracy*”.<sup>10</sup> What approaches like these have in common with conflicts-law constitutionalism is the effort to reflect the historical context of the integrations project, the readiness to acknowledge the limitations of its institutional design, to reflect upon the Union’s potential to cope with its present problems, and to search for a re-conceptualisation of Europe’s legal architecture within which these challenges can be addressed. This is, methodologically speaking, not fundamentally different from the exercises all schools of legal integration theory have undertaken. Our reconstruction on the merits and shortcomings of that legacy will have to proceed selectively, albeit not arbitrarily. Our analyses will depart from, and be restricted to, three schools of thought of long-term significance. Each of these three has some *fundamentum in re*: each can claim to conceptualise important elements of Europe’s integration law, and each provides normative reasons for its specific conceptualisation for the model of European rule which it defends and promotes. It is a further characteristic of our reconstruction that we take account of both the internal developments of each of these models and the continuous contestation among them, along with the ups and downs in terms of their practical impact. We will also argue, however, that all three have, notwithstanding their remarkable viability, deficits in common, which exhaust their potential to cope with the present challenges that Europe faces.

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<sup>9</sup> See Sections II.3 and III.2.3 *infra*.

<sup>10</sup> Nicolaïdis, “The new constitution as European ‘demoi-cracy’?” (2004) 7 *Critical Review of International Social and Political Philosophy*, 76-93.

One aspect which the three models have in common can be stated negatively although it is not meant as a critique of their original ambitions and accomplishments. Legal integration theorists in so-called the foundational period were perfectly aware of the discrepancy between the European and the national level of governance, and did not conceive of the European Economic Community as a constitutional democracy in being. What they have in common is a search for legitimate governance beyond nation-state confines and national frames. Their messages on the modes of transnational governance, however, differed significantly: (1) “Europe should be institutionalised as a technocratic regime and be restricted to that function”. (2) “Europe’s vocation is the establishment of an ‘economic constitution’ which is to protect individual freedoms and to discipline the exercise of political power”; and (3) “Europe has accomplished and should preserve an equilibrium between a supranational legal order and ongoing political contestation and bargaining”.

### II.1 Europe as Technocratic Administration: Hans Peter Ipsen and Ernst

#### Forsthoff

Hans Peter Ipsen was the influential founding father of European Law in Germany. He was a very remarkable protagonist of Germany’s legal scholarship. His past was by no means flawless.<sup>11</sup> “not totally flawless” (*nicht ganz unbefleckt*). His post-war work on the Basic Law of the young German democracy, however, documents very clearly democratic commitments in

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<sup>11</sup> See Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. 3. Band: 1914-1945* (Beck, 1999), 336 f.; Joerges, “Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project”, in Joerges and Ghaleigh (Eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart, 2003), pp. 167-191, at 182-84 (note 92).

general, and to the *Sozialstaatlichkeit* of the new order in particular.<sup>12</sup> He had started to work on European law at the age of 50 – and helped to establish *Europarecht* as a distinct legal discipline.<sup>13</sup> Precisely his democratic commitments may explain both, Ipsen’s sensitivity for the precarious legitimacy of the European system on the one hand, and the affinities between his own response and the work of one of Germany’s most famous contemporary public law scholars, namely, Ernst Forsthoff, on the other. These affinities are, at first sight, somewhat surprising in view of the differences in their constitutional theorising;<sup>14</sup> they are, nevertheless, plausible in view of Ipsen’s search for a type of rule whose validity was not dependent on democratic legitimacy. The communities were to confine themselves to administering questions of “knowledge”, but leave truly “political” questions to democratic and legitimated bodies.<sup>15</sup> The characterisation of the European Communities as “*Zweckverbände funktionaler Integration*” (organisations with functionally-defined objectives) was path-breaking. With this theory, Ipsen rejected both further-reaching federal integration notions *and* earlier interpretations of the community as a mere international organisation. He saw Community law as a *tertium* between (federal) state law and international law, constituted by its “objective tasks” and adequately legitimised by their solution.<sup>16</sup> This theory had an implicit answer to the queries about “the social” on offer. Ernst Forsthoff had, in his contribution to the so-called *Sozialstaatskontroverse*, argued that the realisation of social objectives had to

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<sup>12</sup> Suffice it here to point to Ipsen, “Über das Grundgesetz” (1949), reprinted along with a bundle of his later essays in *idem, Über das Grundgesetz* (Tübingen: Mohr/Siebeck, 1988), pp 1-37.

<sup>13</sup> See his *opus magnum*: *Europäisches Gemeinschaftsrecht*, (Mohr/Siebeck, 1972)

<sup>14</sup> See Ipsen, *Über das Grundgesetz* (note 12) on the one hand, and Forsthoff, “Begriff und Wesen des sozialen Rechtsstaats”, in (1954) 12 *Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer*, 8-36, on the other.

<sup>15</sup> *Europäisches Gemeinschaftsrecht*, (note 13), pp. 176 et seq., 1045; very remarkable, in the present context, is his rejection of the idea of an economic constitution at both European and national level (pp. 563-566).

<sup>16</sup> See Ipsen, *Verfassungsperspektiven der Europäischen Gemeinschaften*, (Walter de Gruyter, 1970), p. 8 et seq., and the interpretation by M. Kaufmann, *Europäische Integration und Demokratieprinzip*, (Nomos, 1997), p. 300 et seq., 312 et seq.

operate outside the rule of law; the provision of welfare was hence, by virtue of the very nature of social policies, characterised as an administrative task, which was incompatible with the commitment to the *Rechtsstaat* (“rule of law”) in the Basic Law.<sup>17</sup> This was not a principled objection against welfare policies. What is, nevertheless, difficult to conceive is how the European *Zweckverband* with its transnational machinery might actively pursue the type of activities which welfare states administer domestically. In more principled terms, it seemed, at any rate, inconceivable that the type of a “hard” legal *Sozialstaats*-commitment, which Forsthoff’s opponents understood as a constitutive dimension of the Federal Republic’s democracy,<sup>18</sup> would be institutionalised at European level.

## II.2 Europe's Economic *Ordo*: Walter Eucken and Franz Böhm

The notion of the “social market economy” was formally introduced into Europe’s constitutional parlance by a joint motion of Joschka Fischer and Dominique Villepin in the course of the debates on the Constitutional Treaty.<sup>19</sup> Their initiative was meant to calm down the anxieties over the neo-liberal tilt in the European project. The clause on the social market economy seems to have fulfilled this function quite well. However, the vague notion of the “social” and simultaneously “competitive” market economy of the Convention and the Treaty of Lisbon is situated at a great distance from the original and fairly precise contours of Germany’s “*sozialer Marktwirtschaft*”. As the most important protagonist of the concept, Alfred

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<sup>17</sup> Forsthoff, “Begriff und Wesen des sozialen Rechtsstaates” (note 14).

<sup>18</sup> The so-called *Sozialstaats*-debate is an evergreen in German constitutionalism; for recent contributions, see Rödl, “Die Idee demokratischer und sozialer Union im Verfassungsrecht der EU”, in Bast and Rödl (Eds.), *Wohlfahrtsstaatlichkeit und soziale Demokratie in der EU, Europarecht*, Beiheft 1/2013. Joerges, “*Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process”, (2010) 9 *Comparative Sociology*, 65-85.

<sup>19</sup> See the references in Joerges, “What is left of the European Economic Constitution? A Melancholic Eulogy”, (2005) 30 *European Law Review*, 461-489, at 486.

Müller-Armack, explained repeatedly and clearly, the “social market economy” was to provide a “third way” beyond economic liberalism, on the one hand, and beyond socialism, on the other. There was no conditioning of this model by requirements of “competitiveness”; quite to the contrary, the governance of market mechanisms were subjected to commands of social justice.<sup>20</sup>

Müller-Armack and his political allies were keen to underline the compatibility of their vision with the Ordo-liberal School of economics and the essential role assigned to economic freedoms and the protection of an undistorted system of competition by law and strong politically-independent enforcement authorities. The development of Ordo-liberalism as an economic theory and vision of a political order had started in the early 1920s as a counter-move against the strong cartelisation of the German economy and its corporatist links with a weak political system. The school survived National Socialism; it was perceived as one among the German traditions not contaminated by National Socialism and therefore entitled to broad public recognition and influence. The details need not concern us here. What is important to note, however, is our concern for the social dimension of the European project, the initial compatibility of Ordo-liberalism and the model of the social market, and the dissolution of this alliance which was replaced by a new alliance between the second generation of Ordo-liberalism and Anglo-Saxon neo-liberalism.<sup>21</sup>

The leading protagonists of the Freiburg School, the intellectual *Heimat* of Germany’s post-war Ordo-liberalism in both economic and legal scholarship, namely, Walter Eucken and Franz Böhm, derived from the dual commitments

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<sup>20</sup> See, the references in Joerges and Rödl, “The ‘Social Market Economy’ as Europe’s Social Model?”, EUI Working Paper Law No. 2004/8.

<sup>21</sup> See Joerges (note 19), 468 et seq.; Wigger, “Competition for Competitiveness: The Politics of the Transformation of the EU Competition Regime”, PhD Thesis VU Amsterdam, 2008, ch. 3 (pp. 100 et seq.)

to the idea of an “undistorted system of competition”, on the one hand, and to the promise of social justice and security, on the other, a challenging task: the dual commitment required institutionalising specific, albeit inter-dependent, orders, namely, a legally-structured order of industrial relations and of social security (“*Arbeits- und Sozialverfassung*”) along with the legally guaranteed economic *ordo*, the “economic constitution” (*Wirtschaftsverfassung*). In this sense, the economic order of which the protagonists of the “social market economy” envisaged was meant to be “socially embedded”.

The “really existing social market economy”, however, was never as coherently realised as their conceptual *Vordenker* would have liked to see it. Even its economic core institution – its *Wirtschaftsverfassung* – was, by no means, a theoretically-uncontested and legally-consolidated project. The strongest practical challenge to the Freiburg style of *Ordnungspolitik* was the *renaissance* of Germany’s corporatist traditions already in the early years of the Bonn Republic. The Federal Republic was characterised by permanent tensions between *Theorie und Praxis*: striking discrepancies between the officious rhetoric of *Ordnungspolitik* on the one hand, and the ongoing bargaining between the political system and the political and economic actors, on the other – a German *Lebenslüge*, to be sure, albeit an economically-successful and socially-beneficial arrangement.<sup>22</sup> The perception of this discrepancy will have influenced the (ordo)-liberal commitment to the integration project. The European level of governance promised to ensure stronger barriers against the *renaissance* of Germany’s corporatist traditions and its political opportunism in economic affairs than the domestic institutional pillars of Germany’s *Ordnungspolitik*.

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<sup>22</sup> Well documented by Abelshauser, *Die Langen Fünfziger Jahre. Wirtschaft und Gesellschaft in Deutschland 1949–1966*, (Schwann, 1987).



### II.3 Europe as Community: Joseph H.H. Weiler

In his very first publication on European issues,<sup>23</sup> Joseph Weiler presented a vision, which he substantiated and defended in his PhD thesis, then retold, refined and complemented in his seminal narrative on the “Transformation of Europe”:<sup>24</sup> Europe has in its foundational period, so Weiler argued, managed to establish an equilibrium between legal supranationalism and political intergovernmentalism. His portrayal of European integration was path-breaking, unique in its doctrinal lucidity and its sensitivity for the European synthesis of “the political” and the law.

Weiler’s *oeuvre* is a powerful critique of the type of national state which Weber’s inaugural address describes. Nowhere, however, did he talk about something akin to “social Europe”. Even in the concluding passages on democracy in Europe and the legitimacy of the integration project of the “Transformations of Europe”, there is no mention of the possibility that democracy might pre-suppose social justice and that Europe’s socially-defined legitimacy might erode through a destruction of welfare state traditions. And yet, even though Weiler’s value-laden work is characterised by a profound distance to technocratic precepts and economic rationalisation of the European Community, his visions seem surprisingly compatible with the benign neglect of the “social deficit” of the European order in European legal studies during the foundational period. To be sure, Weiler’s reconstruction of the Europe as a Janus-headed polity was not meant as a conceptualisation which would exclude Europe’s engagement in social issues as a matter of (legal) principle. It is, nevertheless, true that, thanks to the *Realpolitik*-kernel of his analysis, “social Europe” was an unlikely option, and

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<sup>23</sup> Weiler, “The Community system: the dual character of supranationalism”, (1981) 1 *Yearbook of European Law*, 257–306.

<sup>24</sup> (1990–91) 100 *Yale Law Journal*, 2403–2485.

one of very limited significance, anyway. It was highly unlikely simply because its advent was dependent on unanimous inter-governmental voting; it was, by the same token, of little concern as the later tensions between the integrationist objective and the legacy of European welfarism were still dormant.

### III. The sensitivity of legal integration theory: three retractions

The current problems of the European project are simply overwhelming. There is no consensus neither in the diagnosis of the causes nor on the proper remedies to be taken and the prospects of political developments which would enable Europe to reconstitute stable perspectives are uncertain. It is nevertheless becoming possible to identify institutional design defects of the integration project and the readiness to address such failures in academic discourses as well as in public debates is growing. It is hence unsurprising that legal integration theory has started to reconsider its premises and prospects. And it seems remarkable indeed that this rethinking has already started before the current crisis. This is the case in all of the three conceptualisation of the integration project – technocratic rule, economic rationality, and the community vision – that we have sketched out above. These models were not chosen at random. They represent evolutionary options among which the integration project kept oscillating. None of them identified with the ambitions of the constitutional convention and the mainstream strive for a comprehensive democratic constitutionalisation of the Union. All of them have nevertheless or because of that type of modesty been continuously present in Europe's integration process ever since the

foundational period. They have of course been developing, even mutating, within their particular perspectives, be it in their responses to changing contexts, be it through mutual observation and political learning. We can neither try to document the continuities and innovations within each tradition, nor discuss the affinities between them in any detail. It is sufficient, for our argument, to characterise crucial transformations within each of them – and to underline telling parallels in their diagnosis of the current *impasses*.

### III.1 Technocracy without Efficiency: Majone's Critical Turn

The importance of the technocratic tradition in the *praxis* of the integration project can hardly be over-estimated. Its weight was bound to increase with the involvement of the European Community in ever more regulatory policies which were to be organised at transnational levels without the backing of a consolidated democratic order. How else than through an “objective” and expertise-based conceptualisation of its enormous tasks could the European Community hope to ensure the acceptance of its involvement in ever more problem-solving activities? The by far most interesting and influential work which renewed and refined the legacy is that of Giandomenico Majone.<sup>25</sup> It is unique not only in its clarity and its coherence, but also in its reflections of the option for an alternative to the democratic constitutionalism the Member States of the European Union. Majone's famous conceptualisation of Europe as a “regulatory State”<sup>26</sup> which operates essentially through non-majoritarian institutions was conceived as ensuring the credibility of commitments to in

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<sup>25</sup> Who confronted European studies right upon his return to Europe with essays like “Regulating Europe: Problems and Prospects”, (1989) 3 *Jahrbuch zur Staats- und Verwaltungswissenschaft*, 159-177; “Cross-national resources of regulatory policymaking in Europe and the United States”, (1991) 11 *Journal of Public Policy*, 79-106 and kept working on the perspectives outlined therein ever since (see, recently, his *Europe as the Would-be word power* (Cambridge UP, 2010).

<sup>26</sup> Majone, “The European Community as a Regulatory State”, 1994-V/1 *Collected Courses of the Academy of European Law*, (Martinus Nijhoff, 1996), 321-419 and *Regulating Europe* (Routledge, 1996)

principle uncontested policy objectives. Welfare policies pose additional problems. The Union's failure to institutionalize a comprehensive social policy results partly from the "reluctance of the member states to surrender control of a politically salient and popular area of public policy"; equally important is the factual difficulty and political impossibility to replace the variety of European welfare state models and traditions by some integrated European scheme.<sup>27</sup> Not only does Majone respect the primacy of constitutional democracies; he is equally, and with increasing urgency, underlining the fallacy of an ever more perfect and comprehensive subjection of the integration project to its "operational code", the principle "that integration has priority over all competing values"<sup>28</sup>, and also the camouflage strategies which he calls "integration by stealth".<sup>29</sup> This is an alarming retraction from his earlier trust in the problem-solving potential of the European project. His warnings do, by no means, reflect a change of theoretical premises. Majone continues to underline that Europe is not legitimated to pursue the type of distributional politics which welfare states have institutionalised.<sup>30</sup> He does not retract his plea for regulatory efficiency. His critical turn is, instead, motivated by the *inefficiencies* which he observes in the Union's operations. His quest for more modesty in Europe's ambitions ("Geht's nicht eine Nummer kleiner?")<sup>31</sup> summarises these observations. His adaptation of the "unity in diversity" formula<sup>32</sup> is an implication of these insights to which we will return in the following Section IV.

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<sup>27</sup> Majone, *Europe as the Would-be World Power*, (note 25), p. 144.

<sup>28</sup> *Ibid.*, p. 1.

<sup>29</sup> See his *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, (Oxford UP, 2005).

<sup>30</sup> Majone, *Europe as the Would-be World Power*, (note 25), p. 128 et seq. – And it is for that reason erroneous to classify Majone as a "technocrat". His reserves against a comprehensive European social model rested from early on the democratic concern for a proper legitimation of distributional politics; see Joerges, „Der Philosoph als wahrer Rechtslehrer. Review Essay on Giandomenico Majone“, *Regulating Europe*, 5 (1999) *European Law Journal*, 147-153.

<sup>31</sup> *Ibid.*, p. 170 et seq.

<sup>32</sup> *Ibid.*, p. 205 et seq.

### III.2 What is Left of the Economic Constitution: Ordo-liberal Concerns

An institutionalisation of economic efficiency is widely perceived to day, either affirmatively or critically, as Europe's core agenda.<sup>33</sup> This perception gained prominence since the legendary White Paper on the Completion of the Internal Market.<sup>34</sup> What is hardly noticed, however, even within Germany's European law circles, is that the ordo-liberal tradition had in the 1970s, and hence long before Delors launched his Internal market Programme, experienced a deep transformation. That mutation had started at national level with the move of Friedrich von Hayek from Chicago to Freiburg and his promotion of his version of neo-liberalism which was situated between the Freiburg School's orthodoxy, on the one hand, and the Chicago School's palao-liberalism, on the other. Von Hayek's notion of "competition as a discovery process" captures the essence of his messages best. They have led the second generation of ordo-liberal scholars to re-define the objectives and the methods of national and European competition law. Attention shifted from the control of economic power to the protection of entrepreneurial freedom and the critique of anti-competitive regulation, complemented by the idea of regulatory competition. What happened in the 1970s has been analysed with an amazing precision a good number of years ago by Michel Foucault in the course of the lectures he delivered at the *Collège de France*.<sup>35</sup>

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<sup>33</sup> See, on the one hand, the contributions on European economic law in von Bogdandy and Bast, *Principles of European Constitutional Law*, (Hart Publishing, 2<sup>nd</sup> ed. 2011), by Haltje ("The Economic Constitution within the Internal Market), pp. 589-629, and Drexl ("Competition Law as Part of the European Constitution"), pp. 659-698, which are strongly indebted to the ordoliberal tradition, and Höpner and Schäfer, "A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe", (2010) 33 *West European Politics*, 344-368, on the other. – Such theoretical controversies vary of course as strongly as Europe's varieties of capitalism.

<sup>34</sup> European Commission, "White Paper to the European Council on Completion of the Internal Market", COM (85) 310 final, 14 June 1985.

<sup>35</sup> Foucault, *Naissance de la biopolitique. Cours au Collège de France*, (Paris: Seuil/Gallimard, 2004), in particular the lecture of 7 February 1979, pp. 105-134, and that of 14 February 1979, pp. 135-164.

There, Foucault characterised the ordo-liberal vision of the strong state which is committed to the protection of the competitive ordering of the market as new type of *gouvernementalité*, namely, the acceptance of market governance by the political system and the whole of society.<sup>36</sup> There are remarkable affinities between the second generation Ordo-liberalism and the Chicago School when it comes to practical issues of competition law and policy, but they have never led to a real merger of the two schools. The heirs of Eucken and von Hayek did not subscribe to the Chicago understanding of economic output efficiency and “consumer welfare” but continued to define and defend the “system of undistorted competition” as the core of Europe’s “economic constitution”.<sup>37</sup> They witnessed, however, a steady decline of the impact of their visions, which became most clearly visible in the substantial broadening of European economic policies in the Treaty of Maastricht,<sup>38</sup> then in the so-called “modernisation” of European competition law<sup>39</sup> and the turn to the “more economic approach”.<sup>40</sup> The weakening of their ideational power was symbolically confirmed when French Prime Minister Sarkozy saw to it that the Union’s commitment to “a system ensuring that competition is not distorted” was not included in Article 3 TFEU (ex Article 2 TEU) but moved back into Protocol 27 of the Treaty of Lisbon.<sup>41</sup> Under the impression of the

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<sup>36</sup> “... [A]u lieu d’accepter une liberté du marché, définie par l’État et maintenue en quelque sorte sur surveillance étatique... eh bien, disent les ordolibéraux, il faut entièrement retourner la formule et se donner la liberté du marché comme principe organisateur et régulateur de l’État...Autrement dit, un État sous surveillance du marché plutôt qu’un marché sous surveillance de l’État”, *Biopolitique* (note 35), Lecture 5, p. 120.

<sup>37</sup> See E.-J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union. Beiträge zu Recht, Theorie und Politik der europäischen Integration*, (Nomos, 2003), with a collection of essays written from 1965 to 2001 and his recent critique of E. Posner in *A legal theory without law Posner v. Hayek on Economic Analysis of Law*, (Mohr Siebeck, 2007).

<sup>38</sup> See Streit and Mussler, “The Economic Constitution of the European Community. From ‘Rome’ to ‘Maastricht’”, (1995) 1 *European Law Journal*, 5-30.

<sup>39</sup> Schweitzer, “Competition Law and Public Policy: Reconsidering an Uneasy Relationship: The Example of Art. 81” (December 1, 2007), available at SSRN: <http://ssrn.com/abstract=1092883>.

<sup>40</sup> See Schmidtchen, Albert and Voigt (Eds.), *The More Economic Approach to European Competition Law*, (Mohr Siebeck, 2007).

<sup>41</sup> Legally speaking, the removal looks insignificant, as, for example, Behrens has underlined “Der Wettbewerb im Vertrag von Lissabon”, (2008) 21 *Europäische Zeitschrift für Wirtschaftsrecht*, 193; the law’s truth, however, is not the whole truth.

crisis, the ordo-liberal tradition is experiencing unprecedented challenges. The school had understood Economic and Monetary Union with its dedication to price stability and its institutional protection by the establishment of an independent banking authority outside the framework of the Treaty as the crowning of the internal market – which seemed more important than the status of the “system of undistorted competition”. The derogation of the European Central Bank from its original mandate was therefore bound to meet with fierce critique.<sup>42</sup> Europe’s recent crisis management has not yet been scrutinised by prominent school representatives comprehensively. But its incompatibility with their concepts seems quite obvious. To be sure, the new strive for “competitiveness” and budgetary discipline as envisaged in particular by the new Fiscal Compact,<sup>43</sup> resonate with ordo- and neo-liberal precepts. What is deeply problematic, however, is the enforcement of these objectives. The “European Semester”<sup>44</sup> and the rules of “Six Pack”<sup>45</sup> provide for discretionary and situational measures – an ordering of the European economy not “through” law but outside justiciable criteria.<sup>46</sup>

### III.3 Unity without Community: J.H.H. Weiler’s Constitutional Caution

Joseph Weiler’s early work can in hindsight be identified as truly path breaking in that it synthesised, in a novel way, Europe’s constitutive historical move towards a common peaceful future, the construction of a supranational

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<sup>42</sup> See, most prominently, Mestmäcker, “Der Schamfleck ist die Geldverachtung”, *Frankfurter Allgemeine Zeitung*, 18.11.2011, p.33.

<sup>43</sup> Treaty on Stability, Co-ordination and Governance, [http://european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf).

<sup>44</sup> Communication from the Commission on 12 May 2010, COM(2010) 250 final.

<sup>45</sup> The five regulations 1173-1177/2011/EU and directive 2011/85/EU of 8 November 2011, OJ L 91/2011, 1.

<sup>46</sup> See Adamski, “Europe’s (Misguided) Constitution of Economic Prosperity”, paper presented at the conference “Crise et droit économique”, Wroclaw, Poland, 8-9 November 2012.

## Unity in Diversity

legal alternative to the role of law in the international system, while remaining aware of the political embeddedness and dependency of these accomplishments. The great normative perspectives and the sensitive realism in his design of equilibrium between “legal supranationalism” and “political intergovernmentalism”, however, became gradually ever more apparent as Weiler sought to develop his construct and vision further in the light of Europe’s experiences, accomplishments and failures. In his seminal article on the “Transformation of Europe”, he delivered an insightful diagnosis of the problematical implications of majority-voting in terms of Europe’s legitimacy.<sup>47</sup> He was among the first to realise the normative and political ambivalences of the completion of the Internal Market by the Delors Commission:

“[T]o regard the Community as a technological instrument is, in the first place, to under-estimate the profound political choice and cultural impact which the single market involves – a politics of efficiency, a culture of market.”<sup>48</sup>

Weiler has never subscribed to the far-reaching ambitions of the convention process<sup>49</sup> and he is among the most prominent warners against the quest for “ever more Europe” with comprehensive economic governance.<sup>50</sup>

We can summarise the forgoing observations in an interim conclusion: the *impasses* of the integration *praxis* are mirrored and foreshadowed by the exhaustion of the main theoretical perspectives which have accompanied and oriented legal reflections, theoretical conceptualisations and the prescriptive

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<sup>47</sup> Weiler, “The Transformation of Europe”, (1990–91) 100 *Yale Law Journal*, 2403–2485, at 2461 et seq.

<sup>48</sup> *Idem*, “Fin-de-Siècle Europe”, in: Dehousse (Ed.), *Europe After Maastricht: An Ever Closer Union*, (Beck, 1994), pp. 203-216, p. 215.

<sup>49</sup> See, e.g., his “On the power of the word: Europe’s constitutional iconography, (2005) *ICON* 3 173-190.

<sup>50</sup> See his “The political and legal culture of European integration: An exploratory essay”, (2011) *ICON* 9, 678-694.



modelling of Europe's *finalité*. Where practice and theory concur so significantly in their retroactive moves, the search for alternative paradigm seems overdue.

## IV. Europe's Legitimacy Problem Revisited: The Conflicts Law Alternative

Europe's "operational code" is to prioritise integration "over all other conceivable values including democracy".<sup>51</sup> "Unity in diversity", the motto of the Constitutional Treaty, has become Majone's new *leitmotiv*.<sup>52</sup> Our immodest assertion is: The proper legal form of the Draft-Treaty's motto is a re-conceptualisation of European law as a new type of supranational conflicts law. Since the approach has been presented elsewhere often enough,<sup>53</sup> commentary is here restricted to a depiction of its five core messages.<sup>54</sup>

### IV.1 Conflicts Law as Democratic Commandment

The entire construction is built upon a sociological observation with normative implications. Under the impact of Europeanisation and

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<sup>51</sup> Majone, *Europe as the Would-be World Power*, (note 25), p. 1.

<sup>52</sup> *Ibid.*, p. 205 *et seq.*

<sup>53</sup> For an earlier version, see Joerges, "Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws" (with comments by Damian Chalmers, Rainer Nickel, Florian Rödl, Robert Wai), EUI Working Paper Law 12/2005; for affirmative and critical comments see Joerges, Kjaer and Ralli (Eds.), *Conflicts Law as Constitutional Form in the Postnational Constellation, Transnational Legal Theory*, Vol. 2, Issue 2 (special issue), 2011; for a particularly sensitive recent discussion cf., Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalization*, (Oxford UP, 2012), p. 150 *et seq.*

<sup>54</sup> In the following I draw on "Integration through Conflicts Law: On the Defence of the European Project by means of alternative conceptualisation of legal constitutionalisation", in: Nickel (Ed) *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification*, (Intersentia, 2010), pp. 377-400 and "The Idea of a Three-dimensional Conflicts Law as Constitutional Form", in Joerges and Petersmann (Eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart Publishing, 2<sup>nd</sup> 2011), 413-455.

globalisation, contemporary societies experience an ever stronger schism between decision-makers and those who are impacted upon by decision-making. This schism poses a democracy problem for anybody defending the idea that the citizens of democratic polities should be able to interpret them as in the last instance as the authors of the law they are supposed to comply with. This is the observation on which Jürgen Neyer and the present author based their quest for a legitimation of European law by its potential to compensate structural democracy failures of nation states back in 1997.<sup>55</sup> Even then the argument was not fundamentally new. Jürgen Habermas had submitted a very similar idea in his very first essay on European integration.<sup>56</sup> His most recent re-statement is close to identical with our formula:

“Nation-states ... encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level ...”<sup>57</sup>

Our basic intuition still seems plausible. However, it must not be understood as a kind *passé-partout* which would justify all kinds of interventions into the political autonomy of constitutional states and their decision-making procedures. Any correction of undemocratic external effects must in itself be justified. Suffice it here to point to the control and correction of budgetary policies and all sectors of national polities by the regulatory machinery which

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<sup>55</sup> Joerges and Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology”, (1997) 3 *European Law Journal*, 273-299, at 293. Jürgen Neyer has elaborated and refined the argument systematically in his recent monograph on *The Justification of Europe. A Political Theory of Supranational Integration* (Oxford UP, 2012).

<sup>56</sup> Habermas, *Staatsbürgerschaft und nationale Identität*, (Erker, 1991), reprinted in *Between Facts and Norms. Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, (MIT Press, 1998), pp. 491-516, at 503: The citizens today experience “an ever greater gap being passively affected and actively participating”.

<sup>57</sup> Habermas, “Does the Constitutionalization of International Law Still Have a Chance?”, in *idem*, *The Divided West* (Polity Press, 2007), pp. 113-93, 176.

the six pack and the fiscal compact have by now established.<sup>58</sup> This proviso is an integral dimension of the following deliberations and suggestions.

#### **IV.2 The Supranationality of European Conflicts Law**

Our plea for a new understanding of EU law, must not, the connotations of its terminological origin notwithstanding, serve as a retraction from supranationalism as such. Quite to the contrary, it furnishes a justification for the validity of the supranational jurisdiction – albeit one which is, just like the three models of legal integration theory discussed above,<sup>59</sup> at the same time depicting the limits of supranational rule. To rephrase its sociological and normative basis slightly: as a consequence of their manifold degree of interdependence, the Member States of the European Community/Union are no longer in a position to guarantee the democratic legitimacy of their policies. A European law that concerns itself with the amelioration of such external effects, *i.e.*, which seeks to compensate for the failings of the national democracies, may induce its legitimacy from this compensatory function. It can thus operate to strengthen democracy without needing to establish itself as a democratic state.

#### **IV.3 Convergence, Re-construction, Critique**

Clearly, such a democratic exoneration of European law is only plausible to the exact degree that it may be re-constructed within this perspective, or that

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<sup>58</sup> See, in detail, Joerges, “The European Economic Constitution and its Transformation Through the Financial Crisis”, in Patterson and Södersten (Eds.), *A Companion to European Union law and International Law*, (Wiley-Blackwell, 2013, forthcoming), text accompanying notes 53 et seq.; Joerges and Weimer, “A crisis of executive managerialism in the EU: no alternative?”, Maastricht Faculty of Law Working Paper 2012/7, 28 et seq.

<sup>59</sup> Sections II.1-3 and III.2.

it may be furnished with a conflicts-law orientation. This, however, is already, often enough, the case: European law has given legal force to principles and rules which serve the purpose of supranational “recognition” – the non-discrimination principle, the supranational definition and the demarcation of legitimate regulatory concerns, the demands for justification for actions that are imposed upon national legal systems, and the proportionality principle – which supplies a legal yardstick against which respect for supranationally-guaranteed freedoms may be measured – and the demand that all public exercise of power pays due regard to fundamental rights. All these principles and rules may be understood as a concretisation of a supranational conflicts law, which guarantees that the actions of the Member States are reconcilable with their position within the Community. This is not to say, however, that the solutions to the conflicts at which European law has actually arrived, are always convincing. Our re-construction of European law in the normative perspectives just outlined will reveal tensions between “facticity” and “validity”, as well as failures and missed opportunities – the conflicts approach shares this type of experience with the three approaches from which it seeks to replace.

#### **IV.4 Vertical, horizontal and diagonal Conflicts in Europe’s multi-level system and the Idea of a Three-dimensional Conflicts Law**

Europe’s multi-level system cannot be organised and administered hierarchically. The legal validity of this insight stems from the apportionment of competences within the EU; its factual strength stems from vast discrepancies in the operational resources available at each ruling level. The conflicts-law approach distinguishes accordingly between vertical, “diagonal” and horizontal collisions. Diagonal collisions are an important and unique

feature of multi-level systems. They are a constant feature of the Union's praxis, since the competences, which are required for comprehensive problem-solving are often only partly available at the level of the EU itself; problem-solving then needs to resort to complementary competences of the Member States. This constellation gives rise to two forms of potential conflict – on the one hand, between divergent EU and national political orientations, and, on the other, between divergent interest constellations in the Member States – so that very particular mediation arrangements must be identified. This need for mediation is a characteristic feature of all multi-level systems, but is particularly pressing in the case of the EU, where the existence of diagonal conflict has had, as its corollary, the evolution of a particularly intense degree of administrative co-operation, the institutionalisation of advice-giving instances, and the systematic construction of non-governmental co-operative relationships. This infrastructure may be understood as furnishing the integral components of a conflicts law that may no longer restrict be realised. Such conflicts law must be methodologically and organisationally open to the same type of evolution, which we have witnessed within national systems, namely has the development of post-interventionist regulatory practices and legal forms. Accordingly, we distinguish between three types of conflicts-law ordering or “three dimensions” of conflicts law, which operate in three dimensions: conflicts law of the “first order” is flanked, on the one hand, by a conflicts law, which, most specifically in the realm of European comitology, has concerned itself with the elaboration of material (substantive) regulatory options, and, on the other hand, by a conflicts law, which governs the supervision of para-legal law and self-regulatory organisation.<sup>60</sup>

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<sup>60</sup> This point will be taken up again in Section VI below; see also Joerges and Rödl, “Reconceptualising the constitution of Europe's post-national constellation – by dint of conflict of

#### IV.5 Conflicts Law as Proceduralising Constitutionalism

It follows from the preceding sections that it would be factually and normatively mistaken to regard European law as a system of law dedicated to the incremental construction of a comprehensive legal edifice. Europe must, learn to accept the fact that its diversity will accompany it far into the future, so that conflict born of diversity will continue to characterise the process of European integration. It should therefore further concede that this process should be overseen by a type of law, which, by virtue of its identification of the principles and rules that govern conflict, will generate the law of the European multi-level system. Europeanisation, then, is not simply a process of change; it is also a learning process. Law cannot pre-determine the substance of such processes, but may yet secure its own normative character, by virtue of its self-dedication to the processes of law-making and its justification (*Recht-Fertigung*), which mirror and defend the justice and fairness within law.<sup>61</sup> This understanding is by no means simply some Germanic idiosyncrasy.<sup>62</sup> It is akin to, for example, Antje Wiener's notion of "the invisible constitution"<sup>63</sup> or Deirdre Curtin's concept of the "living constitution".<sup>64</sup> Should it be that such seemingly daring ideas are in fact realistic in the sense that they represent the only conceivable type of responses to the challenges to which the European project is constantly and permanently exposed?

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laws", in: I. Lianos and Odudu (Eds.), *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge UP, 2012), pp. 762-80.

<sup>61</sup> See Wiethölter, "[Just-ifications of a Law of Society](#)", in Perez and Teubner, (Eds.), *Paradoxes and Inconsistencies in the Law*, (Hart Publishing, 2005), pp. 65-77.

<sup>62</sup> See Everson and Eisner, *The Making of the EU Constitution: Judges and Lawyers Beyond Constitutive Power*, (Milton Park: Routledge-Cavendish, 2007), in particular, p. 41 *et seq.*

<sup>63</sup> Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters*, (Cambridge UP, 2008).

<sup>64</sup> Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution*, (Oxford UP, 2009).

## V. Exemplary illustrations: Market building and the recent Labour Law Jurisprudence of the CJEU

As indicated, the conflicts-law approach is not meant as an artificial juxtaposition to positive European law, but it does claim to take up the legacy of legal realism, and, hence, to articulate that law's "real life", to help us to see what the law "does". This is a reconstructive but by no means a purely affirmative exercise. To submit that European law "is" conflicts law is to underline and illuminate its function *and* its problematic – the legal responses to the conflicts can be convincing, less fortunate or even deplorable.

### V.1 The Example of *Cassis de Dijon*

The conflicts-law approach advocates mitigation between controversies over diverging policies and complex interest configuration. With this aspiration, the approach departs markedly from the traditional treatment of public law provisions in private international law, international public and administrative law. Europe has, as Jona Israël put it, the chance and vocation to transform the *comitas* (voluntary and diplomatic co-ordination) among its states and societies into a legally-binding commitment to co-operative problem-solving.<sup>65</sup> This has been accomplished in countless cases -- often convincingly. The Court's legendary *Cassis de Dijon* judgment of 1979<sup>66</sup> may serve to illustrate this point. The Court's response to the controversy between Germany and France over Germany's prescriptions on a minimum percentage of alcohol in liquor was as plausible as it was trifling: the confusion of German consumers could be avoided, and a reasonable degree of protection

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<sup>65</sup> Israël, *European Cross-Border Insolvency Regulation*, (Intersentia, 2005), pp 123, 150-152, and 323-334.

<sup>66</sup> Case 120/78, ECR [1979] 649.

against erroneous decisions by German consumers could be achieved by simply disclosing the lower alcohol content of the competing French liqueur.

At closer inspection, the court's answer to the conflict constellation in *Cassis* is not as plausible as it appears at first sight. As Damian Chalmers, in a critique of this author's praise of *Cassis*,<sup>67</sup> has underlined, at stake in this constellation which did not only affect only the two directly involved parties, the marketing strategies of a powerful distribution chains like REWE were a threat to the survival of small shops which were not in a position to provide consumers. Through the upgrading of economic freedoms to constitutional rights, the CJEU has indeed assumed *en passant* constitutional functions.<sup>68</sup> The issue, then, is of whether the Court has gone a step too far when complementing the recognition of the constitutional status of economic freedoms by its authoritative definition of the kind of concerns which are deemed to be compatible with the establishment of a common European market.<sup>69</sup> All this however, does in no way affect the reading of *Cassis* as a conflicts law case. The CJEU handed down a ruling on a complex conflict constellation. This ruling does provide a legal framework for this conflict. The Court failed to evaluate all dimensions of this conflict when pursuing its market building agenda. This judgment "is" nonetheless conflicts law, albeit not necessarily good law.

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<sup>67</sup> "Deliberative Supranationalism and the Reterritorialization of Authority", in: Kohler-Koch and Rittberger (Eds.), *Debating the Democratic Legitimacy*, (Rowman & Littlefield, 2007), pp. 329-343, at 334.

<sup>68</sup> See, a good while ago, Steindorff, "Probleme des Art. 30 EWG", (1984) 148 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 338-355.

<sup>69</sup> See, in a similar vein, Menéndez, "United they diverge? From conflicts to constitutional theory? Critical remarks on Joerges' theory of conflicts of law", RECON WP 2011/6, Oslo 2011.



## V.2 A Neo-liberal Market Community? The Recent Labour Law

### Jurisprudence of the CJEU

It is difficult for anybody aware of continental private and public international law or Anglo-Saxon conflict of laws *not* to realise the discrepancies between the latter disciplines and the much-debated recent labour law jurisprudence of the ECJ provides a line of cases in point. The much-debated recent labour law jurisprudence of the ECJ provides a line of cases in point. What deserves closer scrutiny, however, is the contents of the principles and rules which the ECJ has invoked and developed in its responses to the conflict constellations which were referred to it.

#### V.2.1 *Viking, Laval, Rüffert*

These three cases are, by now, so well-known that it should suffice here to summarise their contents very briefly.

The first case was decided on 11 December 2007.<sup>70</sup> Finnish seafarers, employed on the ferry *Rosella*, become aware of the intention of their employer to flag out to Estonia. Since they were afraid of losing their jobs or being forced to accept lower wages, they tried to impress their employer by threatening to strike. This was legal under Finnish law. But, so their Finnish employer argued, such action was incompatible with its right *Viking's* right of free establishment as enshrined in Article 43 EC.

The response of the ECJ is conciliatory in its tone, but is, in fact, quite rigid. The ECJ starts out with underlining that the “right to take collective action, including the right to strike ... [is] a fundamental right which forms an

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<sup>70</sup> Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779.

integral part of the general principles of Community law”.<sup>71</sup> Then, however, the Court fundamentally re-configures the traditional balance between economic freedoms at European level and social rights at national level, explaining that the Member States, although “still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question...must nevertheless comply with Community law [...]. Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC”.

The second case was decided only one week later.<sup>72</sup> *Laval*, a company incorporated under Latvian law, had won the tender for a school building on the outskirts of Stockholm. In obtaining the tender, it had profited from the differences in the wage levels of Latvia and Sweden. In May 2004, when work was to start, and after *Laval* had posted several dozens of its workers, the Swedish trade unions resorted to hostile actions against *Laval* with such determination and intensity that *Laval* gave up.

The Unions had acted legally according to Swedish law, but the Court referred to Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.<sup>73</sup>

This Directive requires, with respect to a number of essential working conditions, that foreign workers are not to be disadvantaged. According to Article 3, workers are to be guaranteed the minimum rates of pay. According to the general principle of the same Article, the rates of pay must be laid down either “by law, regulation or administrative provision” or “by collective

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<sup>71</sup> Case C-438/05 (*Viking*), para. 44.

<sup>72</sup> Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, [2007] ECR I-11767.

<sup>73</sup> Directive 96/71/EC OJ 1996, L18/1.

agreements which have been declared universally applicable within the meaning of paragraph 8". Sweden, however, had refrained from changing its pertinent laws but relied on the exceptions listed in Article 3 Paragraph 8 (providing therein the absence of a system for declaring collective agreements or arbitration awards universally applicable. It left the determination of wage levels to collective agreements concluded among the undertakings themselves. The Court argued that, in this respect, Sweden was in breach of (secondary) Community law.<sup>74</sup>

In the third judgment, which was handed down on April 2008, the ECJ further entrenched its position.<sup>75</sup> *Rüffert* concerned the legality of a tender proffered by one of the German *Länder*, Lower Saxony, which contained a clause indicating that the public authorities were bound to respect existing collective-bargaining agreements, so that tendering firms would also be required to abide by the relevant collective-bargaining agreements. The ECJ held that Lower Saxony's legislation was irreconcilable with Article 49 EC since it prevented foreign service-providers from benefiting from lower wage costs within their country of origin.

The vital point within the judgment is its evaluation of the protective purpose of the clause committing the public authorities to respect collective agreements: in this respect, the Court held that "contrary to the contentions of Land Niedersachsen and a number of the Governments, such a measure cannot be considered to be justified by the objective of ensuring the protection of workers".

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<sup>74</sup> See para.s 70-71 of the judgment.

<sup>75</sup> Case C-346/06, *Rüffert v. Land Niedersachsen*, [2008] ECR I-01989.

This finding is all the more remarkable in view of a prior pertinent decision of Germany's Constitutional Court, which had explained only in 2006:<sup>76</sup>

“The combating of unemployment, together with measures that secure the financial stability of the social security system, are particularly important goals, for the realisation of which the legislator must be given a relatively large degree of decisional discretion, and especially so under current, politically very difficult, labour market conditions.”<sup>77</sup>

### V.2.2 Dissenting Opinions in Luxembourg and their Disregard

In all of the three cases, the Court's Advocate Generals – Poiares Maduro in *Viking*, Mengozzi in *Laval*, Bot in *Rüffert* – had submitted Opinions which differed, more or less significantly, from the Court's later judgments. In two more recent cases, the signals of dissent were becoming stronger and more articulate.

The first case concerns the applicability of Directive 2004/18 on a German pension scheme for public employees, and has considerable affinities with *Rüffert*.<sup>78</sup> The German scheme foresaw the involvement of Trade Unions in the transformation of parts of their remuneration into pensions (“*Entgeltumwandlung*”). The European Commission found the involvement of the trade unions in the selection of insurers to be compatible with the Directive.

The opinion which AG Verica Trstenjak delivered on 14 April 2010 does not directly question the Court's labour law jurisprudence.<sup>79</sup> She explicitly

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<sup>76</sup> Bundesverfassungsgericht, - 1 BvL 4/00 - (First senate, 16 July 2006), available at the Court's website at: [http://www.bverfg.de/entscheidungen/lS20060711\\_1bvl000400.html](http://www.bverfg.de/entscheidungen/lS20060711_1bvl000400.html).

<sup>77</sup> Para. 103 (translation by the author; references to earlier judgments omitted).

<sup>78</sup> Case C-271/08, *European Commission v. Federal Republic of Germany*.

<sup>79</sup> See, in particular, para.s.196 et seq., on the *Rüffert* case.

refrains from supporting Germany's quest for an "*Albany* exclusion",<sup>80</sup> and confirms the applicability of the economic freedoms. She then adds, however, that the social right to collective bargaining and the freedoms are of equal weight and invokes the principle of proportionality as a guide for its resolution.<sup>81</sup> The conflict is to be resolved at the level of primary law and that resolution has then to guide the interpretation of secondary legislation. This leads her to question the validity of the Commission's reading of the said Directive and to suggest that the complaint be dismissed.<sup>82</sup>

The second case concerns the compatibility of Belgian requirements relating to the posting of workers in Belgium with the Posted Workers Directive.<sup>83</sup> It is, in this respect, closer to *Laval*. GA Cruz Villalón, in his opinion of 5 May 2010, characterises this directive as a response to the conflicts between social values and economic freedoms which the internal market is bound to generate,<sup>84</sup> and then complements the argument of his Slovenian colleague by a reference to Articles 9 and 3 TFEU, suggesting that, under Treaty of Lisbon, social protection is no longer to be understood as an exception from the economic freedoms, but as commitment of general validity. Like his colleague, he then invokes the proportionality principle to resolve these tensions.<sup>85</sup>

The two Opinions move the conflict between economic freedoms and social rights to the European level and thereby strengthen Europe's judicial supranationalism. The premises and implications of this projection are difficult to understand. Both cases concern policy fields in which national law has not been replaced, but is only partially affected by European prerogatives.

<sup>80</sup> See her discussion of Case C-67/96, [1999] ECR I-5751 in para.s 54 et seq.

<sup>81</sup> See para.s 186 et seq.

<sup>82</sup> See para. 237.

<sup>83</sup> Case C-515/08, *Vitor Manuel dos Santos Palhota and Others*. The judgment of the ECJ case dates from 7 October 2010.

<sup>84</sup> Para. 38.

<sup>85</sup> Para. 52 et seq..

The prospects for a clarification of such queries, however, do not seem bright. In its judgement of 15 July 2010 the ECJ (Grand Chamber) rather flatly rephrases what has been stated in *Viking* and *Laval*:

“[W]hile it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in accordance with European Union law.

Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 are intended to implement, and be in accordance with the principle of proportionality.”<sup>86</sup>

### V.3 The Conflicts Law Alternative

What is wrong about all this? There is no space here to comment on the European wide discussion of this jurisprudence. The following remarks will be restricted to some aspects which illuminate the specifics of the conflicts law approach.

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<sup>86</sup> Case C-271/08, para.s 43-44. – In Case C-515/08 (note 83), the CJEU has handed down its judgment of the ECJ on 7 October 2010, confirming therein that “overriding reasons relating to the public interest capable of justifying a restriction on the freedom to provide services include the protection of workers” and “recognised that the Member States have the power to verify compliance with the national and European Union provisions” (para.s 47-48) without mentioning the TFEU and the Charter. In their proportionality analysis of the Belgian legislation the AG and the ECJ concurred.

### V.3.1 Sweden's Social Democratic *Sonderweg*

The *Laval* case is about the conflict between service providers and worker from Eastern Europe and the protection of Workers provided by Western democracies. The case has a broader significance. It illustrates It is illustrative aspects of a “Swedish *Sonderweg*”: the legal status and social function of *kollektivavtalssystemet* which the Swedish legislature did not want to (dare to?) touch when implementing the Posted Workers Directive.<sup>87</sup> By now the “Swedish model” is politically contested, and not only under pressure exerted by some “kleptomaniac competence extension” of the ECJ. In a conflicts law language, Sweden has to become aware of the tensions between its *Sonderweg* and its European commitments. The Union and its highest Court must defend these commitments which are, at the same time, Community entitlements – and also be aware of the instrumentalisation of European law and court proceedings in internal Swedish power battles<sup>88</sup> – the *Laval* case was, after all, initiated and financed in Sweden.<sup>89</sup> This is an instructive explanation of the background and the implication of *Laval*. It is also, at the same time, an instructive illustration of the conflict patterns which the Europeanisation process generates. This observation confirms the assertion that European law “is” conflicts law. But is *Laval* “good conflicts law”? The constellation is structurally not so different from *Cassis de Dijon*,<sup>90</sup> but much more dramatic. The message of the conflicts-law approach is seemingly abstract: the law should civilise the contest over divergent policies and interests without assuming the mandate to streamline Europe’s diversity.

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<sup>87</sup> Mindus, “Theorizing Conflicts and Politicisation in the EU”, ms. Turin 2009 (on file with the author).

<sup>88</sup> Mindus, text accompanying note 35 *et seq.*

<sup>89</sup> Battle is going on in Swedish politics, legislation and jurisprudence. In a judgment of Judgment of 2 Dec. 2009 of the Swedish *Arbetsdomstolen* which imposed “exemplary damages” on the trade unions, which had taken action against *Laval*. See the annotation by Reich, “Laval ‘Vierter Akt’”, (2010) 21 *Europäische Zeitschrift für Wirtschaftsrecht*, 21-22.

<sup>90</sup> See Section V.1 *supra*.

### V.3.2 Conflicts Law's Prudence

“Judicial restraint” v. “judicial activism” is a misleading dichotomy here, and does not at all exhaust the potential of the traditions on which the conflicts-law approach builds.

Antoine Lyon-Caen has, without resorting to conflict of law or private international law terminology recalled one core message:

“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.”<sup>91</sup>

There is a categorical difference between economic law and labour law, Lyon-Caen argues. This is precisely the message of the disciplinary tradition the conflicts-law approach seeks to recall. The most basic notion of this discipline “characterisation”,<sup>92</sup> Ernst Rabel explained in his seminal essay. And he added that the operation called “characterisation” has to take the views of the forum and the concerned jurisdictions seriously. At stake here is the discrepancy between economic freedoms and collective labour law. Their

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<sup>91</sup> “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 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](http://www.bmas.de/portal/27028/2008_07_16_symposium_eugh_lyon-caen.html).

<sup>92</sup> Rabel, “Das Problem der Qualifikation”, (1931) 5 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 241-288.



categorical difference is not written in stone but deeply rooted, albeit in a variety of forms, in the history of industrial and democratised societies.<sup>93</sup>

The European law parallel is the principle of enumerated competences. Awareness of this parallel is no longer widespread among European law scholars. This is unfortunate because the sensitivity of the elder discipline for the specifics of legal fields although provides some guidance in the interpretation of such opaque provisions as Article 137 (5) EC (now 153 (5) TFEU).<sup>94</sup>

The prudence suggested by conflicts law should not be read as a “solution” to the conflict constellation the CJEU was confronted with. What conflicts *law* suggests, however, is *not* to use European law as an *Ersatz* and compensation of Europe’s political failures.<sup>95</sup> As long as political processes do not deliver orientation, the law should respect the variety in Europe’s social models and content itself with their co-ordination. It seems perfectly justified to further the efforts of the new Member States to exploit their competitive advantages. It is by no means plausible, however, that “direct wage competition” between workers from socio-economically very different jurisdictions would signal and achieve solidarity and further both the prosperity within, and distributional justice among, Europe’s diverse regions. It may well be that, through the opening of the Western Markets for cheap labour, we foreclose the chances for accession states to build up their own social models. Should we really assume that the Swedish employer organisations seek to give a hand to the development of Estonia by the kind of strategies they pursued with Laval and the financing of the lengthy litigation in that case? European

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<sup>93</sup> Dukes, “Hugo Sinzheimer and the Constitutional Function of Labour Law”, in Davidov and Langilde (Eds.), *The Idea of labour Law*, (Oxford UP, 2011), pp 57-68.

<sup>94</sup> See von Bogdandy and Bast, “The Federal Order of Competences”, in *idem*, *Principles* (note 33), pp 275-307, at 294, note 144.

<sup>95</sup> See, for a systematic elaboration, Everson and Joerges, Reconfiguring the Politics–Law Relationship in the Integration Project through Conflicts–Law Constitutionalism. (2012) *European Law Journal* 18 , 644–666.

law should know more about the social price to be paid for the bringing of cheap labour to Old Europe before engaging in the flattening of Europe's diversity.

Again, "judicial restraint" v. "judicial activism" is not the proper frame for these queries. The type of prudence which the conflicts law approach requires is as at least as demanding, but not identical with, what we expect from the constitutional courts of consolidated nation states or federations in their supervision of legislation. To this issue, we will have to return.

## VI. The "Geology" of Contemporary Law, the Project of a Three-dimensional Conflicts Law with a Universalist Imprint and a Concluding remark

*"Unitas in pluralitate"*, the motto of the Constitutional Treaty, transposes the European ambitions and perspectives of the conflicts-law approach. Neither the significance of this motto, nor its translation into the language and proceduralising methodology of the conflicts-law approach are confined to Europe's postnational constellation. The need to cope with conflicting policies and to ensure the legitimacy of their "weight" and co-ordination is present at all levels of governance, in the international system as well as within constitutional democracies. At all levels, this *problématique* has provoked a turn to "proceduralisation", and fostered the insight that legal decision-making cannot be deductive, but must be constructive and must derive its legitimacy from the quality of the procedures guiding its decision-making processes. The identification of this *problématique* at all levels of governance and in the "diagonal conflicts constellations" between them, which multi-level constellations generate, is just one message of the conflicts-law

approach, which these concluding remarks wish to underline. Equally important is a second message which requires a three-dimensional differentiation of the conflicts-law approach. The title of this section alludes to this second message. “Geology” is a term borrowed from Joseph Weiler, who introduced it to explain transformations of international law of paradigmatic importance.<sup>96</sup> “International law as Regulation” is a notion which he contrasts with “international law as Transaction” and “international law as Community”. It represents “a new mode of international law, specific in its normativity and legitimacy”. This latter insight corresponds to the grand debates on the new functions and normative qualities of the law of post-*laissez faire* welfare states, which dominated the agenda of the pre- and post-1968 generations.

### **VI.1. Post-interventionist Law and the Turn to Regulation and Governance**

These two generations witnessed, or participated in, two big waves of theorising. The first wave was preoccupied with the social deficits and methodological flaws of “legal formalism”; the replacement of formalism by substantive rationality criteria was the slogan of the day.<sup>97</sup> “Law as regulation” was not the then prevailing terminology; substantive rationality was to be carried into law through “interventionism”. As all this did not really work out, a second wave of theorising was initiated: substantive rationality was replaced by post-interventionist programming, in particular

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<sup>96</sup> Weiler, “The Geology of International Law – Governance, Democracy and Legitimacy”, (2004) 64 *Heidelberg Journal of International Law (ZaöRV)*, 547-562, at 552.

<sup>97</sup> See Joerges, “*Politische Rechtslehre* and Critical Legal Studies: Points of Contacts and Divergencies”, in: *idem* and Trubek (Eds), *Critical Legal Thought: An American-German Debate* (Nomos, 1989), pp. 597-643 at 611 *et seq.*, reprinted in (2011) 12 *German Law Journal*, 554-598.

through reflexive law and the quest for a proceduralisation of the category of law.<sup>98</sup>

These moves sought to come to grips with the law's assumption of, and involvement in, ever new tasks and problem-solving activities. The search for post-interventionist programming ("governance structures" is the now widely-used term) and legal methodologies sought – or should have sought – to reconcile the erosion of formerly "conditional" legal programmes with the legacy of the rule of law and the idea of law-mediated legitimacy of democratic rule. Nobody has characterised this new challenge as pointedly as Rudolf Wiethölter in one of his early essays: "Purposive programming" is the living law and legal *conditio sine qua non* (*Lebenselexier*) of modern democracies, he wrote back in 1973<sup>99</sup> and complemented this message in 1977 through the discovery of the affinities or structural analogies with conflict of laws.<sup>100</sup> In the meantime, he had already proclaimed the need for a "proceduralisation of the category of law".<sup>101</sup>

Practice, sociological research and theoretical reflections did not come to a standstill. We have, for many years now, accustomed ourselves to ever more sophisticated regulatory programming and we have, more recently, witnessed a turn to "governance", a notion encompassing a grand variety of widely-used co-operative arrangements between governmental and non-governmental actors. There is no space and no need to elaborate on all this here. The only observation to be underlined concerns the structural parallels

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<sup>98</sup> See also Brüggemeier and Joerges, "Workshop zu Konzepten des postinterventionistischen Rechts", Zentrum für Europäische Rechtspolitik, Materialien 4, Bremen 1984.

<sup>99</sup> See his *Rechtswissenschaft in Kritik und als Kritik*, (Mainz: Universitätschriften, 1973).

<sup>100</sup> Wiethölter, "Begriffs- oder Interessenjurisprudenz – Falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm", in: A. Lüderitz et al. (eds) *Festschrift für Gerhard Kegel*, (Metzner, 1977), pp. 213-263. Teubner, "Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter", in Perez and Teubner (Eds), *Paradoxes and Inconsistencies* (note 61), pp. 41-64; partisan positions are cited there in note 5.

<sup>101</sup> "Materialization and Proceduralization in Modern Law", in Teubner (Ed.), *Dilemmas of Law in the Welfare State*, (Walter de Gruyter, 1986), pp. 221-249.

in the national and the postnational constellations. The geology which Joseph Weiler has depicted in international law can be observed at all levels, even within constitutional law. Parallel structures generate similar challenges. Regulatory politics need to be institutionalised and governance arrangements established within the European Union and beyond its “borders”. The practical and challenges and normative problem that these developments pose, however, vary considerably.

## VI.2. The Need for a Three-dimensional Conflicts Law

Throughout the preceding sections, we have dealt with primary and secondary European law, on the one hand, and the legal systems of the Member States, on the other. The sociological background analytics, the normative premises of the doctrinal fabric of the conflicts approach can, quite plausibly, claim to capture the distinctiveness of the EU multi-level system and its vertical, horizontal and diagonal conflicts adequately. With regard to the latter, it should have become particularly apparent why the conflicts-law approach cannot be reduced to the choice of a particular legal order. However, European conflicts law is also distinct in the conceptualisation of “vertical” and “horizontal” conflicts. Its rules and principles are supranationally valid, and, in this respect, stronger than the legal regimes established by international law; equally unique is the degree to which European law has transformed the *comitas* among Member States into binding legal-commitments.<sup>102</sup> This conflicts-law system, however, is by no means comprehensive. The structural reasons have just been addressed: the

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<sup>102</sup> For a comparison with WTO law, see Howse and Nicolaidis, “Democracy without Sovereignty: The Global Vocation of Political Ethics”, in Broude and Shany (Eds.), *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity*, (Hart Publishing, 2008), 163-191.

transformations which have occurred at national level in the turn to regulation and governance are also under way in the EU and in the international system.

Regulatory politics in the European Union have led to the establishment of complex transnational non-legislative quasi-administrative regimes, which we have characterised as a *second dimension of conflicts law*. It responds to the irrefutable need to accompany the Europeanisation of the economy by transnational regulatory politics which must operate outside the administrative-law frameworks which nation states have at their disposal. These need have triggered the co-operation of national bureaucracies with networks of epistemic communities with the European Commission in the much criticised – but also much praised – comitology system, the establishment of ever more European agencies most of whom are without genuine decision-making powers. The conflicts-law approach seeks, here too, to defend the idea of the rule of law and law-mediated legitimacy. Its constitutional hopes and perspectives focus on the quality of transnational decisions-making and its anchoring in, and supervision by, democratically legitimated actors – hence, again, on a proceduralisation of law.<sup>103</sup>

The *third dimension of conflicts law* reacts to the “privatisation” of regulative tasks and the development of new “governance arrangements”, which can also be observed at national level, but which are, unsurprisingly, particularly important at transnational levels.<sup>104</sup> Any sharp differentiation between primarily administratively-anchored regulative forms with which the conflicts law of the second dimension is concerned from the primarily private regimes is not possible, because of the participation of expert communities

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<sup>103</sup> See for a systematic elaboration Weimer, “Democratic Legitimacy through European Conflicts-Law? The case of EU administrative governance of GMOs”, (PhD thesis EUI Florence, 2012).

<sup>104</sup> See Dilling, Herberg and Winter, *Responsible Business. Self-Governance and Law in Transnational Economic Transactions*, (Hart Publishing, 2008).

and societal actors in both of them. What the law needs to be concerned about, is the regulative function which both types exercise, and what it has to consider is its potential to ensure their legitimacy. The conflicts law approach in its third dimension does therefore not qualify these regimes without further ado as transnational “law”. Instead, it seeks to develop and promote the impact of normative yardsticks for their recognition by democratic legal orders; it furthermore builds upon the law’s shadow, particularly the interests of non-statal orders in external recognition and their ensuing readiness to subject themselves to a stringent procedural discipline.<sup>105</sup>

### VI.3 Concluding Remark

The re-conceptualisation of European law as a new type of conflicts law was designed as an exercise in critical theory with normative perspectives which could, in many ways, build upon the evolutionary steps in the integration process, on institutional innovations, on the ingenuity of so many committed actors, and their readiness and potential to cope with Europe’s complex conflict constellations. The preceding sections even suggest that this approach can be usefully applied beyond the confines of the European Union, that it has so-to-speak a universal imprint.<sup>106</sup> When contrasted with the state of the international system and globalisation process the European project could thanks to its many accomplishments be understood as model which the rest of the world should seek to follow.<sup>107</sup> Under the impact of the present crisis

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<sup>105</sup> Thus is the conclusion of the extensive inquiries of Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, (Hart Publishing, 2005), p. 223.

<sup>106</sup> See Joerges, Conflicts-law constitutionalism:ambitions and problems, in Hilpold, Lavranos, Schneider, Ziegler (Eds.), *Liber Amicorum Ernst-Ulrich Petersmann*, (forthcoming with Brill, 2013) and earlier Rödl, “Democratic Juridification Without Statisation: Law of Conflict of Laws Instead of a World State”, in Joerges, Kjaer and Ralli (Eds), note 53 above, 193-214.

<sup>107</sup> The most prominent advocate of that vision is certainly Jürgen Habermas who continues to defend it even where he characterises Europe as a “faltering project”, see his “Does the

this type of European self-confidence seems no longer warranted without further ado. To be sure, Europe's crisis management builds in many ways on its established institutions and signals an unprecedented density of political interaction and economic interdependence. By the same token, however, Europe's resort to a new "*Ersatzunionsrecht*",<sup>108</sup> the austerity measures which are imposed in particular on the southern periphery and the still very questionable prospects of all these endeavours are anything but attractive models for the rest of the world.

How do all these observations affect the conflicts-law project? They certainly confirm its sociological realism. Europe is exposed to evermore complex and precarious conflict constellations rather than developing into an ever more successful and harmonious union. There is also no reason to denounce its main normative messages, the dedication to 'unity in diversity', the rejection of the orthodox 'one-size-fits-all' philosophy, and the quest for a re-configuration of the politics-law relationship which creates new space for political processes. What has become questionable, however, is the claim of conflicts-law-constitutionalism to represent a reconstructive exercise and not merely critical project. In the present state of the Union, the critical function prevails – not for too long, hopefully.

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Constitutionalization of International Law Still Have a Chance?" in *idem, Europe: the Faltering Project* (Polity Press, 2009) pp. 109-130, and *idem, "The Crisis of the European Union in the Light of a Constitutionalization of International Law"*, (2012) 23 *European Journal of International Law*, 335-348.

<sup>108</sup> The term has been coined by a German lawyer and was cited in the recent ESM decision of the German Constitutional Court from 12 September 2012, see BVerfG, 2 BvR1390/12, para. 226.



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European Institute  
London School of Economics  
Houghton Street  
WC2A 2AE London  
Email: [euroinst.LEQS@lse.ac.uk](mailto:euroinst.LEQS@lse.ac.uk)

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