Law, Democracy and Solidarity in a Post-national Union

The unsettled political order of Europe

Edited by

Erik Oddvar Eriksen, Christian Joerges and Florian Rödl

Routledge Series on Democratising Europe

Law, Democracy and Solidarity in a Post-national Union

To many, the rejections of the Constitutional Treaty by Dutch and French voters in 2005 came as a shock. However, given the many tensions and the many unresolved issues it was quite unsurprising. The challenges facing the Constitutional debate go to the core of the European integration process as they have to do with the terms on which to establish a post-national political order.

This book deals with four themes which make up the main sources of the 'constitutional crisis':

- The problem of the rule of law in a context of governance beyond the nation state
- The problem of the social deficit of the Union
- The problem of identity and collective memories
- The problem of institutionalizing post-national democracy.

These themes constitute the unfinished agenda of the European integration process. *Law, Democracy and Solidarity in a Post-national Union* is based on the efforts of a collection of top scholars in the fields of Law, Political Science, Sociology and Economics, and will appeal in particular to students and scholars interested in European integration.

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On 22–24 September 2005, the CIDEL consortium held its concluding conference 'Law and Democracy in Europe's Post-national Constellation'. The conference was hosted by the European University Institute (EUI) in Florence. This book is based on the proceedings of the conference, where analyses of the European polity as a rights-based post-national union, which has informed the work in CIDEL, were complemented by reflections on 'Europe's unfinished agenda'. This turned out to be a thought-provoking and rewarding combination – as the reader of this book will realize. We would like to thank all the participants for the vibrant discussions in Florence, as well as the staff at EUI; especially Marlies Becker at the Law Department and Monique Cavallari and Laura Jurisevic at the Robert Schuman Centre, for organizing such a great event in the wonderful surroundings at Villa Schifanoia.

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Erik Oddvar Eriksen, Christian Joerges and Florian Rödl
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1 Introduction

Europe's unsettled political order

Erik Oddvar Eriksen, Christian Joerges and Florian Rödl

Introduction

This book comprises contributions to the concluding conference of the large-scale, multidisciplinary project 'Citizenship and Democratic Legitimacy in the European Union' (CIDEL). The project was supported by the European Commission under its Fifth Framework Programme and lasted for three years – 2002–2005. From its inception in November 2002 onwards, the programme engaged nine partners from six European countries, and it was co-ordinated by ARENA at the University of Oslo.[1]

CIDEL asked whether the developments at the European level speak to the European Union (EU) as *a problem-solving entity* based upon the idea of a single market, whether they speak to the Union as a *value-based community* premised on a sense of Europeanness, or whether they speak to the notion of the EU as a *rights-based post-national union* founded on fully-fledged political citizenship. Three models of the Euro-polity were developed and assessed during the project period. CIDEL assumed that the third model was the most viable in empirical and normative terms. It took stock of the EU as a rights-based post-national union and examined how far it had proceeded along this developmental path. Studies of the reform processes of the Union, as well as studies of different policy fields and enlargement, documented increased salience of this model in the ongoing process of deepening and widening European integration. In particular, the constitutionalization process of the Union gave credence to the last model.

A rights-based Union, which entails the ideas of democracy, rule of law, solidarity and identity in order to come to full fruition requires: the further delineation of a set of civil and political rights that permit Europeans to conceive of themselves as constitutional actors; an ongoing commitment to those legal and political institutional reforms that are conducive to the furtherance of post-national constitutional patriotism, including representative and accountable institutions; extensive constitutional deliberation; and the explicit recognition that the legitimacy of the EU is founded on a constitutional structure that appeals to fundamental principles of justice.[2]

The concluding conference of CIDEL was planned many months before

anybody could know that the project of a constitution for Europe would lead the EU into a veritable crisis. In hindsight, it turned out wise to conceptualize an agenda whose topicality would not depend on a smooth ratification of the Constitutional Treaty. We could not in our planning foresee the referenda in France and the Netherlands. We were, however, aware that major tensions in the process of European integration would remain unresolved on the European agenda. The pivotal question, on which the integration process increasingly hinges, is whether democracy really can be disassociated from its putative nation state foundation. Further, what are the requirements with regard to collective identity and social regulation for a supranational system of democratic rule to be stable? Lastly, is the system of transnational governance established at the European level compatible with Europe's commitment to the rule of law?

These challenges, we maintain, constitute *the unfinished agenda* of the European integration process, and they call for further research on the basic conditions for democracy and rule of law, for solidarity and identity in the multilevel configuration that makes up the EU. They form the background for identifying the following four interdependent themes which we take to be of utmost importance for the sustainability of the European political order:

- The problem of the *rule of law* in a context of governance beyond the nation state;
- The problem of the *social deficit* of the Union;
- The problem of *identity and collective memories*;
- The problem of institutionalizing *post-national democracy*.

These issues have all, to different degrees, been covered by the CIDEL research work.

In this introduction, we first of all outline briefly our understanding of these items and their underlying tensions. Subsequently, we provide the readers with a brief introduction to the various contributions of the book. But before doing so, we would like to substantiate our questions with a look to Europe's recent constitutional crisis.

The pre-2004 European Union: a success story

To many, the rejection of the Constitutional Treaty by France and the Netherlands in 2005 came as a shock. However, the misgivings that the French and the Dutch voters expressed should not be read as an outright rejection of the integration project. This project is very deeply rooted, and the fact that it has resulted in important achievements has not been called into question. Citing Timothy G. Ash[3] we underline just three of the more important ones:

1 'For centuries, Europe was a theatre of war. Now it is a theatre of peace.' It has become inconceivable that conflicts between today's Member States will be resolved by the exercise of military power. For the EU, it seems true

that the interdependencies induced by mutual trade create incentives for peaceful cooperation instead of military confrontation, as Kant had envisaged long ago.[4]

2 Equally dramatic: 'Italy's president, Giorgio Napolitano, has a vivid recollection of Mussolini's fascist regime. The president of the European Commission, José Manuel Barroso, grew up under Salazar's dictatorship in Portugal. The EU's foreign policy chief, Javier Solana, remembers dodging General Franco's police. Eleven of the 27 heads of government [participating in the European Council in June 2007], including the German chancellor Angela Merkel, were subjects of communist dictatorships less than 20 years ago.'

3 One of the prerequisites for the establishment of a sustainable peaceful European order was the continuous effort towards the establishment of a common market and the completion of the internal market following the legendary initiatives of the Delors Commission in the 1980s. To cite Ash once more: 'Most Europeans are better off than their parents, and much better off than their grandparents.' And he substantiates his praise of Europe's prosperity by a concern which this volume takes very seriously: 'The most characteristic value of today's Europe [is the belief] that economic growth should be seasoned with social justice, free enterprise balanced by social security.'

European economic integration was further deepened with the adoption of the Maastricht Treaty in 1992. This treaty has Europeanized monetary policy, the second of the four core instruments of national macro-economic steering (foreign trade policy was the first). And with the same move in Maastricht, national fiscal policy has also been submitted to European supervision by the Growth and Stability Pact. Only the fourth macro-economic instrument, labour market policies, which also represents a core social concern, has been left to the full discretion of the Member States. It is because this decoupling of economic and social policies creates serious tensions, that the *social deficit* merits the inclusion on Europe's 'unfinished agenda'.

With the adoption of the Maastricht Treaty, even more 'spill-overs'[5] from market integration have materialized in European Primary Law. These include the attempts to institutionalize a Common Foreign and Security Policy, symbolized by a High Representative, and the commitment to deepen cooperation in the field of justice and home affairs, including immigration and asylum policies, and developing the Union into an 'area of freedom, security and justice'.

Apparently, the EU has moved beyond a mere free-trade area – albeit a deeply integrated one – in which the European level merely has to provide and supervise the rules necessary for market building (i.e. rules guaranteeing accessible and competitive markets and rules coping with different regulatory standards for products and services). Thus, the question of precisely what sort of collective enterprise the Union really is, has become more and more pressing. With the integration process reaching into the realms of 'high politics', the

Union seems more and more in need of an overarching conceptualization of its foundation, its mission or vision – its *finalité.* The formalization of 'Union citizenship' in the Maastricht Treaty (Article 17) and, more visibly, the solemn declaration of the Charter of Fundamental Rights of the EU in 2000, served as harbingers of a new self-understanding, signalling the emergence of a new kind of polity which is to be legitimized by individual rights and democratic procedures of decision-making.[6] By the turn of the century, the time started to seem ripe for the project to formally constitute (and constitutionalize) the EU as a polity.[7]

How big a loss? The 'Treaty establishing a constitution for Europe'

The European Council's Laeken Declaration[8] had called for a European Convention. Its mandate pointed to a constitutional text only as a long term option. Nevertheless, the project was very quickly understood by its participants and observers as the chance to create a 'Constitution for Europe' set to crown 50 years of European integration.

To be sure, the EU already has a constitution in a material, legal sense.[9] This 'material constitution' has been established with an explicit constitutional reading of the founding treaties of the European Community by the European Court of Justice (ECJ) in the 1960s,[10] which over time has been accepted by the Member States and their constitutional courts. The 'Treaty establishing a constitution for Europe', which the European Convention elaborated, has to be read against this background. One of the new Treaty's major objectives was to *highlight the constitutional character* which the Union had already achieved and to strengthen it at the same time.

The second, truly ambitious and particularly important objective was to reduce Europe's democratic deficit. The Constitutional Treaty was, to paraphrase Jürgen Habermas, to provide the Union with a 'belated legitimization'.[11] It was meant to 'cure' a political order marked by an inadequate entrenchment of citizens' rights, an inadequate separation of legislative and executive powers, the lack of a European public sphere and of European-wide political parties, etc.

This far-reaching objective was, however, not compatible with Europe's *Realpolitik*. The mandate of highlighting and strengthening the Union's constitutional accomplishments worked as a constraint.[12] At first sight this may appear paradoxical, but it can be easily explained: the existing Treaties entail substantially complex and politically sensitive 'constitutional compromises',[13] which have emerged incrementally over more than 40 years, and which the Council was not prepared to set at the disposal of a convention. What can be so plausibly explained remains a European dilemma. The defence of Europe's constitutional accomplishments foreclosed the path towards a 'belated legitimization' by a substantial autonomous *pouvoir constituant*. The convention did not have a popular mandate, although the people(s) of Europe were represented, albeit only provisionally, by the national and European parliamentarians, who took part in

the deliberations within the European Convention, whose final document also had to be approved either through parliamentary votes or through referenda. In other words, the only option to square the circle seemed to be to present the new constitution as a sort of fait accompli: the essence of the existing treaties, complemented with conventional achievements with regard to unity, procedural transparency and individual rights. Did this outcome 'deserve recognition'? One has to take into account that the European Convention had chosen to keep the divergences from the European *constitutional acquis* as limited as possible by committing itself to 'broad consensus' as the rule of decision-making. This was buttressed by the often opaque working method of the Convention's Presidium and, towards the end of the process, the dominance of the representatives of national governments.[14] However, many hoped that the participatory and deliberative process of constitution-making, on the one hand, and the ostensible improvements in terms of individual rights (incorporation of the Charter of Fundamental Rights) and other areas of apparent normative weight, such as values and democratic proceedings,[15] on the other, would suffice for the national constituencies to raise their hands in favour of the constitution – a consent which would legitimate *both* the process *and* the state of European integration achieved to date.

Europe's constitutional crisis

It seems quite understandable that the members of the Convention, and those who observed its deliberations closely and understood the European *problématique* well enough, nurtured such hopes. It is, however, unsurprising that the public at large did not follow suit. When the 'Treaty establishing a constitution for Europe' was released in the public arenas, many took the promise of a constitution and its legitimizing messages literally and very seriously. The dynamics which the historically and politically laden concept of a constitution initiated had been severely under-estimated by its proponents. This discrepancy became very visible in the heated debates on the Constitutional Treaty in France. The normative yardstick, against which the project was judged in the political process, was the revolutionary French constitutional legacy.[16] Constitutionalization within a system made up of already constituted entities may not be easy.

The French '*non*' and the Dutch '*nee*' have troubled Europe considerably. The possibility that some Member States might fail to ratify the Constitutional Treaty had, of course, been taken into account in public debates. But the implications of such an event had been downplayed. The Presidency of the Convention went so far as to predict that, if a Member State voted 'no', the others would move forward, leaving the 'no'-state behind.[17] This position was legally indefensible[18] and politically naive, and this became apparent after a while. The German Presidency, on which so many hopes rested, has finally seemingly solved the acute crisis simply by avoiding the use of the term 'constitution' in the 'Declaration on the Occasion of the 50th Anniversary of the Signature of the Treaties of Rome' ('*Berliner Erklärung*') of 25 March 2007.[19] The C-word was

again deliberately avoided in the Presidency Conclusions of the Brussels European Council of 21/22 June 2007.[20] These conclusions have by now led to a 'Reform Treaty' which was signed by the heads of state and government in Lisbon in December 2007.[21] Will we in the end be confronted with a 'constitution in all but name'? Or is all this the least significant among the many treaty amendments Europe has witnessed thus far?[22] And does the process represent a complete retreat from the idea of democratic constitution making, merely a pragmatic way out of the current impasses? It seems again wise not to speculate on these questions, but to focus instead upon issues which are bound to remain on the European agenda.

Europe's unfinished agenda

As indicated, it is our view that, underlying the constitutional crisis, there are major tensions within the process of European integration, which have not been, and indeed could not be, solved by the European Convention. These tensions are linked to the prerequisites of a Euro-polity, which in the CIDEL terminology is a post-national rights-based union. Our view was then, and still is today, that this vision entails a set of conditions that are far from being met by today's EU.

The idea of a post-national rights-based union borrows central normative features from the constitutional–democratic model of the nation state, i.e. the ideas of rule of law, solidarity, democracy and identity. It is evident that the articulation of these ideas cannot be the same for a rights-based union as they are for the nation state. Nonetheless, the decisive open question appears to be how they are to be articulated in the alternative Union scenario. How can we understand the ideas of rule of law, solidarity, democracy and identity in and for a supranational entity? It was the conference's underlying hypothesis that a constitutional coronation of the EU, which merits its name in so far as it would really have turned the Union into a post-national rights-based polity, would remain beyond reach as long as these questions remained unanswered.

Rule of law

Europe's commitment to the rule of law at all levels of governance is uncontested in theory – but not so easy to realize in practice. Where we find definite procedural rules about how the law is to be generated, where coercive power is legally bound, where individual rights are protected by legal norms and independent courts adjudicate the resulting rights, the rule of law can be said to prevail. The rule of law is, however, democratic only when those subject to it can interpret themselves as the very authors of the law. Hence, the challenge to the idea of the rule of law in the Union is not the establishment of a supranational level as such. The problem is more of how to render the rule of law legitimate and effective today. The regulation of globalized markets has become a matter for transnational governance-arrangements, instead of national or supranational government, even in Europe. Hierarchical government is increasingly

supplanted by *networks*, epistemic communities and other arrangements. The EU itself has, more recently, in both political and legal science been characterized as a *system of multilevel and multi-centric governance*. Legislation and implementation is 'managed' by networks and partnerships between public and private actors in transnational structures.[23] The exercise of authority is no longer exclusively governmental. The generation of norms via practices of governance is seen as the result of a spontaneous co-ordination process. Governance is a method of dealing with political controversies on the basis of 'soft law'. It refers to a policy process which proceeds according to a codified practice of benchmarking, target-setting and peer review. Thus, the conceptual challenge regarding supranational articulation of the rule of law is how these omni-present practices of transnational governance can be reconciled with an idea of a persistent rule of law.

Solidarity

At the national level, solidarity is enshrined within the complex norms and institutions of the modern welfare state. Political scientists and sociologists have, for a long time, stressed that modern welfare states are highly complex and highly integrated arrangements.[24] The sheer complexity of the welfare systems which Europe's *Sozialstaaten* have developed since the late nineteenth century renders the establishment of supranational solidarity in terms of a supranational welfare state illusory. A second problem with the idea of a supranational welfare state is the fact that the adaptability of a given national welfare system to the pressures of globalized markets has turned out to be an important competitive factor on the world market. Any plan to establish supranational welfare institutions would, therefore, deprive some of the Member States of their competitive advantages and challenge the socio-economic hierarchies within the Union.[25] For this reason, it will always be hard – if not impossible – to achieve consent for such a project.[26] However, at the same time, it is widely held that, due to globalization and de-nationalization, there is a hollowing out of the autonomy of the nation state, i.e. a declining capacity to carry out redistributive policies. Many think that solidarity cannot be preserved at the national level, and therefore has to be re-established at supranational level.[27] The social deficit also figured prominently on the no-side of the French debate on the Constitutional Treaty. In the upshot, the idea of supranational solidarity not only represents a conceptual challenge, but also a practical dilemma: supranational market integration calls for supranational welfare institutions, but their establishment is quite unlikely given the conditions of intensive international economic competition, which is also a result of supranational market integration.

Democracy

According to the credo of democracy, all subjected to the law should have an equal say over its generation, or to be more precise, law should have no other

source than the common will of those who are subjected to it. The conceptual problem for supranational democracy is to determine who is the subject of the democratic principle in a supranational entity. Is it the states or is it the citizens? Both positions are still heavily defended in the case of the EU. There are voices which defend the unanimity rule in the Council, or at least oppose any development towards something akin to rule by a majority of European citizens.[28] On the other hand, there are voices which call for European referenda to be subjected to a slightly qualified majority rule.[29] There is also a third camp which suggests that this dichotomist question need not be answered in abstracto if Europe committed itself to a federal version of the democratic principle.[30] However, although the latter formula might point in the right direction, the underlying problem remains unsolved: What, in a supranational context, is the relationship between the two potential instantiations of the principle of democratic equality, i.e. equality of citizens and equality of states (which all federal systems seek to combine)? And, even more puzzling, who is democratically authorized to articulate this relation?

Identity

To many scholars, it is clear that national identity is shaped by a shared culture, a shared history and heritage, including, in many cases, also a shared religion; in short, a collective conscience based on primordial values, which has emerged over the centuries. Such an idea of a substantive collective identity cannot, evidently, be expected to develop at the supranational level. Notwithstanding this, a supranational union would seem to be in need of an idea of its own identity, given that it should not conceive of itself as a global polity in the making.[31] Thus, the conceptual challenge of the idea of identity is to understand the idea of a supranational identity which is not just wishful thinking, and does not repeat the harmful exclusionary effects of national identities. Maybe something less than a 'thick identity' is required, i.e. something more akin to a shared common understanding.[32] 'Constitutional patriotism', a concept brought into play against strong ideas of substantive national identities, might provide a fruitful starting point.[33] It relies on a particular form of national institutionalization of rights and democracy in a cultural–ethical context.[34] However, as the concept of 'constitutional patriotism' is territorially unrestrained, it lacks the element of particularity, which, on logical grounds, is necessary to draw borders. In contrast to this, European integration testifies to a collective learning process which stems from two world wars, devastating economic crises, the Holocaust, and major social achievements. 'Re-united after bitter experiences', as it reads in the preamble of the Constitutional Treaty, the integration process, as a whole, has led to a new sensitivity to difference and to the decentring of perspectives. A conflict-ridden continent has managed to cope with difference through the institutionalization of peaceful mechanisms of conflict resolution. This might represent a valuable basis for a new understanding of Europe's particular post-national identity.

The contributions to this volume

Following this outline of unsettled issues with regard to the vision of a post-national rights-based union, the book is divided into four sections: (1) Rule of Law in a Context of Governance; (2) The Social Deficit of the Union; (3) Identity and Collective Memories, and; (4) Post-national Democracy in Europe.

Rule of law in a context of governance

With the focus on the European 'turn to governance', the concluding conference of the CIDEL project returned to a theme addressed in the project's initial phase, with regard to the problem-solving model of the Union.[35] The debate on the practices of governance in the EU is as lively as it was three years ago, and is likely to remain so for the foreseeable future. The contribution by Poul Kjaer (Chapter 2) differs significantly from the 3,345 entrants listed in the CONNEX bibliography on governance.[36] Kjaer takes the law seriously, but he also looks at European governance from the perspective of social theory, in so far as he seeks to uncover the concepts of power upon which present-day theories of governance are based. Furthermore, he contrasts the turn to governance with Giandomenico Majone's conceptualization of Europe as a 'regulatory state', the theory of deliberative supranationalism developed by Christian Joerges and Jürgen Neyer, as well as the theory of direct deliberative polyarchy associated with Joshua Cohen, Charles Sabel, Jonathan Zeitlin and others. Last but not least, Kjaer offers a perspective on the constitutional importance of the new European praxis of governance, in which he responds to the concerns of lawyers about the future of the rule of law in the European polity.

While the democratic challenge is left untouched in Chapter 2, this is the core concern of Rainer Nickel's contribution on constitutional legitimacy (Chapter 3). Kjaer underlines the discrepancy between governance practices and Weberian notions of administration. Nickel acknowledges this distinction, but adds that the 'turn to governance' and the 'new modes of governance' do, nevertheless, amount to an empowerment of the executive branch. Just like Kjaer, he assumes that this development is irreversible. The normative vision that he pursues is, however, quite distinct. Nickel's hopes, in ensuring the accountability of the integrating or integrated national administrations, rest upon participatory mechanisms, such as the involvement of civil society, stakeholders and the public. The break with the traditional 'transmission belt' models of administrative action is radical, but can point to the possible remedial effect of a 'participatory democracy' in Article 47 of the Constitutional Treaty and to the European Commission's 2001 White Paper on Governance, in which 'participation' figured prominently among the principles which constitute 'good governance'.[37] However, this is clearly in opposition to the democratic ideal of self-legislating citizens who autonomously govern themselves through the media of law and politics.

In all the attempts to reconstruct Europe's legendary 'integration through law', the ECJ is presented as the noble hero that prudently and patiently

managed to transform the European Treaty into a quasi-federal order.[38] The formative phase in which this happened is long passé. However, the Court has remained a key actor, and the EU may now be more dependent upon the judicial function than ever. However, the tasks of the Court have become much more complex in a steadily deepening and widening Community. Indeed, probably the most intricate challenges that the Court is exposed to stem from Europe's turn to governance. Can one defend the rule of law and build upon the law-mediated legitimacy once the political processes and decision-making start to substitute the 'old Community Method' by flexible and fluid 'new modes of governance'? Paradoxically enough, the ECJ is not only confronted with de-formalization and de-juridification processes, but also with growing '*Normenflut*', which tends to overburden the judicial machinery to an unmanageable degree. The Court is expected to perform the task of Sisyphus with Herculean strength: to act as a Constitutional Court, to supervise all the specialized national High Courts, and to cope with issues in any legal field. 'Judicial Governance', this secret emperor of the integration process, may be in troubled waters. Michelle Everson and Julia Eisner's contribution (Chapter 4) addresses the changing functions of the European judiciary in general, while Christoph Schmid (Chapter 5) analyses its performance as a *Fachgericht* in the realm of private law. The former analysis contrasts theoretical constitutional discourses with the self-perception of the judicial actors, while the latter focuses on the balancing of the constitutional and substantive supervisory functions that the Court has to accomplish. Thus, the guiding questions, theoretical frameworks and methodologies of the two contributions differ considerably. Their observations and findings are, however, quite similar, and are, at any rate, complementary. What the ECJ has to accomplish amounts to a 'rebuilding of the ship at sea'.[39] But can this be done? Somewhat unsurprisingly, Everson and Eisner's account is more optimistic than Schmid's: 'Europe's law can contribute to processes of democratic, and, in particular, deliberative democratic experimentalism without being drawn into brute politics'.[40]

This is not so surprising because it is here that the Court can build upon its successes in less complex, but similarly demanding, constellations. In the realm of private law, however, the tensions which the steadily growing patchwork of European private law has produced are of a different kind:

> Whereas every decision in European constitutional law may reinforce the overall system and 'weave its patches ever tighter', this potential is barely existent in private law. Its division into the European and national sources which make up a multi-level regime, coherence problems within European sources, as well as in the interplay between European and national sources, render the gradual formation of a system and, consequently, the emergence of a system-oriented adjudication, hardly possible.[41]

The social deficit of the union

A pressing issue on Europe's unfinished agenda is certainly 'social Europe'.[42] Still, the topicality that it gained and the emotions that it provoked during the French referendum, came as a surprise. There can be little doubt that the French vote to a considerable degree was determined by both the portrayal of the EU as a piece of neo-liberal de-regulation machinery, and the anxiety induced by the perceived dismantling of the French welfare state. Many political commentators and academic observers adhere to this view, and the opinion polls confirm their point.[43] One of the main targets of the critics in the intense debate in France, was the so-called 'Bolkestein Directive on freedom of services'.[44] It had been designed under firmly established treaty law, and one can, in hindsight, add that what finally happened looked like a mountain giving birth to a molehill.[45] It is, however true that the Convention leaders had underestimated the importance that the 'European Social Model' held in the eyes of European citizens.

The three contributions on this topic come from different disciplines and angles. Their analyses and messages reflect these differences. But they complement each other with synergetic effects. Waltraud Schelkle's summary of the state of the art in political economy (Chapter 6) starts with a pessimistic note: the 'European social model' is 'never referred to as something that has a future'. This message entails a twofold argument. First, it is inconceivable that European welfare state systems can converge into one common model – here Schelkle builds on many pertinent analyses.[46] Second, one must not assume that the 'Open Method of Co-ordination' (OMC), as launched by the Lisbon Council, will make a significant impact on the actions of national governments. One should therefore not conceive of the OMC as the European response to the concerns and anxieties present in the Member States about the erosion of their welfare systems. What she sees emerging instead is 'productivist-specific problem-solving consensus' alluding to the EU as a problem-solving entity, which would presuppose an institutional uniformity of labour market arrangements. This is a perspective which implies that 'social Europe' cannot rely upon any of the welfare state models that it has already experimented with.

Neither the economist Waltraud Schelkle, nor the lawyers, can pose, let alone answer, the same questions. But they can – through their particular conceptual lenses – address the same problem and deliver complementary analyses. Alexander Graser's contribution (Chapter 7) deals with the 'juridification' of welfare through 'social law' ('*Sozialrecht*') by asking what seems, at first sight, to be a provocative question: Are we trying to make merry of the moribund? A further steady growth of social law is inconceivable. Nevertheless, is not the integration project to which the majority of the citizens of two Member States have recently expressed their discontent likely to cure the patient? However, there are two patients to cure, and there is no medicine available yet. This diagnosis and this message are quite close to Schelkle's. But it does not imply a standstill. Graser considers a broad variety of options which law can continuously try out, and discusses their possible effects and institutional implications. In areas which do not

require financial investments by the policy-makers, for example anti-discrimination legislation, Europe can act as an instigator; in other areas, partial centralization is an option; at times, state social policies deserve to be shielded against Europeanization, while in other situations, the efficiency enhancing potential of market mechanisms can be socially beneficial. It may seem unlikely, but it is not entirely inconceivable that this pragmatic experimentalism will ensure some form of compatibility between open markets and solidarity, and thereby represent a possible cure for Europe's social deficit.

Social law and labour law, which are both core areas of welfare states, in many respects follow similar patterns. But the core institution of labour law remains distinct. Labour law institutionalizes the power of the social partners in order to determine their relations both collectively and autonomously. Is it at all conceivable that this core institution of industrial relations ('*Arbeitsverfassung*') will survive European integration? Florian Rödl's analysis (Chapter 8) is not concerned with the likelihood of institutional survival, but with the conceivability of a Europeanized labour constitution. His conceptual suggestion is congenial to both Schelkle's and Graser's arguments in that he rejects both the defence of national traditions and their replacement by a uniform body of supranational labour law. It would be neither possible nor desirable to reverse the opening of the national economies and societies and to suppress rivalry and competition. Regulatory competition, however, is not a sustainable perspective because it tends – in the long run – to erode the social embeddedness of the economies and destroy the social preconditions of their efficiency. Four cornerstones, Rödl suggests, are required to ensure the social responsibility of regulatory competition in the EU. (1) Since the Member States have retained the right to defend important regulatory concerns, they must be entitled to support their national labour constitutions. (2) Common absolute minimum labour standards should not preclude, but instead define a bottom line for, regulatory competition. (3) European law should oblige the Member States to implement standards which are relative to their socio-economic strength. (4) National collective labour law needs to be complemented by regulatory frameworks for transnational collective labour relations. This ensemble would constitute a Europeanized labour constitution.

Identity and collective memories

Law is encapsulated history. It is never written in stone and must not be relied upon as an unshakeable guarantee of constitutional freedoms. This may be an uncontroversial, perhaps trivial, observation. But, in the case of Europe's striving for a common democratic future, this trivial insight has quite disquieting dimensions, which Christian Joerges and Jan-Werner Müller address in different ways. The normative dignity of the integration project, Joerges argues (Chapter 9), rested upon its break with Europe's 'darker past'; the heritage of nationalism and dictatorship and the cruelties of the Holocaust. Integration implied the giving up of national power and sovereignty and the valuing of peace, stability

and welfare over national power and glory. This legacy is by no means outdated. But it needs to be renewed and rethought after the end of the post-war settlements in 1989. Joerges seeks to renew the historical sensitivity of European constitutionalism in three steps. The first deals with the diversity of European pasts and the diversity in their reconstruction. European constitutionalism, Joerges submits, would be well advised to respect this diversity and promote toleration rather than homogeneity. In a second step, the impact of European pasts and experiences are explored in two fields, namely, the controversies over 'social Europe' and the search for a European identity and citizenship. The reluctance of Europeans to confront the darker side of their pasts, including the failures and fragility of law and legal institutions, has many good and acceptable, as well as bad, reasons. It entails moral and political risks. It will lead to new conflicts. Such contestation seems, however, unavoidable – but it might become a constructive exercise. What the Europeans might gain when working through their pasts is modesty, tolerance and sensitivity. Such readiness to confront *Europe's darker legacies* might provide the integration project with a deeper legitimacy than the glorification of its past.

Could *constitutional patriotism* become the reference point and common core of Europe's identity? Jan-Werner Müller's exploration of this possibility (Chapter 10) is compatible with the approach taken by many of CIDEL's researches, and starts with a repudiation of the criticism levelled against constitutional patriotism as being too 'thin' for a conceptualization of a social identity. Müller's reconstruction of Dolf Sternberger's and Jürgen Habermas' use of this category documents its specific German historical context. In this context, two dimensions of constitutional patriotism become apparent, namely, 'memory' and 'militancy'. 'Memory' refers to Germany's anti-democratic past and its organization of the Holocaust; 'militancy' is shorthand for Germany's post-war attitude towards anti-democratic parties. These are the 'thick' anti-nationalist components of 'constitutional patriotism'. Such anti-nationalism renders Habermas'[47] plea for a European form of constitutional patriotism theoretically more compelling, but at the same time more difficult in practical terms. Müller underlines both the unavoidability and the risks associated with memory politics. There are deep and persisting differences in European memories, and these will persist. The Holocaust is the exception. This atrocity has, indeed become a common – negative – reference point for all Europeans.[48] Holocaust denial and anti-semitism in general will therefore preclude accession to the Union. But beyond this commonality, Europe will have to live with its different pasts. Europeans will have to learn that their neighbours have different memories. Müller is himself sceptical towards the memory politics that we have witnessed so far. The perpetrators seek to redefine their roles, while the victims tend to defend their status. Instrumentalization of the past seems to be unavoidable, the learning of tolerance and the definition of its limits extremely difficult. And yet, Europe definitely needs what Joseph Weiler calls 'constitutional tolerance'. It also requires – and ideally enables – a great deal of mutual learning against the background of persistent plurality.[49] This is a demanding vision, but is – so Müller

concludes, quite in line with the commentators on social Europe – not a mere utopia. While the EU cannot develop the same type of identity as its Member States, its diversity and openness may be possible simply because the Member States have retained 'thick' identities, which are now disciplined by the mutual respect which Europe requires.[50]

Post-national democracy in Europe

There is nothing inherently undemocratic in the rejection of the proposed constitution by the very citizens who were expected to live under its order. There is, on the other hand, nothing inherently democratic in a referendum whereby the citizens of one or two Member States got to exercise the power of the veto. What is the state of democracy in the Union after the rejection of the Constitutional Treaty? This is clearly a query which nobody can conclusively resolve. What the two concluding contributions seek to submit are valid analyses of the post-conventional constellations.

Hauke Brunkhorst (Chapter 11) shares the main thrust of the third CIDEL model, but arrives there in a different way. He looks at the constitutionalization of the Union in the light of classical political philosophy, in particular the work of Rousseau and Kant. From this perspective, he points to the democratic risks which the integration project has been exposed to from its formative phase, because of its reliance on political elites, intergovernmentalism and executive power. From this perspective, the integration project – as pursued in its various stages – has threatened the democratic political power of the peoples of Europe. Thus, the tragic aspect of the Constitutional Treaty is that this step towards improvement has been used by '*the people out there*' to strike back.[51] Brunkhorst reminds us that this has happened before, albeit less dramatically and without such visible impact, in the referenda on the Maastricht Treaty and on the Nice Treaty (even though the Danish 'nei' to the Maastricht Treaty in 1991 sent shockwaves throughout Europe). The EU, he concludes, should listen to its *pouvoir constituant* and strive for its re-founding 'as a democratic polity with an overall competence, subsidiarily layered and grounded in the will of the citizenry and oriented towards a democratic separation of powers'.[52]

In their contribution, Erik O. Eriksen and John Erik Fossum (Chapter 12) build upon the continuously refined and tested models which have structured CIDEL's research. Neither the theoretical framing, nor the guiding question which it sought to address, have been either overthrown by the failure of the Constitutional Treaty or lost their topicality. But there is a need to move beyond the CIDEL models in order to understand *what democracy can mean* in the multilevel constellation that makes up the EU. This is so because the constitutionalization-process brought up clearer institutional alternatives and raised questions about the state-centric framework. There is also a need to come to terms with the cosmopolitan dimension of the EU.

The EU has developed beyond an international organization and a derivative democratic construct (an entity whose democratic quality would be entirely

derived from the Member States). But the step from negative determination to positive identification of what type of entity the Union is, requires a more detailed analytical scheme that takes the character of the polity configuration properly into account. Today it is clear that the question of democracy in Europe cannot be settled without taking the EU-polity properly into consideration. Is it conceivable that democracy could be rescued at the national level? This would imply disentangling European levels of governance and retrenching integration. The EU has, over time, extended its agenda, obtained more power and embraced democratic principles. Hence, it asserts that it can no longer be understood as an international organization in the hands of the Member States, but should be seen as *a polity in its own right*, with direct links to its citizens. Can democracy then be rescued in Europe by developing the EU into a federal state? The requisite resources for such a model, in the form of a collective identity and political will, are in short supply. A third alternative is to develop the EU into a post-national union with a clear cosmopolitan imprint; one that is legitimized through human rights and democracy only. Such a Union is not a state but a polity that has achieved competences similar to *government* within a limited range of functions. This would be a rather weak polity endowed with a small system of collective decision-making power. This model targets the link between state and democracy, and the question is whether such an order can be stable.

The rejection of the Constitutional Treaty has created political turbulence and risks. However, the debacle can also be read as confirming the strength of democracy in the mindset of European citizens. Whichever interpretation one prefers, we have every reason to continue our search for a post-nationalist democracy. Pertinent efforts are indeed under way.[53]

Notes

1 www.arena.uio.no/cidel/index.html
2 E. O. Eriksen and J. E. Fossum, 'Europe in Search of Legitimacy: Strategies of Legitimation Assessed', *International Political Science Review*, 2004, vol. 25, no. 4. 453–459, p. 447.
3 'Europe's true stories', in *Prospect Magazine*, 2007, issue 131, online, available at: www.prospect-magazine.co.uk/article_details.php?id=8214.
4 I. Kant, 'Zum ewigen Frieden (1795/1796)', in W. Weischedel (ed.) *Werkausgabe Band XI*, p. 226: 'Es ist der *Handelsgeist*, der mit dem Kriege nicht zusammen bestehen kann, und der früher oder später sich jedes Volkes bemächtigt.'
5 To use Haas' neo-functionalist vocabulary (E. B. Haas, *Beyond the Nation State*, Stanford, CA: Stanford University Press, 1964).
6 See the CIDEL publications: E. O. Eriksen, J. E. Fossum and A. J. Menéndez (eds), *Developing a Constitution for Europe*, London: Routledge, 2004; E. O. Eriksen, J. E. Fossum and A. J. Menéndez (eds), *The Chartering of Europe*, Baden-Baden: Nomos, 2003. See also the list of CIDEL publications at the end of this book.
7 There were, of course, cautious voices, most prominently perhaps D. Grimm, 'Integration by Constitution', *International Journal of Constitutional Law*, 2005, vol. 3, no. 2, 193–208.
8 European Council, 'Presidency Conclusions', European Council Meeting 14 and 15 December 2001, SN 300/1/01 REV 1, 19–26 (Annex I).

9 See A. J. Menéndez, 'Three Conceptions of the European Constitution', in Eriksen, Fossum and Menendez (eds), *Developing a Constitution for Europe*, above note 6.

10 Compare J. H. H. Weiler, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999; and from the perspective of current legal doctrine: A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, Oxford and Portland, OR: Hart, 2006; J. E. Fossum and A. J. Menéndez, 'The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union', *European Law Journal*, 2005, vol. 11, no. 4, 380–410.

11 Habermas has coined the term 'belated revolution' ('*nachholende Revolution*'), referring to the development in Eastern Germany in 1989, see J. Habermas, *Die Nachholende Revolution*, Frankfurt aM: Suhrkamp, 1990.

12 E. O. Eriksen, J. E. Fossum, M. Kumm and A. J. Menéndez, *The European Constitution: The Rubicon Crossed?* ARENA Report 3/05, Oslo: ARENA, 2005. The authors underline that this text was not to be read as any definite settlement of the debates on the nature and status of the EU as a polity, nor as an unambiguous 'further step in the forging of a European democratic constitution', but rather as 'a mere exercise in consolidating the structure already in place'.

13 For the revitalization of Heller's idea of a 'constitutional compromise' for the European context, see J. Bast, 'The Constitutional Treaty as a Reflexive Constitution', in P. Dann and M. Rynkowski (eds), *The Unity of the European Constitution*, vol. 186 in the series *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Berlin: Springer, 2006.

14 J. Shaw, *A Strong Europe is a Social Europe*, Federal Trust Constitutional Online Papers 5/03, 2003, online, available at: www.fedtrust.co.uk – last visited April 2007; G. Stuart (Member of the Presidium), 'Caught in the Coils of Giscard's Folly', *The Times*, 7 December 2003, online, available at: www.timesonline.co.uk/tol/news/article1035973.ece – visited 21 March 2007. For a more benevolent analysis, see Fossum and Menéndez, above note 10; D. Göler, *Deliberation – Ein Zukunftsmodell europäischer Entscheidungsfindung? Analyse der Beratungen des Verfassungskonvents 2002–2003*, Baden-Baden: Nomos, 2006.

15 Thus, the Constitutional Treaty (CT) contains measures aimed at mending the EU's legitimacy gap. This pertains to, in addition to the incorporation of the Charter of Fundamental Rights, the weakening of the pillars, the strengthening of the European Parliament and of the national parliaments, the right to petition, the generalization of co-decision and qualified majority voting as decision-making procedures. Unanimity has been turned into a special rule only applicable to certain policy-fields such as social, tax, foreign and security policy. Further, the CT adopts a constitutional language for legislation as it changes from the terminology of regulations and directives to *laws and framework laws* corresponding to national practice (Article I-33).

16 The, indeed influential, intervention of E. Chouard represents an impressive example, online, available at: http://etienne.chouard.free.fr/Europe/Constitution_revelateur_ du_cancer_de_la_democratie.htm#intro – visited 21 March 2007. In *l'Humanité* of 9 April 2005 one could read: 'Ce professeur est tombé de haut en découvrant le contenu de la constitution européenne. Il en publie une critique, sur Internet, qui se répand comme une traînée de poudre […].' See also H. Brunkhorst, 'Taking Democracy Seriously: Europe after the Failure of its Constitution', Chapter 11 in this volume.

17 This view was promulgated by G. Amato and V. Giscard d'Estaing at the European University Institute on 27 October 2004 (video online, available at: www.eui.eu/RSCAS/Archives%20of%20News.shtml 27 May 2005 – visited 27 March 2007), but also on other occasions. A very similar view was presented by the then President of the European Commission, Romano Prodi, e.g. in an interview with *The Irish Times*, 4 December 2003.

18 B. de Witte, 'The Process of Ratification and the Crisis Options: A Legal Perspect-

ive', in D. Curtin, A. Kellermann and S. Blockmans (eds), *The EU Constitution: The Best Way Forward?*, The Hague: T. M. C. Asser, 2005.

19 'Declaration on the Occasion of the 50th Anniversary of the Signature of the Treaties of Rome' as of 25 March 2007 (no document number), online, available at: www.eu2007.de – last visited 2 April 2007; see the comment by C. Möllers, 'Wie kann so ein hochtrabendes Wort zwischen den Zeilen stehen?', *Frankfurter Allgemeine Zeitung*, 15 March 2007, p. 33.

20 See: www.eu2007.de/en/Meetings_Calendar/Dates/June/0621-ER.html.

21 See: www.consilium.europa.eu/cms3_fo/showPage.asp?id=1317&lang=en.

22 S. Hix, 'The Future of the European Constitution', contribution to the International Conference on Europe and the challenges of the 21st century, Lisbon, 27–29 June 2007, on the eve of the Portuguese Presidency of the EU, organized by the European Studies Inter-university Association, the European Institute of the Lisbon Law School and the Centre of Excellence of the University of Lisbon.

23 There is a large body of literature on this; see, for example, J. Bohman, 'Reflexive Constitution-making and Transnational Governance', in E. O. Eriksen (ed.), *Making the European Polity: Reflexive Integration in the EU*, London: Routledge, 2005; J. Cohen and C. Sabel, 'Directly-Deliberative Polyarchy', *European Law Journal*, 1997, 3(4): 313–342; O. Gerstenberg, 'The New Europe: Part of the Problem – or Part of the Solution to the Problem?', *Oxford Journal of Legal Studies*, 2002, 22(3): 563–571; G. Marks, F. W. Scharpf, P. C. Schmitter and W. Streek (eds), *Governance in the European Union*, London: Sage, 1996; C. Joerges, *Integration through De-legislation? An Irritated Heckler*, European Governance Papers no. N-07–03, 2007, online, available at: www.connex-network.org/eurogov/pdf/egp-newgov-N-07–03.pdf. For a survey covering also globalization see A. Sajó, 'Transnational Networks and Constitutionalism', *Acta Juridica Hungarica*, 2006, vol. 47, 209–225.

24 G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Cambridge, MA: Polity Press, 1990; S. Leibfried and P. Pierson, *European Social Policy: Between Integration and Fragmentation*, Washington, DC: Brookings Institution, 1995.

25 C. Joerges and F. Rödl, '"Social Market Economy" as Europe's Social Model?', in L. Magnusson and B. Stråth (eds), *A European Social Citizenship?*, Brussels: Peter Lang, 2004.

26 See also G. Morgan, *The Idea of a European Superstate: Public Justification and European Integration*, Princeton, NJ: Princeton University Press, 2005.; A. J. Menéndez, 'Taxing Europe: Two Cases for a European Power to Tax (with some Comparative Observations)', *Columbia Journal of European Law*, 2004, vol. 10, no. 2, 298–338; 'Rights to Solidarity': Balancing Solidarity and Economic Freedoms', in Eriksen, Fossum and Menéndez (eds), *The Chartering of Europe*, above note 6.

27 J. Habermas, 'Beyond the Nation-state? On some Consequences of Economic Globalisation', in E. O. Eriksen and J. E. Fossum (eds), *Democracy in the European Union: Integration Through Deliberation?*, London: Routledge, 2000, p. 34. See further J. Habermas, 'The Postnational Constellation and the Future of Democracy', in *The Postnational Constellation*, Cambridge, MA: MIT Press, 2001.

28 See, for example, the dissenting 'Alternative Report to the Constitutional Draft Treaty: The European Convention, Report from the Presidency of the Convention to the President of the European Council', CONV 851/03, 21–24 (ANNEX III: Alternative Report. The Europe of Democracies).

29 For example, Member of the European Parliament Daniel Cohn-Bendit calls for a simple majority of citizens which is valid if there is a national majority in two thirds of the Member States (Interview online, available at: www.cohn-bendit.de/dcb2006/fe/pub/de/dct/174 – visited 21 March 2007); others have called for a double majority of citizens and states, for example, Austrian Chancellor Schüssel, at that time holding

the Austrian EU-Presidency, reported by *EU Observer* 1 June 2006, and Vice-President of the European Parliament, Gerard Onesta, reported by *EU Observer* 13 February 2007.

30 Compare the programmatic title of W. v. Gerven, *The European Union, A Polity of States and Peoples*, Stanford, CA: Stanford University Press, 1995; see, also, U. Liebert, 'Democracy Beyond the State: Assessing European Constitutionalisation', in U. Liebert, J. Falke and A. Maurer (eds), *Postnational Constitutionalisation in the New Europe/Postnationaler Verfassungsprozess im neuen Europa*, Baden-Baden: Nomos, 2006. The question of the locus of sovereignty in the Union is just another way to ask the same question. On this, see U. Beck and E. Grande, *Das kosmopolitisches Europa: Gesellschaft und Politik in der Zweiten Moderne*, Frankfurt aM: Suhrkamp, 2007, and from a constitutional perspective: S. Oeter, 'Federalism and Democracy', in Bogdandy and Bast (eds), above note 10.

31 J. Habermas, *The Divided West*, Cambridge, MA: Polity Press, 2006, pp. 118ff.

32 B. Peters, 'Public Discourse, Identity and the Problem of Democratic Legitimacy'; G. Delanty, 'The Quest for European Identity', both in E. O. Eriksen (ed.), above note 23; K. Eder and B. Giesen (eds), *European Citizenship: National Legacies and Transnational Projects*, Oxford: Oxford University Press, 2001; G. Delanty, *Inventing Europe: Idea, Identity, Reality*, London: Macmillan, 1995; R. Viehoff and R. Segers (eds), *Identität, Kultur, Europa*, Frankfurt aM: Suhrkamp, 1999.

33 Two approaches to this are discussed in J. E. Fossum, *Constitutional Patriotism – Canada and the European Union*, RECON Online Working Paper, 2007/04, 2007, online, available at: www.reconproject.eu/main.php/RECON_wp_0704.pdf?fileitem=5456960. This contribution deals with the notion of deep division in relation to the Charter and the Convention's text, respectively. See also J. E. Fossum, 'The European Union – In Search of an Identity', *European Journal of Political Theory*, 2003, vol. 2, no. 3, 319–340; 'Still a Union of Deep Diversity? The Convention and the Constitution for Europe', in Eriksen, Fossum and Menéndez (eds), *Developing a Constitution for Europe*, above note 6.

34 J. Habermas, 'Citizenship and National Identity' (1990), reprinted in J. Habermas, *Between Facts and Norms*, Cambridge, MA: Polity Press, 1996.

35 E. O. Eriksen, C. Joerges and J. Neyer, *European Governance, Deliberation and the Quest for Democratisation*, ARENA Report 2/03, Oslo/Florence: ARENA/EUI-RSCAS, 2003.

36 www.connex-network.org/govlit (visited in September 2007).

37 European Commission, 'European Governance – A White Paper', COM (2001) 428 of July 2001, p. 10.

38 Expressed famously and beautifully by E. Stein:

> Tucked away in the fairytale Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal type Europe.
>
> (E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', 1981, *American Journal of International Law*, vol. 75, no. 1, 1–27)

39 J. Elster, C. Offe and U. K. Preuss (with F. Boenker, U. Goetting and F. W. Rüb), *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea*, Cambridge, UK: Cambridge University Press, 1998.

40 See the concluding paragraph in the contribution of Michelle Everson and Julia Eisner in this book, p. 83.

41 See C. Schmid's intermediate conclusion in his contribution to this book, p. 93.

42 This dimension of the integration project was taken up in one of the CIDEL workpackages: Workpackage 6 on 'Taxation and Social Policy', see www.arena.uio.no/cidel/projects.html.

43 For a detailed discussion, see D. della Porta and M. Caiani, 'Quale Europa? Europeizzazione, Identità e Conflitti' (typescript Florence, 2005, on file with the authors).
44 See European Commission, 'Proposal for a Directive on Services in the Internal Market', COM (2004) 2 final.
45 Directive 2006/123/EC was adopted on 12 December 2006, OJ L 376/2006, 36.
46 See the literature cited by Waltraud Schelkle in notes 3 and 4 in her chapter in this volume (Chapter 6), and in addition, F. W. Scharpf, 'The European Social Model: Coping with Diversity', *Journal of Common Market Studies*, 2006, vol. 40, no. 4, 645–670; Leibfried and Pierson, above note 24; S. Leibfried, 'Social Policy', in H. Wallace and W. Wallace, *Policy-Making in the European Union* (4th edition), Oxford: Oxford University Press, 2005.
47 J. Habermas, 'Citizenship and National Identity', above note 34.
48 See M. Jeismann, 'Völkermord und Vertreibung als Medien der Europäisierung', *Historische Anthropologie*, 2005, vol. 13, no. 1, 111–120.
49 J. H. H. Weiler, 'Federalism Without Constitutionalism: Europe's *Sonderweg*', in K. Nicolaïdis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford: Oxford University Press, 2001.
50 It seems worth mentioning that these formulae are fully compatible with the idea of a conflict of laws approach to the constitutionalization of Europe's unity in diversity (*unitas in pluralitate*), which Joerges submits in his contribution. See C. Joerges in Chapter 9 in this book, text accompanying note 23 and following.
51 H. Brunkhorst, Chapter 11 in this book, p. 224, emphasis in original.
52 Ibid., p. 226.
53 In particular, in the context of RECON ('Reconstituting Democracy in Europe') an Integrated Project coordinated by ARENA in Oslo and funded by the Sixth Framework Programme of the European Commission, see www.reconproject.eu.

Part I

Rule of law in a context of governance

2 Three forms of governance and three forms of power

Poul F. Kjaer

Introduction

One of the central characteristics of the European integration process is the emergence of a whole range of different governance structures. Among the most significant ones are regulatory agencies, comitology and the Open Method of Co-ordination (OMC). For each of these three forms of governance corresponding theories have been developed. Giandomenico Majone's theory of the regulatory state focuses on regulatory agencies, Christian Joerges and Jürgen Neyers' theory of deliberative supranationalism is exploring the comitology phenomenon and Charles Sabel has, in cooperation with a number of other scholars, developed a theory of directly-deliberative polyarchy (DDP) which is aligned with the OMC.

Whereas the question of power has played a substantial role in the ongoing theoretical contentions on the overall logic guiding the European integration process, the vast majority of scholarly work on governance has not granted much attention to the question of power. That is also the case for the three theories mentioned above. This chapter therefore seeks to clarify which concept of power the three theories are based on.

The point of departure is a reconstruction of the three theories combined with an uncovering of the schools of thought which they are built upon. It is argued that the theory of the regulatory state remains faithful to a Weberian worldview and hence to a concept of strategic rationality and an understanding of power as a teleological instrument of steering. In contrast, the theory of deliberative supranationalism revitalizes Jürgen Habermas' critique of Max Weber's one-dimensional concept of rationality. Habermas argues that the social dimension of rationality is just as significant as the strategic dimension, thereby allowing him to develop a consensual concept of power. It is this Habermasian concept of power which provides the foundations for Joerges and Neyers' theory, which argues that comitology is a consensual mode of decision-making. In contrast to these two positions, the theory of DDP relies on a concept of power which has close affinities to the poststructuralist concept of power developed by Michel Foucault. The proponents of DDP emphasize the OMC's function as an instrument of discourse transformation aimed at defining the setting within which

social processes unfold. Within the OMC power is therefore only being exercised indirectly. Hence, it can be argued that DDP relies on an understanding of power as orientated towards regulating the conduct of conduct, which is similar to the understanding of power presented by Foucault. This line of thought is moreover closely aligned with a dramaturgical form of rationality, as the central point of focus is form rather than content.

The reliance on different assumptions of rationality and power means that the proponents of the three theories are inclined to talk at cross purposes. Hence, the chapter proceeds by presenting the argument that a more fruitful starting point would be an identification of the different functions that the different governance structures fulfil in the larger context of the European integration process. It is argued that the three forms of governance fulfil three different functions within the context of the integration process, which respectively can be labelled convergence, harmonization and steering. These three functions are, moreover, particularly prevalent in different phases of policy-development, thereby allowing for the introduction of a distinction between pre-integrative, integrative and post-integrative phases of regulation. The three forms of governance should therefore not be understood as mutually exclusive.

A clarification of the function of each is, moreover, seen as an appropriate starting point for the development of a constitutional concept capable of binding the three modes of governance to the broader framework of the European Union (EU) system. Hence, the chapter concludes with the suggestion that a viable constitutional compromise could be based on an anchoring of the three forms of governance in the foundational treaties of the Union by; limiting the OMC to policy areas where the Community possesses only complementary competences; comitology to policy areas characterized by shared competences; and full-scale regulatory agencies to policy areas where the Community has exclusive competences.

Regulation as a problem of time and space

In his theory of the regulatory state, Giandomenico Majone advocates delegation of discretionary power to non-majoritarian institutions in the form of regulatory agencies. Majone argues that delegation offers solutions to the problem of time: he presents it as an institutional response to the contradiction between politics' short-term operational perspective and the need in practice for long-term solutions to problems in many policy areas, ranging from central banking and competition policy to risk regulation.[1] But Majone emphasizes that the problem of time is not only a problem of political short-termism. Even if regulation is deemed appropriate, problem-solving via political intervention in discretionary policy areas often leads to the application of policies that are already outdated by the time they take effect. Thus, Majone suggests, interventionist measures are typically suboptimal as policy instruments; they may even tend to do more harm than good. Besides in-built tendencies to opportunism and short-termism, the political system is therefore also characterized by a structural deficit; namely

that it does not possess the instruments needed to undertake rapid and precise regulation (e.g. to adjust interest rates in the area of monetary policy).[2]

The restricted effectiveness of political intervention due to time lags might be thought to indicate limits to the cognitive resources of politicians and political institutions as the root problem. However, Majone dismisses this and argues that the need for policy credibility is the most important explanation of why power is delegated to non-majoritarian institutions. Politicians delegate competences in order to protect specific policy areas from their own short-sightedness. Thus, while Majone points out two time-related reasons for delegation, he ultimately identifies the 'real' reason as political short-sightedness, thereby subscribing to a largely 'anthropological' understanding of the *homo politicus*.[3]

According to Majone, non-majoritarian institutions avoid political short-sightedness because such institutions are characterized by three elements: i) a strong sense of purpose based upon functionality, since, at least ideally, only one institution is assigned the task of regulating a well-defined policy area; ii) strong professional norms, such as expertise, professional discretion, policy consistency, fairness and independence of judgement;[4] iii) a long-range institutional perspective, tending to imply a strategy for long-term survival, which incentivizes the adoption of policies that may be maintained consistently over time. For Majone, the mixture of these three characteristics provides the optimal basis for policy interventions. Their absence at the political level provides the argument for delegation of discretionary powers to non-majoritarian institutions.

Applying the theory of the regulatory state to the EU, Majone further reacts to a problem of space, in the sense that regulatory regimes need to take account of structural changes to the economy through internationalization. Functionally, this creates a need for the transfer of competences from the national to the European setting. But Majone argues that the delegation of powers to the EU in many areas exceeds what is needed in order to establish an internal market (e.g. environment, consumer protection, health and safety at work). Majone views this as a result of regulatory competition which provides the sovereigns, that is the Member States, with an incentive to agree on common rules while partly delegating rule-making to a 'neutral broker' in order to avoid a situation where other Member States impose less costly standards, thereby gaining comparative advantage. Common rules are made to preclude the famous race to the bottom. Hence, Majone understands the attempt of Member States to ensure relative economic gains vis-à-vis other Member States as the primary driving force behind the European integration process.

The Weberian foundations of the theory of the regulatory state

The form and content of Majone's theory of the regulatory state clearly shows his subscription to the mainstream self-understanding of the political science discipline originally developed in the US context, as well as to a particular version of Weberian thinking which, more or less consciously, was adopted in

its formative period.[5] This is particularly clear in relation to the concept of power which he relies on. Weber stated that 'power means every chance within a social relationship to assert one's will even against opposition'.[6] This definition was adopted by Robert Dahl who defined power as 'A's power over B insofar as A can get B to do something B would otherwise not do'.[7] Both definitions are methodologically focused on observable behaviour – actual decisions and clear causality. Both definitions are furthermore based on a pluralist view, in the sense that each assumes a multiplicity of individual actors competing with each other to further their interests on the basis of strategic rationality. Power is not an end in itself, but a teleological tool which can be deployed in order to achieve certain objectives. Hence, the Weberian concept of power is basically being extrapolated from a uni-dimensional concept of strategic rationality.

It is this Weberian concept of power that Majone builds his theory upon. He departs from the assumption that power resides in a clearly identifiable sovereign (in the case of the EU, in a number of well-defined Member State sovereigns), thereby making the act of delegating power a straightforward matter. He moreover assumes that different actors engage in a zero sum game aimed at achieving the largest possible control of the power resources of the sovereign. Hence, his understanding of politics – at the national level, as well as between the Member States of the EU – proceeds from the pluralist assumption that several actors compete for power by acting on the basis of strategic rationality. In Majone's view the purpose of the struggle is the furthering of interests of a largely economic nature. Moreover, he understands power as being opposed to freedom: in general, markets should be left to regulate themselves – only in the event of market failure do the 'unfortunate' necessities of state intervention and regulation come into play.

The Weberian heritage of Majone's theory is not only visible in his concept of power but also in his concept of bureaucracy. The professional norms that Majone refers to – expertise, professional discretion, policy consistency, fairness and independence of judgment – are almost identical to the norms Weber highlighted as essential elements of modern bureaucracy.[8] However, Weber's theory of bureaucracy has become rather 'old-fashioned', in the sense that it does not take into account the autonomous role and self-interest of bureaucracies, the partial breakdown of hierarchy, nor the erosion of limits on external contacts. In classical conceptions of bureaucracy, such contact is the exclusive reserve of the hierarchical peak whose main function is to represent organizations externally in relation to their environments.

Moreover, the EU context differs profoundly from that of the nation state. For instance, the cognitive resources of the EU system differ radically from those of the Member States. Another indication of asymmetry is the almost complete lack of implementation and compliance tools in the EU system compared with nation states.[9] Precisely to compensate for this structural deficit in information-gathering capabilities and control mechanisms, the EU system and Member State administrations are linked through governance structures such as comitology and 'networked' agencies. Although Majone rejects that lack of cog-

nitive resources is a central reason for delegation of discretionary competences,[10] it may be argued that a quest for cognitive resources is an important explanation of the delegation of discretionary competences to alternative governance structures at the European level.

Overall, the evolution of European integration- and constitutionalization processes, and especially the 'turn to governance', illustrate that Majone's Weberian approach is based on outdated theoretical premises and, seen as a policy proposal, is a construction out of touch with reality. With the Treaty of Maastricht, Europe stepped beyond its origins as a mere economic government (*Gouvernement économique*) based upon an ordoliberal economic constitution (*Wirtschaftsverfassung*). That move entailed the need for new regulatory structures, one of which was Majone's concept of regulatory agencies with discretionary power. Since the 1990s, a large number of agencies have indeed been established. Amongst these, following Yatanagas,[11] one can differentiate four forms: i) 'quasi-regulatory' agencies (e.g. the Office for the Harmonization in the Internal Market, the Community Plant Variety Office, the European Aviation Safety Authority and the European Medicines Agency); ii) monitoring agencies (e.g. the European Environment Agency, the European Monitoring Centre for Drugs and Drugs Addiction and the European Monitoring Centre on Racism and Xenophobia); iii) 'social dialogue' agencies (e.g. The European Centre for Vocational Training, the European Foundation for the Improvement of Living and Working Conditions and The European Agency for Safety and Health at Work); iv) 'executive' agencies (e.g. the European Training Foundation and the Translation Centre for Bodies in the EU). Majone's theory, however, only refers to quasi-regulatory agencies as only these have discretionary power. Moreover, existing quasi-regulatory agencies have only been granted limited discretionary power, as Member States have sought to retain a significant degree of control over them via the continued activities of comitology structures in the relevant policy areas. Consequently, instead of becoming full-blown regulatory agencies exercising power through top-down steering, European regulatory agencies have become networked agencies, acting as secretariats for EU-wide networks linking national administrations *inter se* and national administrations to European institutions.

Yet the more fundamental problem with Majone's theory of delegation to non-majoritarian institutions is that it presupposes the EU's transformation into a state (although only a regulatory state). A massive transfer of competences to the EU level would be needed to realize Majone's presupposition that regulatory agencies possess exclusive competences in their respective fields. It is not surprising, therefore, that EU competition policy, with its strong top-down approach, serves as the role model for Majone's theory.[12] Competition policy is however a very distinct policy area from which it is impossible to extrapolate a general regulatory model for Europe. Moreover, recent reform of EU competition policy points towards the establishment of a network of competition regulators with the potential to soften the existing principal-agent structure.[13]

In conclusion, Majone's analysis goes several bridges too far. For the preconditions of his policy proposal to be met, there would have to take place a

substantial further centralization of policy-making at the EU level as well as an increase in vertical as opposed to horizontal governance structures. Moreover, the uncritical deployment of the concept of the state evinces commitment to an outdated ontological heritage, while methodological nationalism follows from his uncritical transfer of concepts from the nation state to the EU context.[14] The tendency to recycle old-European concepts is clearly expressed in Majone's assumption that full-blown principal-agent structures can be established at the European level.

Yet current trajectories of integration- and constitutionalization processes indicate single European statehood, whether of modern, post-modern or regulatory form,[15] to be out of reach for the foreseeable future. Majone acknowledges this in his latest work, which abandons the earlier concept of the Regulatory State based on the model of competition policy, and instead finds in the Common Foreign and Security Policy (CFSP) a new model for the establishment of a European Confederation.[16] Although attempting to scale back his ambitions, Majone nevertheless remains committed to a Weberian concept of power, and hence sees power as a principal-agent structure which makes government – as opposed to governance – the most suitable way to steer social interaction in the European context.[17]

Governance as a framework for deliberation

Important parts of Majone's theory were advanced before the establishment of a large number of European agencies. Accordingly, his work can be seen as a deductive exercise aiming to develop a theory, or policy plan, with the intention that this consequently be put into practice. Christian Joerges and Jürgen Neyer have taken another path. Their analysis of comitology, devised within the parameters of their theory of deliberative supranationalism, aims to illuminate an already existing but frequently disregarded structure. In combination, they undertake an inductive investigation of the extent to which this structure provides a framework for deliberation. In doing so, they align themselves with Habermas' normative objectives for the development of legitimate structures of political deliberation at the European level.[18] Joerges and Neyer do however reject Habermas' agenda for the replication of national constitutional structures at the European level. In their view, the construction of a European federal state as originally envisaged by European integration's chief ideologists – Haas, Hallstein and Monnet – has not and cannot be expected to be realized. The EU's current status as a hybrid – it is more than an international organization but less than a federation – appears to have acquired certain permanence. Hence, Joerges and Neyer's project can be seen as a pragmatic attempt to explore how far Habermas' normative objectives concerning the establishment of deliberative structures beyond the nation state setting can be achieved in a hybrid system.

Their first claim is that the normative ideal of ensuring legitimacy of supranational structures via deliberation is not just an ideal; elements of deliberation are already embedded in the political and administrative practices of the EU,

most notably comitology. Comitology is seen as a potential space for deliberation because it is embedded in a robust legal framework establishing a procedural infrastructure that facilitates at the reaching of consensus through deliberation. On the other hand, the ideal is not fully realized in comitology's political–administrative practices. Deliberative supranationalism is therefore developed as a partly descriptive and partly normative concept, embodying the intention to bridge the gap between normative discourse and political realities.[19] Accordingly, deliberative supranationalism can be characterized as a hybrid concept developed for a hybrid structure, in the sense that it not only describes how 'real world' political and administrative processes unfold in the European setting, but also acts as a regulatory ideal.

Against Majone, Joerges and Neyer explain why the evolution of European integration and constitutionalization has not led to a regulatory state, with the establishment of regulatory agencies as a logical consequence of the transformation of the EU into a conglomerate with massive regulatory functions. They argue that the reason why the Commission and the Member States have retained discretionary competences within comitology structures, and only half-heartedly support the establishment of regulatory agencies (though these were proposed in the Commission's White Paper on Governance), is that the concept of the regulatory state does not sufficiently acknowledge the normative-political aspects of regulation. These are especially strong in the area of risk regulation, on which Joerges and Neyer focus.[20] No constitutional state has so far completely delegated risk regulation to non-majoritarian institutions.[21] The political dimension is accentuated where regulation imposes substantial economic costs (costs which, de facto are distributive, in the sense that they are not equally divided[22]) on industry and consumers. Classical principal-agent concepts, such as Majone's, fail to account for the fact that social constructions are more than the sum of their parts, and have an autonomous impact on their constitutive units. It is this additional element which leads to the need for autonomous justification of their operations, beyond the output legitimacy which offers the sole justification for agreements reached by bargaining.[23] Again, risk regulation offers an obvious example, since here scientific knowledge acts as a filter for strategic objectives. Joerges and Neyer argue that proponents of classical principal-agent theories fail to adequately recognize the role of commonly accepted scientific knowledge and scientific argumentation in day-to-day decision-making in risk regulation.

The Habermasian foundations of the theory of deliberative supranationalism

As already indicated, it is Habermas' normative objective of promoting rational political outcomes on the basis of consensus-oriented deliberation and the 'non-forced force of the better argument' which serves as the guiding principle for the theory of deliberative supranationalism. With the Weberian heritage of Majone's theory in mind, it is not surprising that Joerges and Neyer's critique of the

theory of the regulatory state essentially mirrors Habermas' critique of Weber. Habermas rejects Weber's concept of strategic (cognitive–instrumental) rationality as too narrow. Consequently, he adds social (moral–practical) and dramaturgical (aesthetic–expressive) forms of rationality to the strategic.[24] However, his main emphasis is on what he labels social rationality. It is from this dimension that Habermas derives the central elements of his concept of communicative power. Accordingly, he does not see power as the instrumentalization of another's will, but instead as aimed at forging a common will, on the basis of consensus established through intersubjectivity.[25] Consequently, within this dimension, consensus becomes an objective in and of itself.

Though Joerges and Neyer do not systematically scrutinize or evaluate their Habermasian foundations, the theory of deliberative supranationalism still indirectly (and probably unintentionally) provides an important correction of Habermas' deliberative theory, as it holds that bureaucratic structures are potentially capable of producing communicative power. In contrast, Habermas sees communicative power as intrinsically linked to the political sphere (including civil society and the broader public), while at the same time expressively excluding the bureaucratic sphere from the political realm. Consequently, he regards bureaucratic structures as inherently problematic structures that are incapable of reproducing communicative power.[26] This view, which is developed in detail in his legal and political philosophy, illustrates his continued attachment to the distinction between system and lifeworld, which he developed in his theory of communicative action. Here the lifeworld is understood as the context of culturally and linguistically organized patterns of interpretation within which subjects find themselves.[27] This common ground consists of implicit or unimpaired beliefs, which makes it possible for two or more subjects to constitute a common understanding of the world on the basis of an already existing shared interpretation.[28] Hence, the lifeworld acts as the source of communicative power. As bureaucratic (and economic) systems operate independently of the lifeworld they are however not capable of producing communicative power. Instead such structures remain dominated by strategic rationality and instrumental forms of power.

This perspective has been questioned by Niklas Luhmann. In developing his concept of trust, as a substitute for the Habermasian concept of the lifeworld, Luhmann focuses on the concept of reiteration. Every social operation which is repeated becomes a condensing operation, which increases the 'pre-knowledge' available for future social operations.[29] Given the strong role of procedures in bureaucratic organizations, a consequence of Luhmann's position is that he can argue that the lifeworld actually becomes a strong characteristic of such organizations.[30] In turn, Luhmann can therefore claim that the potential basis for an unfolding of the social dimension of rationality is in fact relatively strong within the realm of bureaucracy.[31]

From this Luhmannian perspective, Joerges and Neyer's attempt to expand the empirical validity and normative reach of Habermas' theory so as to encompass bureaucratic structures, can be seen as an important strengthening.

Habermas has however rejected the concept of deliberative supranationalism due to the lack of 'input-legitimacy' within regulatory structures such as comitology,[32] and instead continues to maintain that bureaucratic structures need to be kept under 'permanent siege' by the public sphere[33] if the normative ideal of achieving legitimacy through deliberation is to have any chance of realization. This perspective is also supported by Habermas' followers, such as Rainer Schmalz-Bruns, who argues that deliberative supranationalism favours technocratic regulation at the cost of 'true politics'.[34]

Instead of engaging in a debate on the theoretical implications of their approach, Joerges and Neyer have concentrated on providing empirical evidence to support their claim that most comitology decisions issue from consensus achieved via deliberation rather than through strategic bargaining.[35] Thereby they have sought to undermine the empirical validity of Majone's assumption concerning the dominance of strategic interaction and at the same time corroborate their own claim about the autonomous value of comitology deliberations. Though their findings have been supportive on both counts,[36] given the limited extent of their empirical investigations, it remains difficult to extrapolate from them to the broader range of committees in the EU system.[37] As a result, the extent to which the theory of deliberative supranationalism can be generalized remains uncertain. Both the theory and empirical investigations relating to it need to be expanded in scope and refined if deliberative supranationalism is to develop into a general theory of comitology or of committees across different phases of the European policy cycle.

The poststructuralist foundations of the theory of directly-deliberative polyarchy

Charles Sabel, together with Joshua Cohen, Oliver Gerstenberg and Jonathan Zeitlin, has developed the theory of directly-deliberative polyarchy (DDP). DDP, it is argued, provides a theoretical underpinning for the OMC. Proponents of DDP distance themselves from the position of Habermas, arguing that their own theory is more radical in terms of seeking to extend the sphere of deliberation and participatory democracy to the bureaucratic and economic areas of society.[38] The theory of DDP emphasizes direct participation, the independent value of deliberation, pluralism, and concrete problem-solving. Starting from the US context, they emphasize civil society, comprising family, church and voluntary associations, as a third sphere for the production of social capital besides the state and the market. Accordingly, they regard 'street actions' where citizens 'come together' and in partnership with public authorities solve practical problems in the local area (e.g. crime control and renewal of neighbourhoods) as a deliberative democratic ideal.[39] While they assume the continued presence of institutional structures such as legislators, courts, executives and administrative agencies, they nevertheless shift the focus away from institutions towards concrete problem-solving. In doing so, they highlight the limitations of the institutions' problem-solving capacity and

accentuate the role of the third sphere as a repository of such capacity in addition to state and market.[40]

The theory of DDP does not contain an elaborated concept of power. The theory does however seem to rely on assumptions about power with close affinities to the post-structuralist concept of power developed by Foucault. Foucault's concept of power is based on a critique of the early modern concept of sovereignty and on Weberian assumptions concerning the nature of power. According to Foucault, the early modern concept of sovereignty is based on the following four assumptions: i) power can be possessed; ii) power is clearly located in specific organizations, positions and geographical places; iii) power is a zero-sum phenomenon; and iv) power represses, and stands opposed to freedom.[41] Foucault questions these assumptions. He sees power as intrinsic to all forms of communication. Consequently, power can neither be seized nor clearly located. This means that the application of power in any one area does not necessarily lead to its decline in other areas. Freedom and power are intrinsically linked, in the sense that power first exists the moment the subject has the freedom to choose. Hence, more freedom of choice creates more room for the exercise of power. Against this background, Foucault defines power as 'conduct of conduct', situating power as the ability to define the field of possible action for others. Not confined to the juridical–political sphere, the conduct of conduct moreover unfolds within all kinds of social relations.[42]

The advocates of DDP build, more or less consciously, on the basic elements of the poststructuralist concept of power. On the one hand, like Foucault, they assume that power is 'everywhere', and accordingly, they reject the assumption that it may be found only in specific institutional structures. Moreover, they do not view power as a zero-sum phenomenon: the focus on the development of a third dimension between state and market suggests potential for an increase in citizens' power without any claim of a concomitant reduction in power produced in other areas. Hence, like Foucault, DDP proponents do not claim that power opposes freedom. Bearing in mind that post-structuralism partakes in broader themes of post-modernist thinking, it is also notable that the theory has a post-modernist undertone in explicitly renouncing concern with principles, identity, solidarity and ideology. Instead, it is a 'pure' problem-solving tool, without modernist nation state or welfare society-based connotations.[43]

Despite such affinities with the Foucauldian concept of power DDP purports to turn the concept upside down. Whereas Foucault regards power as an intrusion, the proponents of the DDP see it as an inherently positive concept. A reduction of the differences between continental–European post-structuralism and the theory of DDP to a distinction between pessimism and optimism is of course an oversimplification.[44] Nonetheless, the difference between the concept of power developed by Foucault and the perspective taken by promoters of DDP can be largely boiled down to a fundamental distinction between 'anthropological' views about the 'true' nature of social practices, at the same time as they paradoxically seem to agree about the structure of those practices.

Discourse construction through the open method of co-ordination

Whether the optimism of DDP advocates in the United States is well founded is not an issue for debate here. Instead, the central issue is their attempt to combine the theory of DDP with the concept of the OMC in the European context. Officially baptized with the birth of the Lisbon process in 2000, earlier versions of the OMC had already emerged with the Broad Economic Policy Guidelines (BEPG) and the European Employment Strategy (EES). Today different versions of the OMC are applied within a wide range of policy areas. Borrás and Jacobsson distinguish three main groups: 1) Social policy (pensions and social inclusion) and research and technological development. A shared characteristic of these areas is that earlier attempts to transfer competences from the Member States to the EU level have failed. Accordingly, the OMC was introduced as a substitute for increased competence transfer. 2) Policy areas where public involvement at the EU level is relatively new. This is the case for employment policy and policies related to the information society. 3) Policy areas which do not fall under the Community Method (CM) but which exhibit strong interdependencies with other EU policy areas subject to the CM. The prime example here is the co-ordination of the Member States' economic policies and their relation to the European monetary policy.[45]

These different versions of the OMC all rely on comparisons, evaluations, benchmarking and peer reviews as the main policy instruments. These instruments are seen as process-oriented tools whose substance is continuously revised via incorporation of new knowledge and lessons learned. Consequently, their deployment is intended to foster policy experimentation, knowledge creation, flexibility and revision of normative and policy standards. Furthermore, the OMC aims to achieve the highest possible level of participation and diversity, as well as radical decentralization.[46]

Sabel and Zeitlin argue that the fact that the OMC exhibit these characteristics means that the method expresses the very essence of DDP. The OMC is deliberative, they claim, because it purports to disrupt settled practices and redefine interests. It is directly deliberative because it involves actors with direct 'field-experiences' in order to generate different reactions and open up new possibilities. And it is polyarchic because it establishes a system where local units learn from, discipline and set goals for each other.[47]

Concerning the OMC's operational mode, several instructive studies have been conducted. Their findings suggest that although free discussion, exchange of ideas and deliberation appear to be relatively strong features of the operational mode of the Committees created to facilitate the OMC, the deliberative element tends to decline as the initial problem-identifying phases expire. Furthermore, the processes tend to become institutionalized and 'framed' as the workload grows, and the level of deliberation seems to decline the more the process moves away from 'cheap talk' and gets closer to 'real' decision-making with important policy implications.[48] It has also been highlighted that participating civil servants often

act on rather narrow mandates with little room for deliberation, and are inclined to defend the way a given policy area is organized in their home state.

In addition, as Stijn Smismans has illustrated, the idea that participation by actors with 'hands-on' experience is particularly strong within the OMC, is largely a myth.[49] Rather than being a process whereby new knowledge is continuously derived from actors on the ground, the OMC works on ideal models which enable ongoing evaluation of the Member States' performance. The ideal model in the area of the European Employment Strategy (EES) consists of a mixture of the Nordic and Anglo-Saxon labour market paradigms. Within the area of social inclusion, the ideal model comprises Nordic and corporatist elements as found for example in Germany and the Netherlands.[50] Such ideal models have been developed within rather closed and elitist policy circles, made up of civil servants from the Commission and Member State ministries. The influence of the Commission in this context should not be underestimated as ideal models tend to be developed principally by Commission officials, followed by minor amendments by national civil servants.

Overall, these findings of gaps between the ideals of the DDP concerning deliberation, participation and pluralism and the actual operational mode of the OMC, undermine the latter's classification as a polyarchic process. However, the OMC's actual impact remains difficult to assess. This is not only because it is a relatively new procedure, but also because of its very nature as not intended to produce 'real' decisions, but rather to ensure continued transformation of discursive structures. The main outcome of OMC processes is common language, in the form of key concepts, classifications, indicators and a common knowledge base, which is followed up by strategic diffusion of knowledge and evaluation of results.[51] With their strong emphasis on ideal models, OMC processes can also be described as oriented towards the establishment of discursive hegemony and 'voluntary' internalization of preferences and norms associated with these models amongst relevant actors in the Member States. In other words, bearing in mind that the vast majority of policy areas in which it is applied have only recently been 'uploaded' to the European level, the OMC can be characterized as an instrument for 'entrepreneurial discourse building'. It is a method which creates common European universes within policy areas which until now have been dominated by separate, nationally embedded discourses. From the Brussels perspective, the OMC has therefore become an instrument that can be used to create new 'fields of action'.

Still, its effects are to a large extent 'invisible', being achieved through reiteration. The message contained in the developed ideal models is repeated over and over within ongoing evaluation processes. Such repetitive exercises tend to make the message part of an unquestioned normality. As already stated, the OMC is not aimed at intervening directly in the selection of social operations, seeking rather to alter the perspective and reality of the social structures in question by encouraging the internalization of objectives developed within the scope of the method. The OMC can therefore be conceived as an instrument expressing the essence of Foucault's definition of power as conduct of conduct. From a

Habermasian perspective, the form of soft power produced by the OMC can in addition be seen as based on a dramaturgical (aesthetic–expressive) concept of rationality, insofar as it is concerned more with form than substance.

Three functions of regulation: convergence, harmonization and steering

As discussed above, the three theories of governance associated with the regulatory state, comitology and the OMC stem from different schools of thought and make different assumptions about rationality and power. As the majority of the proponents of the different theories are pragmatists, preferring to focus on the development of concrete policy proposals rather than on clarifying the theoretical basis of the proposals, they are inclined to talk at cross purposes. Within the larger context of European integration and constitutionalization, they also tend to focus on different policy areas and regulatory structures, with the result that their theories remain partial, none complex enough to encompass the whole range of regulatory measures at the European level.

Given the complexity of the issues in question and the extreme dynamism of the evolution of regulatory measures at European level, developing such a general theory is of course difficult. The basis of such a theory should be a multidimensional concept of rationality, not only capable of incorporating the functional, social and dramaturgical dimensions of social structures but also of acknowledging their equal importance. In addition, the disperse characteristics of power should be acknowledged at the same time as the higher density of power within formalized institutional forms should be taken into consideration. Hence, it would be necessary to develop a gradualist but still analytically coherent concept of power capable of encompassing the diffuse sorts of indirect power highlighted by Foucault, the kind of consensual processes emphasized by Habermas, as well as condensed forms of strongly institutionalized power of the sort Weber focused on.

Developing such a general theory is beyond the scope of this chapter. However, a clearer picture can be developed by increasing the focus on the functioning of the three modes of governance. All three modes of governance are complex phenomena, with several subordinate forms identifiable within each. Still, a bird's eye view reveals that the societal functions of the OMC, comitology and the concept of the regulatory state represent three different modes of regulating social interaction. Respectively, they are deployed in order to achieve convergence, harmonization and steering. In addition, all three forms of governance are intrinsically linked to the quest for increased integration, in the sense that they can be labelled respectively pre-integrative, integrative and post-integrative forms of governance. Consequently, the three forms should not be regarded as mutually exclusive, but rather as complementary forms of governance.

As already indicated, the OMC is, de facto, used to 'upload' policy areas which to date have not been subject to common European approaches, and is

mainly deployed within policy areas falling outside the CM. The policy areas in question are characterized by substantial divergence in terms of organization across the EU. This is especially true within the area of social policies. In addition, the specific way these policy areas are organized, and the policy objectives they embody, are within national political discourses often considered as constituent of the inner core of nation states' national identities. Such idealizations can of course easily be dismissed with the observation that the different welfare systems of European nation states are evolutionary phenomena resulting from contingent and uncontrollable processes.[52] In terms of political realities, nationally embedded welfare regimes are, however, linked to substantial socio-economic interests and strong ideological and emotional forces, making attempts to increase EU competences within such areas extremely difficult. It is against this background – large differences in organizational mode and policy objectives, and high levels of political sensitivity – that the use of the OMC should be understood. It is a subtle instrument, applied in order to achieve convergence between policy objectives and organizational modes in policy areas where political resistance and technical difficulties standing in the way of harmonization are substantial. From this perspective, to the extent that it succeeds in terms of output, the OMC could provide a structural basis for increased integration through competence transfers at a later date. Political sensitivities might gradually be overcome by intensive communicative exchanges taking place at the EU level, provided these can provoke a change of perspective among key actors and public opinion in favour of EU involvement in the areas in question. Moreover, systematic comparisons and evaluations can be seen as reflexivity-increasing instruments that break down national myths concerning the superiority of national policy regimes, and hence reduce resistance to common European approaches.[53] To the extent that convergence between the different ways of prioritizing and organizing relevant policy areas is achieved, this is also likely to provide a structural basis facilitating actual harmonization.

In contrast to the OMC's role as a soft mode of governance which, in its pure form, does not imply any formal transfer of competences, comitology serves as the engine room of integration. Its main purpose has been harmonization and continuous evaluation and revision of standards in the wake of competency transfers. As a result, comitology has traditionally been activated in the more intense phases of integration when the 'technical specifications' of new integration initiatives needed to be fleshed out. From the 1960s onwards, comitology structures thus spread outwards from the agricultural sector to all policy areas transferred to the CM, and where integration initiatives were launched. Though most important in the areas of agriculture, the Internal Market and risk regulation, comitology, remains a flexible tool which can in principle be applied to the majority of areas where integration through harmonization is deemed desirable.

Though the concept of the regulatory state remains largely unrealized as a policy proposal, to the extent it would have been actualized in the establishment of regulatory agencies with full discretionary powers, the EU would possess state-like powers in those policy areas, indicating them as zones of 'completion'

of integration processes. This would imply a move towards a post-integrative phase, where the main policy concern would no longer be the question of increased competency transfers, but rather the day-to-day exercise of top-down steering in the relevant policy area. However, as the latest reform of EU competition policy indicates, such forms of steering are unlikely to prevail as a dominant mode of regulation in the European context.

Towards a constitutional compromise

The EES – the mother of the OMC – was invented as a mere *Verlegenheits-formel* intended to persuade the European publics that the strong focus on fulfilling the convergence criteria guiding entrance to the Euro-area in the late 1990s did not mean that politicians were heedless about unemployment.[54] Even so, the OMC gained a life of its own, and has since spread rapidly to new policy areas. Similarly, when comitology emerged in the 1960s, no one could imagine that it would extend into virtually all policy areas dealt with under the CM.[55] In both cases, unexpected evolutionary developments have highlighted the need for legal containment.

The proponents of the DDP have called for a constitutionalization of the OMC.[56] This, however, stems from an insoluble contradiction, in that purely political processes which operate outside the realm of law cannot be constitutionalized. Any meaningful concept of constitutionalization implies a restricted conferral of power upon an authoritative structure capable of restraining the use of discretionary power at 'lower' levels through legal means. But, from a legal perspective, the OMC does not confer any authoritative power on the EU system: one of its advertised central aims is precisely to avoid further increasing the authoritative power of the EU. The absence of law (an intriguing idea for political scientists, because it removes the 'irritation' arising from the clash of legal with political rationality) means that the OMC can never be a normatively satisfactory solution for the emerging European polity.

On the other hand, the OMC will not go away. As illustrated above, it fulfils a specific and perhaps even necessary 'pre-integrative' function within the realm of the European integration process. From a functional perspective, the OMC is neither a vehicle of deliberation nor just an instrument of intrusion. Such unhelpful dichotomies can rather be circumvented, by focusing on the usefulness of the OMC, as long as it is maintained as a strictly preliminary tool, applied within policy areas where integration, meaning the conferring of legal competences on the EU system, has not taken place; policy areas, in other words, which by their nature are guided by relatively unrestrained forms of political rationality, because relevant juridical frames have not yet been established.

From a normative perspective, this would lead to an assessment of the OMC as an unfortunate but necessary first encounter in the integration process within a given policy area. A realistic normative approach should therefore seek to define narrowly its areas of deployment through legal means, so as to ensure that

colonization of other more mature policy areas is avoided. A constitutional containment of the non-legal character of the OMC would establish firewalls between 'pre-integrationist', and therefore 'pre-legal', and inherently political, operations, and policy areas where power politics has already been successfully restrained via legal instruments. Concretely, this would mean that future treaty revisions ought to limit the deployment of the OMC to areas outside the CM and where the Community possesses only complementary (or supportive), as opposed to shared or exclusive, competences.

That would, of course, merely amount to a negative limitation of the OMC and not to a substantial juridification of the method. Constitutionalism, however, remains a limited option insofar as it is only oriented towards regulation of the dense power of formal institutions. Limiting the application of the OMC to policy areas falling outside the CM would, however, safeguard the balance between contingency and stability in the EU. As already indicated, DDP proponents see change and unpredictability as inherently positive values. In sharp contrast, the function of law is to stabilize normative expectations and ensure that they can be maintained even when they are not met.[57] Hence, the coupling of law and politics through constitutionalization has served to curb the volatility and contingency of political processes, insofar as constitutions maintain the balance between law and politics, and institutionalize a relationship that enables a mutual level of increase between change and stability.[58]

The concept of the regulatory state contrasts with that of the OMC across virtually all dimensions. Besides one very positive element, namely that regulatory agencies can be safely anchored in the rule of law, the regulatory state is the embodiment of technocratic governing. As a normative ideal, it is therefore bound to remain unsatisfactory. On the other hand, as Majone convincingly argues, for structural reasons there are specific societal functions which the political system is ill-equipped to carry out (e.g. central banking, competition policy and some forms of risk regulation). Indeed, independent regulatory institutions with discretionary powers are today a common feature of most, if not all, mature democracies. To the extent that such functions are transferred to the EU system, a case can therefore be made for the establishment of truly independent regulatory agencies within narrowly defined policy areas. As already noted, many agencies have already been established, a number of which are not concerned with regulatory issues as such, but instead with, for instance, monitoring and dissemination. Currently there are few indications that any of these agencies will develop into full-fledged regulatory agencies in the foreseeable future. Yet, as the unexpected emergence and evolution of comitology and the OMC illustrates, the future remains uncertain. In order to avoid the emergence of European agencies with full discretionary powers where this lacks functional justification and normative acceptability, a constitutional safeguard could be inserted, stating that a complete transfer of discretionary competences to regulatory agencies can only occur within policy areas under exclusive Community competence. Any move towards the establishment of full-blown regulatory agencies would thereby be conditional upon the consent of all

Member States to grant the Community exclusive powers in the relevant policy area.

In between the OMC and the concept of the regulatory state, comitology retains vibrancy. Its success as an instrument of integration rests on its hybrid structure, which corresponds to the hybridism of the European construction. Comitology is strongest in zones of specific and complex regulation, where detailed harmonization is needed. Even if comitology is a normatively adequate means of producing harmonization, its uncontrolled spread across policy areas since the 1960s is not normatively acceptable, as it embodies integration by stealth. To counter this development, future treaty revisions could limit the introduction of comitology structures to policy areas which fall under the CM and which are characterized by shared competences.

Ideally such a legal constraint should be combined with a reform of CM, which in its present form is overly rigid and cumbersome. The core element of the CM is the concept of institutional balance (IB). In the absence of alternatives, the present IB represents a pivotal safeguard mechanism, and should be maintained. The restraints on power that this early-modern, and indeed Montesquieu-like, concept imposes can, however, be maintained at the same time as the CM is rendered more dynamic, if the concept of IB is substituted by a functional separation of powers. The disadvantage of the IB is that it is a 'crude' concept, focused on a negative limitation of power in the sense that it is based on a form of power sharing, whereby all institutions and Member States have a stake in the policy processes: legislative power is divided between the Commission, the Council and the Parliament; executive power between Commission, Council and Member States; and juridical power between the European Court of Justice (ECJ), Court of First Instance (CFI) and Member State courts. A move towards clearer functional separation of powers would rationalize the system, and increased functional differentiation would simultaneously ensure limitations on the exercise of power. Ideally, this would facilitate the establishment of a relationship of mutual increase, where the exercise and restraint of power go hand in hand. In turn, this ought to ensure the EU system's ability to react to changes in its environment and an increase in the incorporation of new knowledge without the rule of law being abandoned.

Moreover, within the framework of a reformed CM, it would be possible to accentuate the existing trend towards more flexible framework legislation diminishing trade-offs between centralization and decentralization and between harmonization and flexibility. As Sabel and Zeitlin point out,[59] areas such as electricity regulation, drug authorization, occupational health and safety, and competition policy have all been reformed in recent years and network models combining traditional legal instruments, such as directives, with the agency model and comitology, applied. New configurations may further increase regulatory measures' flexibility for policy development, while simultaneously retaining firm legal ground in the form of legislative procedures and access to juridical review.

Conclusion

The central argument of this chapter is that theories of the regulatory state, deliberative supranationalism and direct-deliberative polyarchy (DDP) are based on three different concepts of power which can respectively be labelled steering, consensus and conduct of conduct. These concepts, it is further suggested, reflect their foundations in three different forms of rationality: strategic, social and dramaturgical. The proponents of particular theories, however, largely adopt the concepts in an un-reflexive manner. In addition, the three theories remain partial theories; respectively focused on three different forms of governance: regulatory agencies, comitology and the Open Method of Co-ordination (OMC).

As for substantial critique, the theory of the regulatory state has been criticized as being based on outdated Weberian premises, and out of touch with fundamental realities of the European integration process. Claims associated with the theory of deliberative supranationalism concerning the prevalence of deliberative modes within the realm of comitology were considered to be theoretically viable. This theory, it was observed, does however require refinement and expansion, and relevant empirical findings are still too inadequate to permit any thorough evaluation of its strength. With respect to the theory of DDP, a fundamental discrepancy was noted between the theory's normative ideals and the actual function and operational mode of the OMC. Against this background, it was questioned whether the theory is a suitable instrument for analysing the OMC.

On the basis of a contextualization of the three forms of governance within the larger realm of the European integration process, it was also argued that the three forms are not mutually exclusive but rather tend to reproduce different functions in terms of convergence (the OMC), harmonization (comitology) and steering (regulatory agencies). Moreover, these functions were found to be particularly prevalent within different phases of policy development, allowing a distinction between pre-integrative, integrative and post-integrative phases of regulation.

This contribution concludes with the proposal that a feasible constitutional compromise could be based on an anchoring of the three forms of governance in the treaty basis of the EU, by limiting; the OMC to policy areas where the Community only holds complementary competences; comitology to policy areas characterized by shared competences; and full-scale regulatory agencies to policy areas where the Community has obtained exclusive competences.

Notes

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3 Participatory governance and European administrative law

New legal benchmarks for the new European public order

Rainer Nickel

European Governance is more than just a policy instrument without legal significance. Its regulatory sub-divisions, such as Comitology, the Lamfalussy procedure, and the growing number of European administrative agencies, have colonized substantive parts of the law-shaping and law-making processes. This contribution argues that European Governance is a distinct phenomenon that cannot be easily reconciled with traditional notions of legislation and administration, but needs to be theorized differently. Accordingly, its legal shape has to be adjusted to this new situation, too. Neither a – still only vaguely defined – concept of 'accountability', nor a non-binding policy concept of 'good governance' can fill this gap (Section 1). A redefinition of European Governance – as an 'integrating administration' – has to take the new development of a distinct European administrative governance sphere seriously. At the same time, it has to address the specific legitimacy *problématique* of the new governance structures in a sufficient manner (Section 2). The specific character of these structures calls for an institutionalization of *participatory* patterns within the governance structures: by ensuring the involvement of civil society actors, stakeholders and the public in the arguing, bargaining, and reasoning processes of both European governance and European regulation, the odd position of European governance, which oscillates between legislative and administrative functions, can be targeted more adequately (Section 3).

Good governance and European administration

'Governance' is not a legal term – this opinion was and still is, or has at least until recently been, the state of the art in European administrative law. While, for a number of years, neighbouring sciences, such as political and social sciences, have increasingly used and embraced the term both as an empirical category for new forms and modes of the execution of public power, and as an analytical category to differentiate these developments from 'classical' concepts of government and administration,[1] the term 'governance'[2] has not yet entered the legal texts of the EU, or classical legal textbooks. Given the fact that the legal profession is known to be rather averse to change, its terminological conservatism may explain its reluctance to embrace governance as a legal concept,

while the more trendy (or more attentive and creative) political sciences happily welcome the new concept: the fact that 'this is the end of the world as we know it' (REM) appears to be less threatening for social scientists than for lawyers.

Better reasons can be named, however, to explain why governance has not yet become a keyword in European public law. 'Governance', in its vague meaning[3] of a new steering and implementation technique of political programmes, does not evoke the necessary legal guardrails for the execution of public power: while we expect governments and administrators to be democratically legitimized, guided by the legal acts of parliament and controlled by the courts, we do not know which legal mechanisms and/or standards to apply to European governance techniques, structures, and decisions. Benchmarking and knowledge-generating procedures, such as the Open Method of Co-ordination, intertwined public–private regulatory mechanisms, such as the Lamfalussy method, and a gigantic network of bureaucracies called Comitology, under the roof of the Commission, which is engaged in both policy-making and policy-implementing, these phenomena are all far from a hierarchical, Weberian-style bureaucracy and a Kelsenian hierarchy of norms.

Out of this difficulty to cope with new forms of governance and its legal supervision, the term 'accountability' has been promoted as a possible substitute term, with similar roots in political economy as the term 'governance' itself.[4] Carol Harlow's book *Accountability in the European Union*[5] reflects such a deep unease with the governance-accountability newspeak extremely well: she starts with a chapter entitled 'Thinking about Accountability', in which she sees the need to explain and defend the use of the term 'accountability' with a view to the common roots of governance and accountability in New Public Management concepts. Thus, accountability through law is just one possible concept out of many; efficiency or transparency could substitute law as a normative benchmark. In essence, accountability is a vague umbrella term, which is based on the general idea that it denotes mechanisms and procedures which serve the purpose of holding public administrators to account vis-à-vis the citizens.[6]

The European Commission's 2001 White Paper on Governance, however, went beyond the mere acknowledgement that something had changed in the self-description of European bureaucracy and its functional mechanisms. It promotes a concept of *good governance*,[7] thus introducing a normative yardstick into the discussion about governance. The European Charter of Fundamental Rights reflects this turn to a qualitative approach to governance; in Article 41, the citizens are granted a 'right to a good administration', albeit limited to 'his or her affairs' and focused on individual measures instead of all administrative actions.[8] In contrast to this limited and individualistic concept of 'good administration' in the Charter, the Commission's concept of 'good governance' is applicable to all forms of the extensive regulatory functions and actions that characterize the present system of EU governance, including new governance mechanisms such as Comitology, the Lamfalussy procedures, and the Open Method of Co-ordination.

The White Paper's outline of 'good governance' contains a catalogue of five principles that describe the policy goals of the Commission (openness, participation,

accountability, effectiveness, and coherence).[9] It fails, however, to translate these positive goals into a clearly normative – legal – language. 'Good governance' is not (yet) a legal concept, and the question remains as to how the law should deal with the turn to governance. One possible answer might be to draw on the idea that a modern understanding of European governance as a heterarchical compound of Eurocrats who act as policy planners, policy makers, organizers, network co-ordinators and supervisors in countless policy networks,[10] does not pre-empt a description of the EU in administrative or bureaucratic terms, at least from a legal point of view.[11] The creation of the single market was – and is – accompanied by extensive and detailed re-regulation activity,[12] and this regulatory activity is de facto the work of public officials from the Member States and of officials from the Commission, accompanied by experts in the respective regulatory field. Both its central function for the internal market and its governance reflect the fact that the focus of modern administrative law is not on individual administrative decisions but on the general regulation of issues such as market failure and the balancing of risks.[13]

As a consequence, the answer to the question of the legal gestalt of good governance may be found in the administrative law of the EU *de lege lata*. Its well-known fragmented character, however, renders it difficult to assess outlines for legal constraints on regulatory activity: European administrative law consists of a patchwork of scattered EC treaty provisions, general principles of European law shaped by the ECJ and its case-law, and secondary norms within special fields of regulation. Most remarkable is the fact that major regulatory activities, such as the Comitology procedures, are hidden in an opaque provision of the EC Treaty, instead of being outlined in depth in a prominent chapter of the Treaty. The wording of Article 202 EC, in particular, hides the fact that the real power of decision-making tends to shift to 'expertise'. This expert knowledge is mainly provided by the administrations of the Member States,[14] and generated within a plethora of EC committees. Fundamental questions of 'good governance', such as whether and under what conditions the documents and the minutes of EC committees, set up according to Article 202 and the Comitology decision, can be viewed by private parties, were not even roughly defined within the regulatory framework of EU administrative law, and consequently had to be decided by the Community courts[15] on rather vague legal terms.

In a number of recent cases, the Community courts were confronted with legal challenges to European governance structures. Questions of access to the documents of the committees, the Council Secretariat, and the Commission,[16] challenges to regulatory procedures, claims regarding the violation of procedural rules,[17] the right to be heard,[18] and other legal issues surrounding the new governance structures, had to be dealt with by the courts. Because a comprehensive ('constitutional') legal framework is lacking, the courts had to decide on a day-to-day basis. It is no wonder, then, that the legal coming to terms with new governance structures resembles a piecemeal process, and that attempts to formulate a physiognomy of European administrative conflicts[19] pose more questions than they have so far been able to answer.

For European administrative lawyers, this unpleasant situation strongly suggests that it may make more sense to stick to the traditional arsenal of European administrative law. A look at contemporary depictions of European administrative law confirms this presumption. Prominent European lawyers, such as Paul Craig, in his recent writings,[20] or Jürgen Schwarze, in the new edition of his ground-breaking work on European Administrative Law,[21] do not even mention the term 'governance'. Their main concern still lies with the relationship between the EU level and the Member State level of administrative law, and with decisions concerning individuals, and not with the regulatory activity of the EU as such. This is not to say that the vague legal character of the new governance structures goes unnoticed, but that it is, to some extent, perceived as belonging more to the political side of the policy process. In Paul Craig's words, it is a matter of 'normative choice' for the Community courts to decide, for example, that the right to be heard in relation to individual determinations is fundamental, while a similar right to participation or consultation in the context of regulatory activity depends on a clear legal basis in the Treaty or secondary legislation.[22] Administrative law, and the concept of 'good governance', it seems, do not contain sufficient legal substance to determine the choices of the Community courts.

European governance as an *integrating administration*

The aforementioned résumé is dissatisfying in two respects: it does not sufficiently take into account that the EC/EU has transformed itself from a mainly functional compound of economic co-operation and economic policy co-ordination to a law-generating *hydra*. Its fields of administrative activities and regulations have extended from the re-regulation of the European market in the 1980s and early 1990s, to *services publiques*, such as education, health, social security, broadcasting, public transportation,[23] as well as to the domain of public order in the 'area of freedom, security, and justice' at the present time. Secondly, it is the centralization/decentralization issue that has to be addressed when theorizing about European administrative law: administrative actions in the European realm are increasingly 'decentred' in the sense that they are neither rooted in a single legal source or structure, nor formed or implemented by a single administrative entity, be it the European Commission, or the administrations of the Member States. They represent the transformed reality of an 'integration décentralisée' (Eduardo Chiti) and 'décentralization integrée' (Loic Azoulay).[24] A new administrative space has emerged in which the traditional Community methods and structures of hierarchy and delegation, in the framework of an executive federalism, are supplemented by new forms of procedural, communicative, and conflictual techniques.[25] A special characteristic of this new space of regulatory and administrative activity is the fact that its institutional structures have emerged outside the traditional Community method with its legislative triangle of the Council, the Commission, and the European Parliament, and are therefore, in some aspects, completely outside the reach of the ECJ.

This new European public legal order is still in search of its legal form. The fusion of classical government functions (regulation and administration) with new institutional modes and forms, combined with the absence of a classical parliamentary legislator, blurs the distinction between legislation and administration to a heretofore unknown degree. One crucial question, then, is whether this development should be described in, and measured according to, constitutional terms and norms (with regard to doctrines of separation of powers, of popular sovereignty, or of constitutional rights, for example), or in terms of administrative law and administrative accountability, with its own distinctive set of normative expectations (following the doctrines of rule of law/*Rechtsstaat*, for example).

While it is widely acknowledged that the new structures of European governance de facto occupy a prominent position in the real world of the EU's activities today, and that they operate in large parts beyond the formally constituted rules of the treaties,[26] their legal shape and role is still underexposed. Only recently have some efforts been undertaken to shed light on the New European Public Order. Eduardo Chiti has observed the 'emergence of a Community administration',[27] and most recently Herwig Hofmann and Alexander Türk have made an attempt to map the New European Public Order under the title of what they perceive as 'Europe's Integrated Administration'.[28] They analyse the wide-ranging spectrum of governance structures that have emerged under the roof of the EC/EU (Comitology, European Agencies, the Open Method of Co-ordination) and discuss whether these diverse developments, forms, and institutions add up to a constitutionalization of EU Governance – in the form of administrative law.

Such an account of Europe's administration deserves closer attention in three respects: First, can we really speak of an *Integrated* Administration given the fragmentation of administrative law and procedures at the level of the Community/Union? A second aspect that deserves scrutiny is the popular thesis that the general structures of the EU's administration add up to some form of administrative 'constitution'. Finally, in a concluding remark (below Section 3), I wish to address some additional aspects that should be observed when designing a possible 'juridification' of European governance, and when developing normative concepts of 'good governance', especially the crucial question of how to achieve a better inclusion of civil society in administrative law-making processes.

The diffusion of administrative structures

Hofmann and Türk base their analysis on the well-founded observation that the classical model of EU administration (branded by Koen Lenaerts as 'executive federalism'[29]), with a distribution of administrative functions between two distinct levels, no longer reflects the reality of administrative action in the framework of the EU. Indeed, while the law in the books sees the Member States in the role of the executors of EU input, nowadays we can observe the 'intensive co-operation of administrative actors from the Member States and the EU in all

phases of the policy cycle from agenda-setting over decision-making to implementation of policies'.[30] The Member States themselves increasingly produce input, and the EU is – via composite administrative procedures – more and more involved in the implementation of administrative programmes that are shaped by the Member States, too. This situation radically calls into question whether the description of EU governance by political scientists as multi-level governance[31] is still the correct metaphor. In some important fields, such as the system of EU committees ('Comitology'), theoretically separate levels melt together into a *Verbund*, a compound operation in which the roles of the controllers and the controlled seem to have become twisted and entangled.

The most striking feature of this *Verbund* is the fact that it operates to a large extent beyond the formally constituted legal framework of the treaties. EU committees, for example, are not EC or EU treaty institutions, and the same holds true for European Agencies. Only at sub-treaty level can we find legislative acts which contain fragments of something like a general legal framework for administrative actions and decision-making.[32] However, these fragments only partially juridify the *Verbund*. Naturally, the same holds true for the adjudication of the ECJ, whose interpretations of the legal structures and whose intervention in the actual performance of the actors, necessarily remain punctual.[33]

Hofmann and Türk use the term 'integrated administration' to describe this system of governance. Their understanding of administration is based on a formal, or rather, institutional category. They base their concept of an integrated administration on a generous definition of 'administration', with the result that it comprises any activity by actors from the EU or the Member States, which fulfil public duties and are not directly elected legislators, members of Member States governments (such as Ministers in the Council) or members of the judiciary.[34] This definition suggests that *every action* of public officials in the EU (with the exception of Member State ministers and judges) is administrative action, and thus the definition also covers the preparation of legislative acts, and regulative actions under the umbrella of the Commission. The latter functions, however, point more towards a somewhat legislative role (in the case of Directives and Regulations) or quasi-legislative role (in the case of Comitology), than towards 'administration' in the traditional sense – the execution of the legislative will. Although Hofmann and Türk acknowledge this legislative (and sometimes even adjudicatory) function of public officials in the EU, they claim that this does not prohibit the use of the term 'administration'.[35]

The very wide[36] definition of administration also leads to a very wide definition of administrative law: it comprises all legal relations among public officials, and between them and the EU citizens. As a consequence, administrative rules and principles are rules which regulate the functioning of the EU and the interaction between its institutions as well as the relations between individuals and public bodies in the implementation of EU-policies. This definition includes not only the administrative rules within legal acts on specific policy fields, such as environmental law, and the fragmented general rules of EU administration, but also the TEU and the TEC. Even the Charter of Fundamental Rights, once

adopted as a legally binding document, would possibly fall under the definition of 'rules and principles that regulate the relations between individuals and public bodies in the implementation of EU policies'. If read in this way, the whole legal structure of the EU would add up to 'administration', a definition upon which the strongest critics of the EU and its democratic deficit could easily and happily agree.

A less formal definition of administration may take into account that the supposedly clear lines between legislation and administration are blurred, not only in the context of the EU, but also in the Member States themselves. Important fields of regulation, such as environmental law or risk regulation, are dominated by administrations (and private actors whose regulations 'deserve recognition') because the legislator largely appears to be unable to provide the resources, manpower, knowledge assessment, and experience necessary for the fulfilment of the regulatory tasks.[37] The emergence of a regulatory *Verbund* of administrations on the EU level only reflects this development towards administrative structures that colonize and occupy law-generating procedures, and fulfil extensive law-making functions.

It is not by chance that the auxiliary term 'governance' (and not government or administration) is widely used to denote these structures and actions which do not fit into our traditional typology and methodology. A redefinition of governance according to the institutional background of the actors, and not along the lines of their actions and functions, as Hofmann and Türk seem to suggest, may provide a terminological safe haven, but it may also, to some degree, cover up core aspects of EU governance structures, instead of describing and revealing them adequately.

The essence of Hofmann and Türk's approach lies elsewhere, however: their analysis of the Comitology and Lamfalussy procedures, of the growing number of European Agencies and of the Open Method of Co-ordination underlines the point that the intensive co-operation of administrative actors from the Member States and the EU has increasingly blurred the traditional distinction of direct and indirect administration within the Union. Various forms of administrative interaction play a central role in the development and implementation of policies in the EU. Hofmann and Türk conclude that a 'homogeneous organizational phenomenon has emerged' which has a 'specific character being neither a federal state nor an international organization'. Instead, this phenomenon constitutes a third way between a clear-cut federalism and the traditional two-level system of direct and indirect administration. In summary, they hold that this heterarchic, but homogeneous, structure deserves to be called 'integrated administration'.[38]

According to Hofmann and Türk, this finding is not only the result of a sociological observation; it is also a normatively desirable model for EU administration. They claim that, through broad and intensive participation of the Member States' administrations, an integrated administration does not threaten the very existence of the EU Member States, because it avoids the creation of heavily hierarchic structures.[39] However, the term *integrated* administration conveys a

strong notion of unity in a field where actually diversity prevails. As the authors themselves observe, administrative structures in the EU are of an evolutionary nature and represent a patchwork, rather than a coherent structure, and this holds especially true with regard to the institutional structure, with its sometimes confusing variety of European Agencies and Comitology committees. In its White Paper, the European Commission even strongly favoured the establishment of new regulatory agencies, in place of Comitology committees, in order to enhance the coherence of the organizational structure[40] (and in order to strengthen its institutional position, too). Thus, to call this variety 'homogeneous', as Hofmann and Türk do, is clearly a misnomer. In addition, there is very little co-ordination between the policy fields, and only limited legal coherence, because there is no clear general framework to guide and limit the various fora and procedures of EU administrative governance, but only scattered provisions which regulate administrative action. Thus, it appears questionable whether it is justified to describe the existing patchwork of administrative constellations of a diffuse and fragmented character as *integrated*, rather than as *integrating*.

Furthermore, the projection of an *integrated* administration is difficult to reconcile with the existing legal structure of the EU, which is, as mentioned before, very fragmented. In the absence of a treaty provision allowing for a comprehensive European administrative law code (and a political initiative for such an endeavour), this situation will remain relatively stable in the foreseeable future. In this environment, a *normative* claim for an integrated administration would need a stronger support from those who would be affected by such an administration – the European citizens and the European public. While the integration of the market(s) was clearly a political and legal project that the European states agreed upon, supported by a wide-ranging consensus among the Member States and their constituencies, the administrative integration process is viewed with a lot more scepticism and suspicion. It cannot be separated from the deep mistrust with which the apparently overwhelming and anonymous bureaucratic rule within the EU is viewed. The French and Dutch referenda on the Constitutional Treaty may be taken as an expression of this scepticism.

A 'salad bowl' concept of legitimacy

The insight that we are facing a de facto *self-integrating* EU/Member State administration; a diffuse and incompletely formalized governance structure, evolving mainly outside the legal framework of the treaties, immediately raises legitimacy concerns. Hofmann and Türk correctly stress that '[i]n this situation, the establishment of traditional Weberian-style legitimacy through intra-administrative chains of hierarchical responsibility becomes increasingly difficult'.[41] They present and discuss three distinct models for legitimacy of governance in the EU: the 'parliamentary/government' model, based on the idea of a true federal European state,[42] and the 'regulatory model',[43] based on the assumption that the EU should be confined to technical, not social, regulation, as

two rather traditional approaches, and the model of 'deliberative supranationalism'[44] as a more up-to-date approach that takes the evolution of governance modes such as Comitology seriously.

Hofmann and Türk reject all three models – for different reasons – as insufficient. They claim that

> [T]hese models of legitimacy for the exercise of governance in the EU each address certain aspects, but they are not in themselves sufficient to provide for the whole set of criteria for legitimacy of such a complex phenomenon as government and governance by an integrated administration in the EU.[45]

This 'whole set of criteria', however, does not add up to a single, compact normative approach, but remains quite flexible; the complex and heterogeneous nature of European administrative governance requires 'the development of models which are adapted to the necessities of the integrated nature of the EU', and 'additional difficulties arise from the fact that conditions for legitimacy differ according to each policy phase'.[46]

The concept of legitimacy that Hofmann and Türk present and then flesh out in the course of their text is – necessarily, they claim – incoherent when viewed through a traditional lens: instead of referring to a single frame of reference for their legitimacy claims (democracy, a constitution, effectiveness), they accept various concepts and aspects as possible sources for administrative legitimacy. This allows them to differentiate between the activities forming and shaping the legislative process, and the implementation phase of EU governance.[47] In the former context of legislative activity, legitimacy is 'more dependent on its transparency, the integration of expertise and the participation of affected interests, rather than on the judicial control by courts'. However, it remains somewhat unclear why they differentiate within the legislative activity between an 'agenda-setting process' and a 'policy-making process'. The legitimacy of the former is said to depend on transparency, expert integration and participation of interest groups, while the legitimacy of the policy-making process is supposed to be based on the institutional balance between the actors involved in the legislative process. However, it appears to be difficult to find a clear-cut division between agenda-setting and policy-making, as Hofmann and Türk themselves point out in other sections of their contribution.[48] In the real world of European regulation and rule-making processes, both activities are more often than not inseparably linked, and coincide in a single regulatory project and strategy.

In summary, Hofmann and Türk reject a 'one-size-fits-all' approach, and underline that questions of legitimacy have to be answered according to the structures of the different levels of administrative action: sources of legitimacy vary significantly from the agenda-setting process over the policy-making process to the implementation process. In a seemingly small, but in fact significant shift, they turn from questions of legitimacy (without defining their own understanding of legitimacy in depth) to *accountability*.[49] While questions of legitimacy in most theoretical approaches are seen as being linked to both the

problem and the possibility of supranational law in the absence of a fully-fledged European parliamentarian democracy and a single European public sphere, the term accountability clearly narrows the perspective. In Hofmann and Türk's view, the shift to accountability 'means that we need to explore criteria and means of holding the relevant actors contributing to the creation and implementation of EU accountable', which 'requires a rethinking of the notions of political and judicial accountability as currently discussed in the constitutional debate'.[50]

Accountability of administration has many facets and can be defined in many different ways, as already stated above. We may ask: who is accountable to whom (the regulators to the citizens; the private participants of regulatory processes to the market forces; the Member State officials in Comitology committees to the European public?) and to what extent, and what are the legal and factual consequences of a violation of accountability benchmarks and rules? Hofmann and Türk fail to deliver a more precise answer to all of these questions. Instead, their research focuses on the role of the courts, as in many administrative law concepts in which accountability replaces classical notions of the rule of law, and the *Rechtsstaat* principle. Courts, in particular the Community courts, still play a central role in controlling administrative activity, and, according to Hofmann and Türk, it is their task to elaborate and to safeguard the rules and principles of good governance.[51] However, it is important to confront such an approach with the lack of clear general rules and regulations for European administrative procedures, including a legally-binding concept of good governance. This renders it very difficult, if not impossible, for the Community courts to elaborate criteria out of the vague 'general principles of law' such as equality or fairness. In addition, courts have to respect both political decisions and the limits of judicial control. In Hofmann and Türks words, '[t]he more political control is afforded in areas more akin to legislative activity – agenda-setting and policy-making through expert groups and the activity of council working parties – the less detailed judicial control will take place'.[52]

In order to fill this gap, Hofmann and Türk propose a 'system of checks and balances', without explaining in detail, however, in what sense such a system would be different from the already existing EU-system of balanced institutions and powers. Maybe this is meant as a metaphor for techniques of mutual observation? In addition, they also mention the Commission's internal 'Hearing Officer' and alternative dispute settlement procedures, such as the ombudsman procedures, as possible blueprints for enhanced administrative accountability, without elaborating further, however, on how a further extension of these additional, and not strictly 'legal', accountability mechanisms would enhance the legitimacy of EU governance. A recent proposal of European lawyers for the installation of a new 'European Criminal Law Ombudsman'[53] underlines the problems and pitfalls of such a 'soft law' approach: This proposal stresses the urgent need for a counterweight against the administrative–institutional preponderance of Europol, Eurojust and other forms of the hybrid New European Public Order, and, at the same time, shows that the 'old' procedural safeguards

against fundamental rights infringements are toothless with a view to the new, network-based structures of European Governance. Thus, the installation of an(other) ombudsman, to a certain degree, represents an act of desperation; the law hastens after governance, and governance wins.

Governance is here to stay: how to reconcile democratic legitimacy and supranational governance?

Is it sufficient to seek legitimacy in a diverse mixture of accountability mechanisms alone, with an underlying concept of something similar to a composite legitimacy? Like a number of other authors who try to translate European governance into legal terms, Hofmann and Türk do not explicitly ask this question, but it appears to me that they do address the problem, albeit under the different heading of a 'constitutionalization of European administration'. These approaches rely on the concept of 'constitutionalization' while defining this term in the given context of European governance, not in the literal sense of a written constitutional document, but in the sense of a two-level system of constitutional norms (of a higher order) and a general framework for European administrative activities. This inevitably leads to the quest for a European Administrative Procedures Act, or a similar codification of general administrative law. A set of procedural cornerstones within a general administrative law framework would clearly help to structure and legitimize administrative activity in the EU. Two aspects speak against such a codification, however: attempts to unify historically developed fields of law at European level, as the passionate discussion about a European Civil Law code shows,[54] touch upon the very nerves of law-making in supranational constellations;[55] furthermore, the Treaties do not contain a clear and explicit competence for the creation of a European Administrative Law code. The fragmented character of the existing administrative rules will thus persist for the foreseeable future.

A pragmatic view of these obstacles may hold that a comprehensive codification is not only impossible, but also unnecessary, and it may underline the rationality of the governance structures that have emerged. Hofmann and Türk, for example, turn the vice of an increasingly integrated administration via cooperative procedures and networks (the 'underworld', as Joseph Weiler coined it for the Comitology committees) into a virtue: in their view, the structures of Comitology, European Agencies and Lamfalussy procedures represent 'the substance behind the theoretical notion of shared sovereignty'.[56] This may well be true, but, at the same time, this statement highlights the problematic nature of the administrative compound even more. An integrating administration disconnects the citizens – the European *citoyennes et citoyens* – from the European law-making processes, be it in the form of agenda-setting and 'classical' law-making under the umbrella of the Council, or in the form of Comitology or Lamfalussy procedures, where, in many cases, the 'real', material content of norms is defined.

A mere upgrading and perfectioning of accountability mechanisms, especially if they are basically of a *judicial* and/or *non-legal* nature, then, cannot

deliver a sufficient answer to these legitimacy problems. The combination of judicial supervision and the soft techniques of ombudsman interventions that Hofmann and Türk embrace, undoubtedly play an important *additional* role, especially with regard to transparency, visibility and procedural fairness in individual cases. What they do not address, however, is the fact that a bureaucratic culture of compromises and 'best practices', even if agreed upon in a more or less deliberative fashion, cannot replace a process of *public* deliberation on legally binding norms, but rather holds connotations of benevolent absolutism. In its place, a 'culture of contestation' is needed, where the (thin) European public sphere and the (thick) Member State public spheres can be integrated and included in the law-generating processes.

The Draft Constitutional Treaty, with its Article 47 on 'participatory democracy', and the Commission's White Paper, with its reference to participation as a fundamental principle of European governance, express this deep unease with the classical Community method and the new governance structures alike. Even if the White Paper's commitment to the participation of civil society may be called a misnomer, because, in substance, it is reduced to the well-known technique of consultations,[57] it stands for a symptom of crisis. The same may be said about Article 47 of the Draft Constitutional Treaty, where the principle of 'participatory democracy' is anchored. The content of the provisions remains very vague and unsubstantial with regard to the actual legal position of civil society actors within participatory processes. Both documents, however, may point towards alternative ways of facing the legitimacy gap, a gap that has been deepened by the process of an integrating European administration.

A mere change in terminology – from government/administration to governance, from administrative law to accountability – without a proper theory of the very concept of 'governance' itself, cannot provide satisfying answers to the legitimacy gap, and cannot cover the failure of classical administrative law instruments and concepts to grasp the novelty of European governance.

European governance extends to the field of legislation to a much higher degree than governments do within the framework of the nation state, especially in the form of the Comitology structure and the emerging concepts of regulation following the Lamfalussy procedure. It is precisely this aspect which has fuelled the discussions about supranational rule-making and its relation to democracy. While democratic 'fundamentalists' claim that this renders the EU's rule-making structure undemocratic in principle, others have argued that pure technical legislation does not need strong legitimacy (especially Andrew Moravcsik[58] and Giandomenico Majone[59] have supported this view). However, a third way of thinking about risk regulation and legitimacy has offered a surprising proposal: Christian Joerges and Jürgen Neyer[60] have turned the notion that non-elected public officials from the Member States decide upon a major part of material risk regulation into a virtue of the rule-making system. They underline that this technique of rule-making has the potential to preserve democratic legitimacy, instead of destroying it. Their starting point is the fact that rule-making in the Member States always and inevitably – especially in the

context of an integrated market – has grave external effects. The population of the Member State which is at the receiving end of this chain cannot influence this rule-making process in a different way than through mechanisms that may at least make sure that its perspectives will be voiced and heard, too. In an – admittedly simplified – manner, the effect of Comitology deliberations can be seen as resulting in a preservation of democratic will-formation across borders.

The concept of 'deliberative supranationalism' was created in the context of the system of Comitology committees established according to Article 202 TEC, and a number of aspects give weight to the assumption that it cannot be transferred easily to other structures of European governance. European Agencies, for example, are structured differently, even if some observers hold that they do in fact represent Comitology, albeit under a different name. If applied to another emerging governance technique, however, namely, the Lamfalussy procedure, parallels with Comitology are even harder to draw. This is mainly due to the fact that this regulatory concept relies upon the involvement of the regulated sector, which leads to a high degree of involvement of private actors in the regulating mechanisms. These actors may voice views that are representative of the affected industries, but they certainly do not represent the constituencies of the respective Member States. Extending the concept of deliberative supranationalism, as theorized by Joerges and Neyer, to all areas of European governance would, therefore, overstretch the conceptual framework.

As a consequence, European governance cannot comprehensively be captured and theorized by such a concept as deliberative supranationalism. A possible alternative to resignation, or a mere confirmation of the existing structures as somehow rational and thus legitimized (as Niklas Luhmann would probably hold), has been mentioned above: participatory structures are needed to ensure the involvement of civil society actors, stakeholders and the public in the arguing, bargaining, and reasoning processes of European governance and European regulation.[61] If European governance is here to stay, the social humus necessary for democratic self-regulation, an element which is clearly missing at present, has to be integrated into the 'laws of law-making', which guide European governance mechanisms. In the meantime, European governance continues to be executed without being properly constituted.

Notes

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1 H. Wilson was one of the first authors to use the term in the context of a political regime (H. Wilson, *The Governance of Britain*, London: Weidenfeld and Nicolson, 1976). An early approach to governance as public management is reflected in J. W. Bjorkman, *The Governance of the Health Sector: Issues of Participation, Representation and Decentralization in Comparative Perspective*, Berlin: Wissenschaftszentrum Berlin, 1979. The ground-breaking titles, however, are the volume by J. N. Rosenau

and E. O. Czempiel (eds), *Governance without Government: Order and Change in World Politics*, Cambridge, UK and New York: Cambridge University Press, 1992, for the field of international relations; and M. Jachtenfuchs and B. Kohler-Koch, *Europäische Integration*, Opladen: Leske & Budrich, 1996, who fostered the term 'multi-level governance' in relation to the EU.

2 For an instructive account of the interdisciplinary concept of governance, see G. F. Schuppert, 'Governance im Spiegel der Wissenschaftsdisziplinen', in G. F. Schuppert (ed.), *Governance-Forschung*, Baden-Baden: Nomos, 2005.

3 The United Nations Commission on Global Governance defined in 1995 that 'Governance is the sum of many ways individuals and institutions, public and private, manage their common affairs' (Commission on Global Governance, *Our Global Neighbourhood*, Oxford: Oxford University Press, 1995, chapter 1, online available at: http://web.archive.org/web/20011222021819/www.cgg.ch/chap1.html).

4 Interestingly, neither the term 'governance' nor the term 'accountability' can be translated in a fitting manner into another European language. In German, '*Regieren*' (governing) and '*Steuerung*' (steering) were used as auxiliary terms, but these terms do not capture the whole range of governance mechanisms, leaving out, for example, self-regulatory mechanisms as a means for indirect public management. Other terms, such as the '*Gewährleistungsstaat*' (Schuppert and Hoffmann-Riem), still embrace the idea of the state as a reference point for re-regulation; this renders the term rather useless in the non-state context of the EU. For similar problems with the term 'accountability', see C. Harlow, *Accountability in the European Union*, Oxford: Oxford University Press, 2002, especially pp. 14–18.

5 Harlow, above note 4. Others have identified an 'accountability and legitimacy deficit' of the European Union, without explaining in detail, however, how these deficits are linked, or whether these are political or legal deficits. See, especially, A. Arnull, 'Introduction: The European Union's Accountability and Legitimacy Deficit', in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002.

6 The usage of the term 'accountability' in (post-)modern concepts of public administration/governance conveys a remarkable portion of irony: The roots of the contemporary concept can be traced back to the reign of William I, in the decades after the Norman conquest of England in 1066. In 1085, William required all property holders in his realm to render a *count* of what they possessed. These possessions were assessed and listed by royal agents in the so-called Doomsday books. Thus, in its original meaning, 'accountability' referred to *sovereigns holding their subjects to account*. See M. Bovens, *Analysing and Assessing Public Accountability: A Conceptual Framework*, European Governance Papers (EUROGOV) no. C-06–01, www.connex-network.org/eurogov/pdf/egp-connex-C-06–01.pdf, p. 6.

7 COM (2001) 428, July 2001. For a number of thoughtful and critical reviews of the White Paper, see C. Joerges, Y. Mény and J. Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, 2001, www.jeanmonnetprogram.org/papers/01/010601.html.

8 Charter of Fundamental Rights of the European Union, OJ C 364, 18 December 2000, pp. 1–22.

9 *European Governance – A White Paper*, COM (2001) 428, July 2001, p. 10.

10 See, especially, K. H. Ladeur, 'Towards a Legal Theory of Supranationality – The Viability of the Network Concept', *European Law Journal*, 1997, vol. 3, no. 1, 33–54.

11 A. Somek, 'On Delegation', *Oxford Journal of Legal Studies*, 2003, vol. 23, no. 4, 703–709, pp. 703–704.

12 See for an early account G. Majone, *Regulating Europe*, London and New York: Routledge, 1996.

13 See C. Harlow, 'European Administrative Law and the Global Challenge', in P. Craig

and G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, p. 273; A. Somek, above note 11, p. 704.

14 See R. Dehousse, 'Misfits: EU Law and the Transformation of European Governance', in C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market*, Oxford: Oxford University Press, 2002, p. 207; C. Joerges, 'Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures', in C. Joerges, K. H. Ladeur and E. Vos (eds), *Integrating Scientific Expertise into Regulatory Decision-Making*, Baden-Baden: Nomos, 1997, p. 295.

15 In the *Rothmans* case, the Court of First Instance (CFI) resolved the case in favour of the right to access to documents and stressed the importance of the principle of transparency. It held that 'for the purposes of the Community rules on access to documents, "Comitology" committees come under the Commission itself, […] which is responsible for rulings on the applications for access to documents of those committees' (CFI, Judgment of 19 July 1999, Case T-188/97, *Rothmans International BV* v. *Commission*, note 62).

16 See above note 15; and the *Italian Foreign Language Teachers'* case on access to Commission documents relating to a treaty infringement procedure against Italy (CFI, judgment of 11 December 2001, Case T-191/99). The teachers – lecturers of foreign mother tongues in Italy – demanded access to the documents and statements the Italian Republic had delivered to the Commission. In its judgment, the CFI dismissed their action.

17 In the *Germany* v. *Commission* case, the ECJ declared a regulation on construction materials void on the grounds that procedural rules had been violated; allegedly, the draft for a decision had not been sent within a certain time-frame to the Member State, and not in the right language (ECJ, Decision of 10 February 1998, Case C-263/95, *Germany* v. *Commission*).

18 See, for example, the recent decisions in the *Bactria* and *Jégo-Quéré* Cases, where the CFI reaffirmed that in the context of regulatory/delegated rulemaking, and in absence of special provisions in the Treaty or in special legislation, there is no individual right to be heard or to be consulted in the process of rule-making (Case T-339/00, *Bactria Industriehygiene-Service Verwaltungs GmbH* v. *Commission* (2002) and Case T-177/01, *Jégo-Quéré and cie SA* vs. *Commission* (2002))

19 J. B. Auby, 'Physionomie du Contentieux Administratif Européen', in J. Ziller (ed.), *What's New in European Administrative Law?*, EUI Law Working Paper 2005/10, online, available at http://cadmus.iue.it/dspace/handle/1814/3330.

20 P. Craig, 'Process Rights in Adjudication and Rulemaking: Legal and Political Perspectives', in Ziller (ed.), above note 19; but see P. Craig, *European Administrative Law*, Oxford: Oxford University Press, 2006, chapter 4, where he debates the Comitology procedures with reference to the governance concept.

21 J. Schwarze, *Europäisches Verwaltungsrecht*, 2nd ed., Baden-Baden: Nomos, 2005.

22 Craig, in Ziller (ed.), above note 20, p. 27.

23 See the landmark decision of the ECJ in the *Altmark Trans GmbH* Case, judgment of 24 July 2003, Case C-280/00.

24 L. Azoulay, 'Extension et Élévation du Champ du Droit Administratif Européen', in Ziller (ed.), above note 19, p. 44, with further reference to E. Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', *European Law Journal*, vol. 10, no. 4, 2004, 402–438, p. 402.

25 Azoulay, ibid., p. 44.

26 See G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999.

27 E. Chiti, 'The Emergence of a Community Administration', *Common Market Law Review*, 2000, vol. 37, no. 3, 309–343.

28 H. Hofmann and A. Türk, 'The Challenges of Europe's Integrated Administration' in E. Eriksen, C. Joerges and Florian Rödl (eds), *Law and Democracy in the Post-National Union*, ARENA Report no. 1/2006, Oslo: ARENA, 2006.
29 K. Lenaerts, 'Some Reflections on the "Delegation of Powers" in the European Community', *Common Market Law Review*, 1991, vol. 28, no. 1, 11–35.
30 Hofmann and Türk, above note 28, p. 107.
31 See, in particular, Jachtenfuchs and Kohler-Koch, above note 2.
32 These are especially: the Comitology Decision: Council Decision 1999/468 of 28 June 1999, laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L 184/23; the Agencies Regulation: Council Regulation 58/2003, laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1; the Regulation on Access to Documents: Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145/43; and the new Comitology Decision of 2006, introducing for the first time since the establishment of Comitology in the 1960s a genuine role for the European Parliament, albeit only on a very limited scale (in the context of regulatory committees); Council Decision 2006/512/EC of 17 July 2006, amending Decision 1999/468/EC, laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 2006 200/11. A consolidated version of the entire Comitology Decision 1999 as amended in 2006 was published in OJ 2006 C 255/4.
33 See, for example, the aforementioned Rothmans decision of the Court of First Instance, judgment of 19 July 1999, Case T-188/97, *Rothmans International BV* v. *Commission* on the access to committee documents; and the decision of the ECJ on procedural requirements for a valid decision of a committee: ECJ, decision of 10 February 1998, Case C-263/95, *Germany* v. *Commission* (referring to the language regulation from 1958, Regulation 1/58).
34 See Hofmann and Türk, above note 28, p. 107 with footnote 2 and pp. 108–111. Although Hofmann and Türk themselves mention the involvement of private actors – especially in the field of standard-setting – in the implementation phase, their formal definition of administration, if taken literally, clearly excludes private actors from administrative functions.
35 See Hofmann and Türk, above note 28, p. 108.
36 See above note 34. The definition is too wide and too narrow at the same time. The exclusion of private parties acting *functionally* as part of governance structures (e.g. in Lamfalussy procedures) from the definition of 'administration' can hardly be justified.
37 For an account of this modern tendency to 'guvernative structures' in the German context, see A. von Bogdandy, *Gubernative Rechtssetzung*, Tübingen: Mohr, 2000; for similar accounts in the EU context, see K. H. Ladeur, *The Changing Role of the Private in Public Governance: The Erosion of Hierarchy and the Rise of a New Administrative Law of Co-operation*, EUI Working Paper Law no. 2002/9; and R. Dehousse, above note 14, p. 207.
38 Hofmann and Türk, above note 28, p. 108.
39 Ibid., p. 108.
40 COM (2001) 428, July 2001, pp. 19, 24.
41 Hofmann and Türk, above note 28, p. 112.
42 See the famous proposal of the former German Secretary of State, Joschka Fischer, in his Humboldt University speech, and the following discussions about a 'core Europe' (C. Joerges, Y. Mény and J. H. H. Weiler, *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*, 2000, online, available at: www.jeanmonnet.org).
43 Majone's book *Regulating Europe* represents this position best. *Regulating Europe*, London and New York: Routledge, 1996.

44 See the seminal article by C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', *European Law Journal*, 1997, vol. 3, no. 3, 273–299.
45 Hofmann and Türk, above note 28, p. 115.
46 Ibid.
47 Ibid.
48 Ibid., p. 122.
49 Ibid., p. 121.
50 Ibid., p. 117.
51 Ibid.
52 Ibid., p. 119.
53 This is a proposal launched by the Council of Bars and Law Societies of Europe (CCBE), the apex organization of European lawyers. The Ombudsman is supposed to function as a counterweight against growing activities of the EU institutions in the field of criminal law, including the European Arrest Warrant; 'In the European Union, Europol and Eurojust are working across borders in the interest of law enforcement, but there is an urgent need for a new form of "cross-border protection" of defence rights to counterbalance this.' (CCBE statement of 22 December 2004, p. 8, online, available at: http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/doc/contribution_ccbe_en.pdf).
54 For a very outspoken contribution to this discussion, see P. Legrand, 'Antivonbar', *Journal of Comparative Law*, 2006, vol. 1, no. 1, 13–39.
55 The issue of codification and its limits cannot be elaborated here. For a critical perspective on a European Administrative Law code, see C. Harlow, 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot', *European Law Journal*, 1996, vol. 2, no. 1, 3–25, p. 3.
56 Hofmann and Türk, above note 28, p. 122.
57 For a more detailed critique, see R. Nickel, 'Participatory Transnational Governance', in C. Joerges and E. U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart Publishing, 2006, especially pp. 179–195.
58 A. Moravcsik, 'In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, 2002, vol. 40, no. 4, pp. 603–624.
59 G. Majone, 'Europe's "Democratic Deficit": The Question of Standards', *European Law Journal*, 1998, vol. 4, no. 1, 5–28.
60 Above note 44. For a recent reformulation of the concept of 'deliberative supranationalism', see C. Joerges and M. Everson, 'Re-Conceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication', in Hofmann and Türk (eds), *EU Administrative Governance*, Cheltenham: Edward Elgar, 2006, pp. 512–540.
61 For details of a concept of participatory governance in supra- and transnational contexts, see Nickel, above note 57, Sections I and III.

4 Judges and lawyers beyond constitutive power

Michelle Everson and Julia Eisner

> [I]f the French or the British or whoever it is, or the Dutch are voting against it, that's not a disaster for me … [.] … More important for me is constitutionalism. And we have constitutionalism.[1]

The indeterminate EU Constitution

The unfortunate fate of the European Constitution raises interesting questions about European law. As a former Advocate General confirms, European lawyers are unconcerned by current constitutional malaise, having long argued that Europe is already in possession of something resembling a constitution.[2] Nonetheless, the failure to identify a 'popular' European constitutive moment must surely cast some degree of doubt on the validity of European law's current constitution-making activities. For all that European lawyers claim to play a legitimate role in constitutionalizing integration, European publics have left us in little doubt; not that they wholly reject a constitution, but, rather, that they are utterly divided about the appropriate content that should be ascribed to it. Vitally, as Dutch and French referenda confirmed, the split is ideological and not national: some rejected the draft treaty because it was too liberal in nature; to others, it was anathema, since it imposed too great a welfare burden.

The negative referenda unveiled deep-seated disagreement about the defining ideals that should guide the EU's development. Seen in this light, the claim of lawyers to be providing Europe with its own brand of constitutionalism must be subject to trenchant questioning: given that a European polity is so divided about its own characterizing values, current treaties cannot be viewed as immutable texts with one clear meaning. Instead, a problem of legal 'indeterminacy' inexorably arises. Where views are so radically divergent, EU treaties are little more than empty shells of non-meaning, around which a variety of interests coalesce in an effort to dictate the ideals that such texts should promote. Given this degree of social and political contestation, how can European lawyers ensure their own impartial legitimacy?

Legal indeterminacy, or the fact that law can mean very many different things to different people, is not a new problem. What is new, however, is the existence of constitutional indeterminacy on such a grand scale. In traditional constitutional

theory, constitutional indeterminacy is a persistent problem of ensuring that judges remain true to the stated aims of the politically constituted founding act. Within Europe, however, corrective theories of constitutional interpretation have little application: the problem is not one of ensuring judicial faithfulness to the stated governance values of the European polity; instead, it is one of identifying these values in the first place. The problem is not that European law *may* mean different things to different people; it is that European law *does* mean different things to different people. European law must work to identify 'legitimate' governance structures without the help of a constitutive act.

European law is consequently exposed; a potentially illegitimate constitutional law, made up only of personal judicial opinion. Or is it? European integration processes may have posed an unrivalled constitutional conundrum. However, unbridled social and political contestation also presents us with a unique opportunity to re-examine how *all* legal systems do, and can, mediate between competing social and political ideals – how 'the law in fact' works to neutralize conflict and constitute a society, all the while constituting and legitimating itself. In this analysis, contention about integration values is not unique; and neither is Europe's law *sui generis*. Instead, deep-seated contention about European integration is merely a uniquely *explicit* expression of the contestation that marks *all* efforts to create social order. Likewise, the constitutionalizing effect of European law does not represent an illegitimate act of lawyerly constitution of society, but, rather, a uniquely *visible* instance of indeterminate legal decision-making under conditions of social and political contestation.

Contested European integration processes have stripped us of our governing certainties. Law is never a simple automaton, forever dedicated to defence of the constitution. Instead, deploying the terms of the German legal theorist Rudolf Wiethölter, law is forever engaged in an eternal waltz of societal and self-constitution.[3] If society is marked by unbridled political and social contestation, law can only find authority where it establishes mechanisms that structure contestation and that simultaneously allow law to constitute *itself*. In Wiethölter's analysis, law must be conceived of as *Rechtsverfassungsrecht*; a socially-constitutive and self-constitutionalizing institution, which, in the absence of constitutionalized authority, must found itself within a real-world, where its legitimacy is measured by its ability to ensure that, whilst a polity may be marked by fundamental disagreements, the law itself is respected as an impartial arbiter of social disputes.

In this light, legal processes of constitution-building within Europe become a useful focus for academic study: if European law is a law exposed, with no authority-endowing recourse to a settled constitution, then it also offers us a mirror upon the real-world of law, together with its mechanisms of social management.

Adjudicating on the institutional balance: normative vision, political contention and legal principle

> [T]here are endless opportunities for friction and misunderstandings because some of these things are not very clearly laid down in the law. And even the constitutional treaty, if it comes about – which is to clarify these things – it will never do it perfectly. Maybe, in five hundred years time, everyone will understand precisely who does what. But these things are still moving targets.

The 'community method', that is the cumbersome procedure whereby cohesive European governance is assured through a process of decision-making based on compromise and respect for all the values of parties to the integration process, has much to recommend itself. After all, political compromise, if not necessarily dedicated to the identification of the 'best possible solutions', has, at the very least, ensured the actors' continuing 'voice' within a complex integration process, and has accordingly ensured the 'loyalty' of a diverse set of parties to it. Nonetheless, the inclusion of everyone's interests also has detrimental effects on the scheme of European governance. As one Commission official notes, the notion of 'functionality' within the Community setting is not necessarily characterized by its more usual meaning of achieving an 'adequate' legislative result. Instead, and within the terms of a substantive understanding of the institutional balance that demands that each institution must have its own influence on decision-making, functionality can give rise to 'obscure' decisions and laws:

> Instead of saying, here's a problem, how should it best be solved … [.] … we tend to say, here's a problem, we can deal with this bit, somebody else has got to deal with another bit. And then we'll try and put it all together in the end.

At one level, the negative impact of the community method should be of general concern, as a modern imperative of 'output legitimacy', or a demand for efficient decision-making, cedes to a byzantine complex of interest aggregation, designed to serve democracy, not by furnishing good legislative results, but by keeping an 'EU public on board'. The underlying mismatch between input and output legitimacy, however, also raises specific issues within the ambit of this analysis of the socially-constitutive and self-constituting nature of Europe's *Rechtsverfassungsrecht*. More specifically, the mandate afforded to law to fill in the inevitable gaps left by the tired legislative process, as well as the *gouvernment des juges*, which such a mandate entails, would appear to confirm the founding assertion of this chapter: whilst EU governance may not differ substantially from its national counterparts, the mechanics of European integration processes have, in a unique way, exposed the fact that governance processes can never be conceived of as encompassing a pre-determined scheme of normative government, characterized by legislative supremacy and simple acts of judicial application.

Instead, legal indeterminacy takes on yet another guise, as the indeterminacy of legal language becomes a political mechanism; a mode of masking the

failures inherent in compromise and a political expression of faith in the ability of legal process to flesh out final decisional contours. Seen in this light, the battle to establish a socially-constitutive and self-constitutionalizing law, is not simply a normative legal programme for the adaptation of inevitably indeterminate grammatical legal substance to suit the values of a real-world. Instead, it is a task directly thrust upon law by the uncertain nature of the European polity. If the power of circumstances might be said to entail their own legitimating force, delegation of political powers to legal processes, it could be argued, carries a justificatory normativity all of its own; indeed constituting a mandate. Nevertheless, the enmeshment of legal process with a law-external political environment brings with it its own hazards, as law struggles to find an adequate mirror of reality that it can digest within its own grammar, and, at the same time, seeks to maintain its own internal neutrality. Within the constitutional jurisdiction, the dangers posed by indeterminacy are likewise intensified as legal debate moves away from consideration of technical market regulation in order to confront the unveiled politics of power.

In particular, for the purposes of this analysis, adjudication on the EU's principle of institutional balance becomes a vital 'constitutive' legal act, one of identifying and creating 'reality'. With each decision to apportion power this way or that way in the institutional balance of powers game, the Court impacts directly, not only upon the power relations between individual institutions, but also upon the legitimate nature of the European polity as a whole. Accordingly, judicial interpretation of a constitutional principle of a balance of power, is a socially-constitutive legal act, which requires simultaneous legal appreciation of an extra-legal environment – the evolving and 'acceptable' *praxis* of a European polity – and further demands the self-constitution of law.

How, then, might we identify the modes in which Europe's lawyers promulgate a 'legitimate' European constitutionalism? Far beyond traditional constitutional theory, European law does, in fact, identify the values of European integration, deploying the term 'constitutionalism' to describe its incremental efforts to identify which elements within the European polity may exercise which powers on which occasions. Accordingly, the analysis presented here uses structured interviews with Commission officials, European lawyers, as well as former and serving members of the European Court of Justice (ECJ) and the Court of First Instance, in an endeavour to peek behind the veil of formal European adjudication in order to identify the guiding contours of Europe's *Rechtverfassungrecht*.

More particularly, in seeking to understand whether adjudication on the institutional balance of powers is legitimized by anything more than brute politics or personal judicial diktat, this chapter finds itself in a world between norm and fact; a world in which the contours between law and politics are inexorably blurred, as all certainties about the directive power of politics and the implementing simplicity of law fall victim to the vagaries of the emerging European polity. A once touching political faith in the handmaiden status of legal process is now far more nuanced within the general political culture of EU institutions.

In a gentle echo of the assertion that the EU's political process affords European law a 'mandate' to engage in the refinement of political decision-making, members of EU institutions recognize the far more intricate relationship established between European politics and its 'servitor' law. Thus, one member of the Commission stresses the political origins of the concept of institutional balance, but also accepts the potential tensions that might accompany the legal pursuit of political goals:

> I think it's a political principle, which takes the form of certain legal principles. The objective is to say [that] the EU is about pooling sovereignty. But the Member States don't trust each other, so they need a neutral party, which is supposed to filter the common interest … [.] … and then you have certain legal principles like the balance of power *which try to translate the political intention behind it into actual fact*. *But, I mean, as a non-lawyer, I always have the tendency to see the law as subservient to politics* [laughs].
>
> [emphasis added]

Humour is, as ever, indicative. The Commission possesses its own clear vision of the role played by institutional balance, and more particularly, of the role which it plays within it: the Commission is an honest broker, dedicated not to parochial interests, but to 'ever closer union'. Nonetheless, the substantive vision of the balance of powers, within which it assumes its facilitative role, for all that one might wish that it were protected by 'legal principle', remains legally indeterminate. Law is not necessarily 'subservient' to any individual political vision. Instead, law can only 'try' to give effect to 'political intention'.

The recognition that law is not a monolithic bulwark dedicated to the service of one inspiring institutional balance vision is one which is reproduced throughout the research data-set. Thus, whilst almost all interviewees are in complete agreement that the institutional balance should be viewed as a 'constitutional principle', a more prosaically expressed opinion, arguing that the institutional balance 'is a bar of soap in the bath', is attributable to a political 'realism', which finds stark affirmation amongst the practising lawyers whose business it is to convince the ECJ of its particular meaning within the courtroom:

> [I]t's a political, anthropological consequence of having creatures in the undergrowth … [.] … some of them have prospered, some of them have not prospered. In the perpetual shifting of balance and opportunity, at any one moment, a different institution is more important. And what lawyers do is help to advance their client's cause, taking account of … [.] … the political, the economic verities.

And thus, the 'bar of soap' which is the institutional balance resolves itself into an intangible mass of political contention. For all that individuals may aspire to view the institutional balance as a noble vision of how Europe should be governed and its polity constituted, it is simply the lair 'of creatures in the

undergrowth', unconscionable beings who seize the opportunity wherever they can to pursue individual interest and power. Far from being a momentous constitutional principle, the notion is simply an empty shell, guarded only by the thinnest red line of a '*gouvernement des juges*'. Or is it? European judges naturally, possess their own perception of the nature and role of institutional balance, and of their own role within its construction, oversight and application:

IR: 'Do you see it as primarily a constitutional or a political or administrative concept?'

IE: I think that there's an element of all three … [.] … but from the Court of Justice's point of view, clearly, it is legal, and therefore, constitutional in the broad sense. It's not constitutional in the sense that we don't formally have a constitution, and it doesn't look like we're going to have one. *But it is constitutional in the sense that it's a question of the legal definition of the powers of institutions* … [.] … And it's also political in the sense that, even if the law isn't entirely clear, nevertheless, the politicians may feel that they have to do certain things, and I think that has been true over the relationship between the Council and the European Parliament.

[emphasis added]

Clearly, the Court is also a realist institution, which recognizes that a lack of clarity within European treaties has often necessitated 'political', rather than 'legal', solutions; the lacunae within governance schemes have often been filled, not by law, but by political agreements (Inter-Institutional Agreements). Nonetheless, the Court also has its own distinct and formalist vision of the concept of institutional balance; a vision which raises a constitutional principle of the balance of powers above the fray of anthropological contention, and which places it firmly in a pre-political sphere of 'legal definition' – a series of rights and prerogatives to be apportioned by the Court to this or that institution in the law internal, but politically-constitutive, process of 'legal definition'.

With this, the particular difficulties of the clear identification of the meaning and importance of the notion of the institutional balance become apparent. Is it a formalistically flavoured constitutional principle of legal definition and pre-political constitution? Alternatively, is it a sphere of normative contention, within which differing visions of a European polity are presented and contrasted with realistic appraisal of economic or political verities? Finally, is it a simple 'bar of soap', an inchoate slime of real-world power-brokering? The truth of the matter is, of course, that the notion is all three things at the same time.

The legal or constitutional principle of 'institutional balance' is not quite an empty shell. Certainly, the constitutional principle is a focal point for a gathering of contrasting visions of the legitimate nature of the European polity. Simultaneously, however, legal process maintains its own, if initially wholly formalistic, claim to predate contention. Between fact and norm, the notion of 'legal definition', or the constitutional principle of institutional balance, now becomes the focus for examination. As a variety of interests, ideas and visions gather around

the notion of institutional balance, clamouring for substantive inclusion within it, the role of law is a socially-constitutive one of the identification of the visions that will prevail within the European polity. The adjudication stakes are particularly high. Choice is not simply a potential matter of unfairly privileging brute political power and illegitimate self-interest. Instead, interests are also always expressed with reference – rhetorical, strategic or impassioned – to the diverse visions of what particular shape the legitimate European polity should take (or be afforded by law).

Visions are contradictory: Commission interviewees favour an original 'functional' reading of the institutional balance, laying greater weight upon its value in apportioning European 'competences', and are correspondingly less convinced of its ability to ensure the representation of the European citizen. Nonetheless, judicial voices are also heard in further favour of the colonization of the balance of powers principle by its separation of powers counterpart, and, in particular, by the majoritarian elements present within that principle: 'If you want to ensure acceptability, legitimacy of what we are doing, the way to go … [.] … is to strengthen the role of the European Parliament in all this.' Equally, however, the privileging of majoritarian rule within the EU can also be contrasted with endeavours to give voice to individual Europeans by means of 'legal rights', one lawyer's impassioned frustration with the predominance of policy-making over individual rights and its institutional counterpart of restricted individual standing under Article 230 EC being expressed as follows: 'one often gets the impression … [.] … that the institutions would rather not have the individual involved … [.] … the people [who] have the gall actually to challenge some of these decisions [are] seen as an irritation.'

The underlying point is an obvious one. Parties clustering around the notion of institutional balance may have their own particular interest power preservation. At the same time they also appeal to deeper visions of a European polity. The 'stroke of genius' attributed by one Commission official to a system in which the Commission acts as a 'filter' for 'the common interest' might, at one level, be a rhetorical tool deployed in argument in order to ensure that the Commission retains its institutional 'margin of appreciation' as a negotiator. At yet another level, however, it is also an impassioned plea for the maintenance of a polity vision, within which the scheme of government is felt to be surprisingly perfect: '[P]erhaps you're not surprised … [.] … Now that's the, a, political idea. You can agree with it or disagree with it. But it has to be written down somewhere so there's a treaty.'

Certainly 'we are surprised': once again, political faith in the power of law, or 'a treaty', to maintain one particular vision of the European polity is telling, indeed. However, as the respondent also admits ('*the*' or '*a*' political idea?), judges are confronted with a competing cacophony of European ideals, or normative social reality constructions, each of which demands its promotion above all others in every technical decision on the apportionment of prerogatives. The principle of the balance of powers is a magnet for the expression of competing visions of the 'legitimate' shape of a European polity and a constitutional

fulcrum within the ambit of which, European law can bend and re-bend treaties in the effort to re-embed law within social reality and constantly reconstitute the European polity. At the same time, the principle of the balance of powers is also the focal point for an immense challenge to law. Engaging in real-world constitutional development, and freeing patterns of legal observation of an extra-legal environment from a straitjacket of formal constitutional reasoning, European law is likewise faced with the demand that it needs also to constitutionalize itself. Between fact and norm, European *Rechtsverfassungsrecht* must also identify the mechanisms and modes of 'legal interpretation', which both open a window on European integration realities, and maintain the internal legitimacy of European law.

Principles and (self-) illusion within European constitutionalism

European law is confident about its constitutional status. The origins of the constitutionalization of European law are deemed by one former Advocate General to lie in the remarkable assault made by the ECJ upon the contractual privacy maintained between the individual Member States in the case of *van Gend en Loos*.[4] The issue of whether the concept of institutional balance is a static or dynamic concept thus elicits its own responsive questions about the exact nature of the role played by judges in processes of European adjudication:

> What is a static and dynamic concept? To give one example … [.] … *van Gend en Loos*, you could have said that [it] is a very static concept: that rights are existing between Member States [which] have concluded a treaty, therefore a contract. And then, all of a sudden, the court says, yes, but third parties can also rely on that … [.] … For a private lawyer … [.] … that's quite a change.

Within the judicial mind, the constitutionalizing consequences are clear. You do not need any form of 'political' constitutive will to found constitutionalism: 'more important for me is constitutionalism.' But more significantly, dynamic judicial constitutionalism is also wholly divorced from traditional processes of constitutional adjudication, as judicial pronouncement of constitutive will dispenses with the textually immanent analysis of any 'static' concepts within the Treaty ('original' will of the 'Masters of the Treaty'), to found itself instead in the intricate legal consideration of whether the private contractual autonomy of individual Europeans can best be secured by the breach of one of the basic tenets of private law, privity of contract.

This remarkable divorce of European law from conventional constitutional interpretation finds its echo in the startled comments of a refugee common law judge on the workings of the ECJ. Common law judges are not surprised by the precedence of principles over the 'facts' within a constitutional jurisdiction, and, more particularly, over the 'facts' of the statutory expression of political will.

After all, even within the common law jurisdiction, simple statutory interpretation overlaps with a distinct constitutional jurisdiction to an ever increasing degree:

> [A]nd when Parliament speaks, it speaks with precision and your job is merely to interpret and implement precisely what Parliament says. But, in constitutional law, you are supervising general *principles* on top of this totally empirical system.
>
> [emphasis added]

Nonetheless, a common lawyer who is sensitive to the socially-constitutive nature of legal principles still expresses surprise at the apparent weight laid upon principles within a European jurisdiction that is seemingly wholly divorced from more contextual modes of constitutional adjudication. With reference to a lesson learned from the US jurisdiction, legal principle is more normally to be regarded as a socially-contextual instrument:

> And you found frequently you were looking to the American Federal Supreme Court … [.] … as to interpreting the constitutional balance in the country. *And trying to give life and reality to general principles in the light of experience*.
>
> [emphasis added]

And indeed, the ECJ seemingly also shares this much in common with its US counterpart. 'Now, when I went to Luxembourg … [.] … this kind of thinking was fairly familiar to me.' However:

> What was something of a shock was that frequently, among my colleagues in Luxembourg, the facts seemed to be of almost no significance whatsoever. [laughs] And it was a question of implementing the principle. You know that frequently you'd have a meeting of judges and Judge X would give you his impression of his preliminary view of the case. Very frequently, it would be a question of this case raises the principle of equality before the law. What facts do we need to ensure that we apply those principles correctly? And then we'd think up questions so that we wouldn't misapply the principle.

Laughter in this case has a myriad of potential meanings. Does humour circumscribe common law embarrassment, a final inability to depart the earthy realm of common law, in order fully to embrace the finely-wrought intellectual intricacies of the *Code Civil* tradition? Alternatively, does laughter have its roots within generic legal embarrassment and an underlying awareness of the eternally illusionary nature of the self-referential foundations of law and legal principle?

'I don't see how the Court could have decided otherwise': thus intones one Advocate General on the imposition of direct effect by European law. Granted,

the Treaty of Rome itself, being viewed by its 'masters' as little more than an international trading agreement, contained very little scope for constitutional manoeuvring of its own: '[Y]ou really didn't have any general principles, or very little except the four freedoms.' However:

> How could [the Court] decide that national law prevails over Community law. It would have made no sense. The French Parliament could always pass any law and just forget everything that has been agreed in common.

Accordingly, 'more general legal principles' were called upon to oil the wheels of constitutional adjudication within Europe. Even critique from within the Court must cede to the determinative power of legal principle. One Advocate General's published doubts about the ever greater expansion of the notion of state liability to cover the actions of national courts[5] is again met and overcome by the inevitable power of legal principle:

> [I] was astonished by all this … [.] … I've said openly and in public that I can't see how we could have decided otherwise, because it's a *traditional*, and also a *public national law principle* that the state is responsible for the actions of all [of] the people.
>
> [emphasis added]

Law simply cannot decide otherwise. Legal orders are closed systems of interpretation with internal cognitive recognition mechanisms furnished by the litany of 'shared' legal principles that each law student, regardless of national origin, learns at the mentoring knee of his or her Law School: 'to every right a remedy'; 'equality before the law'; 'access to justice'. Beyond the legitimating *Grundnorm* of finite constitutional settlement, and beyond politically constitutive will, shared 'traditional' legal principles bind *all* lawyers together in an organic and essentialist enterprise of inevitable judgment; an essentialist process which has seen 'an ever closer union between the peoples of Europe' teased out of the stony ground of an international economic agreement.

This is surely a primary example of the transcendental nonsense of formal legal reasoning. The futile romantic organicism of notions of 'traditional' legal principle, which are inevitably common to all jurisdictions, is matched only by the (self-) illusionary endeavour to recast poetically-derived and indeterminate legal principles as rigid elements within the formalist, technical canon of legal interpretation. As one former Attorney General notes:

> [W]hen I read the English literature, it starts already by saying what everybody else on the continent would call a subjective right. You cannot translate it in English, you can say right, but not a subjective right. Because, of course, you have another word for objective law, that's law. [both interviewer and interviewee laugh] So, we have just *rechts* or right or *droit* which is both subjective and objective. But, anyway, I once read a definition

> in one of the judgments of the High Court, saying when you have a remedy, when you get a standing before a court, then you must have rights. Whereas the continental reasoning would be that, when you have a right, then you must have a remedy, which would force that right.

All substantive and objective doctrinal differentiation notwithstanding, and all equalizing laughter apart, common and civil lawyers are undoubtedly co-conspirators in the cause of transcendental nonsense. In the constitutionally vital matters of 'access to justice' and 'equality before the law', or the question of who gains standing under the Article 230 EC judicial review mechanism, it makes no difference whatsoever if right forces remedy or remedy forces right. The organic legal inevitability of right for remedy, or remedy for right is one and the same nonsensical thing. A right inevitably derives from a remedy, and a remedy inevitably derives from a right, but not in the real-world of legal application: rights and remedies are not flesh and blood beings. Instead, the inevitability of derivation occurs within the transcendental realm of legal reasoning, where principled incantation creates its own legal realities, and one and the same court identifies the existence of a right or remedy since *that selfsame court* has already identified the existence of remedy or right.

Reconstructing social and political reality: legal (self-) illusion unveiled

To reiterate: judicial adjudication on the nature of the institutional balance impacts on the constitution of the European polity. It is a simultaneous expression of the underlying normative structure of a 'legitimate' European polity: who should decide on what for whom and when, and who is accountable to whom for what and when. The normative principle of institutional balance of powers is accordingly a focal point for contention in a real-world. Between facts and norms, and in the face of deep-seated polity contention, 'principled' constitutional adjudication on the balance of powers is a socially-constitutive act, a normative incursion into the real-world of the evolving European polity.

Between facts and norms, however, adjudication upon the institutional balance must also be a self-constitutionalizing act. In the interplay between formal legal self-containment and the appreciation of real-world demands for social and political justice, law must struggle to identify its own legitimizing structures. Constitutional adjudication within a contested European polity is all about the opening of a legal window onto a real-world of facts, which creates influential interconnection between self-contained law and its extra-legal environment, whilst still ensuring the normative self-coherence of law. 'General principles of law' may very well constitute a necessary formalist 'glue' of law-internal self-illusion. In a real-world, however, 'general' legal principles are meaningless; no more than a theocratic mantra of judicial self-justification. The principled mechanics of constitutional development must instead be proximate to a real-world. Within the European jurisdiction, as within all constitutional

jurisdictions, *Rechtsverfassungsrecht* must also be rooted in the reflexive effort to '*try to give life and reality to general principles in the light of experience*'.

Science, facts, explanation and legal reconstruction of reality

'Giving life and reality to general principles in the light of experience', however, entails its own clear dangers. Experience, we should never forget, can be bitter:

> The most important aim of the Constitution is to avoid a repetition of the developments, which, in the Weimar Republic, led to the abolition of the separation of powers, and thus to the collapse of the rule of law.[6]

As the Rheinland-Pfalz Tax Court reminded us back in 1963 when rejecting the application of European law, judicial assessment of 'experience' not only entails the hazard of ill-informed legal reconstruction of social reality, but also poses the danger that fact will simply lead norm, with the de-legitimating consequence that law will merely descend into the instrumentalist tool of brutish political power. Accordingly, potential critique of the ECJ's stated aversion to 'fetishist' emphasis upon 'facts' must be distinguished, at least to the degree that the Court demonstrates clear awareness that facts, or the 'scientific' appreciation of facts, have a part to play within the constitutional jurisdiction, but must likewise be strictly circumscribed.

Thus, at the general level of constitutional adjudication, the Court, in the character of a former ECJ judge, expresses explicit awareness of the need for the introduction of interlocutory 'scientific' constructions of social reality within the Courtroom:

> There was very little of that kind of socio-economic explanation. In a sense, I thought that more would have been useful, and I can give one particular case. There was a case about liberalization of electricity markets. It would have been greatly helpful to have had more economic explanation of how it worked and why it was important to go one way rather than the other.

In other words, in the nitty-gritty world of adjudication upon the best organization of socially re-distributive markets, amateurish judicial appreciation of complex social reality should be mediated against by evidence founded on the scientific appraisal of social reality. Nonetheless, scientific reconstructions of reality should always also be subject to a healthy dose of judicial scepticism:

> IE: … [.] … in our Court of First Instance, of course, we had an extraordinary thing … [.] … if the Commission was saying the steel industry is running a cartel … [.] … the businessmen in charge of the various companies never give evidence … [.] … But you have expert testimony, say from an econo-

mist, saying he's studied the market and never has he seen evidence of such intense competition … [.] … And you find yourself caught in a conflict between experts … [.] … And one often wonders whether one is really in touch with reality.

IR: What would you have preferred as evidence?

IE: One would like to see the managing directors of the various companies before the court to cross examine them *as to what they were at.*

[emphasis added]

Frustration is telling: (social) science is not reality, merely another construction of reality, and, accordingly, another reality construct that can be contested or subverted. Nonetheless, frustration brings with it its own rewards, as the judicial aspiration to ascertain what 'people were really at' begins to hint at the shape of one socially-constitutive/self-constitutionalizing mirror that might operate to reflect social reality into the courtroom.

The battle for the soul of institutional balance is not merely founded within social reality: to wit, 'we, the peoples of Europe, *want* a more representative voice within Europe'. Instead, it also entails promotion of normative reconstructions of social reality: 'we, the peoples of Europe, *should have* a more representative voice within Europe.' To this extent, then, adjudication on the institutional balance cannot merely limit itself to fact, but must also confront normative demands. Nonetheless, the desire to 'know what people were at', if deployed to recast and redefine the notion of 'fact' as a concept of 'explanation', has its own constitutive force as law moves to submit legal, social and political processes to the disciplining effects of procedural legal standards. As one judge notes: '[I]n the cases coming from national courts, what was important was to see how the national system worked … [.] … And so, it wasn't really evidence at all. *It was explanation*' [emphasis added]. Within the ambit of the Article 234 EC mechanism, and even though it is not a fact-finding tribunal, the ECJ nonetheless appears to locate its considerations within 'explanation/fact', or an initial perusal of 'why' an individual might or might not be thought to be placed in a disadvantaged position. Importantly, however, *explanation*, when linked together with *procedural standards*, also plays its influential role within adjudication on the institutional balance as Article 230 EC review of the 'legality' of the acts of individual institutions, although a legal focal point for the presentation of 'argument in a very broad sense', also becomes an adjudicative mirror on political process, and, more particularly, the facts, or factual constellation of political process. Thus, if the vital *explanatory* distinction between the first Comitology case and *Chernobyl* was the *fact* that, within the latter constellation,[7] 'the Commission had a different position from the Parliament' and 'therefore could not represent the Parliament properly', the judicial strengthening of parliamentary position under the institutional balance is less a matter of radical alteration in the political purview of judges, and more a result of the constitutive power of the interplay between 'explanation/fact' and procedure.

IR: Specifically thinking about it [institutional balance] as a fundamental principle of European law, how do you think it relates to other leading principles of European law such as proportionality or subsidiarity?

IE: I think they're all part of the same picture. The institutions have a defined relationship in the Treaty. … [.] … The Treaty, in a sense, does not always define what the relationship between them is. And, therefore, it's to that extent linked to proportionality. I suppose underlying some of the Court's jurisprudence on the powers of the Commission or powers of the Parliament is a sort of sense of '*why are you making such a fuss about this?*' Which is, in its own way, a question of proportionality.

[emphasis added]

The explanatory judicial key of 'why are you making such a fuss about this?', thus, finds its echo and legal rationalization within other regulative procedural principles; principles, which judges themselves use to characterize further judicial efforts to investigate the legality of EU decision-making:

> There's a margin of appreciation perhaps left to an institution when it's taking a political decision, say, on the question of subsidiarity … [.] … The Court of Justice will not take that decision for itself, but it will simply examine the *rationality* of the decision of the institution.
>
> [emphasis added]

Even at the level of political contention, the judiciary finds its own mode of escaping direct confrontation with individual political positions. Fact can still play a role: what has happened and why are you making such a fuss? But fact must also be linked to procedural principle: was political process 'proportional', and/or 'rational', and did it pay due regard to the notion of 'subsidiarity'? To this measure, at least, *Rechtsverfassungsrecht* steers its socially-constitutive and self-constitutionalizing nature away from interventionist adjudication on the nature of the European polity. The Court does not take political decisions for Community institutions; nor is it politically constitutive, favouring one institution above another in line with its own vision of what the European polity should be. Instead, judicial purview of an extra-legal environment, together with the contemporaneous maintenance of internal legal coherence, is initially furnished through the interplay between explanatory fact and procedural principle. What has been going on? How can we assess what has been going on? What are the measures of sensible or rational decision-making within Europe?

Law and political reality: democratic experimentalism

The notion of the procedural legal reconstruction of social and political reality is a common feature within judicial self-appraisal. Interestingly, however, one judge is moved to make an explicit link between notions of proceduralization and a perceived 'democratic deficit':

> And everybody acknowledges [that] there is a democratic deficit. Judicial review by the Court of Justice of Community measures is one method of ameliorating that democratic deficit. The Treaty requires that a measure, a directive or regulation, must recite the grounds and basis on which it has actually been adopted … [.] … giving the underlying reasons and objectives. Therefore, in striking down such legislation, the Court is ensuring that the institutions exercise their legislative powers within the ambit of their constitutional functions and requirements. Allowing the Parliament to do so, because the Parliament was denied its prerogatives, is part of that *democratic constitutional balance*. So, I don't think there was anything political at all.
>
> [emphasis added]

Once again, the mantra of judicial self-description is one of denial of political involvement. *Chernobyl*, or its extension of protection for parliamentary prerogatives, was not a political act. Instead, the ECJ serves the principle of democracy through its review of the legality of political acts and through its perusal 'of what went on'. This perusal, which is abetted by the procedural requirement that all EU decision-making be accompanied by 'statements of reasons', thus furnishes the vital fulcrum by which happenings in a real-world can be explained within a legal idiom, and, at the same time, can be subsumed within the normative legal edifice in order to reconstitute social reality. Procedural principles of rationality, proportionality and subsidiarity are a contemporaneous mirror on the 'real-world' and a normative legal intrusion *into* the real-world. Through their operative counterpart of a 'statement of reasons requirement', procedural principles facilitate the pragmatic legal operation of ascertaining 'what went on'. However, explanation or investigation of reality is also a double-edged sword, a simultaneous act, which constitutes reality, as all decisions are likewise required by the courts to be rational and proportionate.

Importantly, however, and all the powers of proceduralization apart, the art of *Rechtsverfassungsrecht* cannot fully escape substantively-flavoured judgment. Indeterminate law still demands a measure of 'principled' judgment that must be informed by the social and political mores which an operational social reality embodies. In a final analysis, some form of substantive adjudication has also taken place within the Court's jurisprudence. The place of the European Parliament within political negotiations has also been assured, its position at the political table confirmed by law. The substantive reading of the principle of institutional balance has been altered in favour of its majoritarian colonization by the principle of 'democratic constitutional balance'. Within the constitutional jurisdiction, the social and political justice demands which a real-world embodies must be addressed, and a procedurally conceived *Rechtsverfassungrecht* is, therefore, exposed directly to the dangers of direct intervention within the substantive mores of the environment within which it is embedded.

All self-illusionary and nonsensical efforts to disguise substantive judicial intervention apart, European law is, therefore also engaged in its own various and varied forms of 'democratic experimentalism'. At first glance, this process

of legal democratic experimentalism might be considered to be dangerous, a betrayal of judicial impartiality within classical conceptions of the separation of powers. Rather than restrict its role to that of oversight over political power, law, in the character of the judge, claims a politically constitutive prerogative for itself:

> I refuse for myself to split politics from policy, from law … [] … of course, they are … [.] … twin notions. [Y]ou cannot, as a lawyer, give a solution to something without having this policy-oriented mind. *And then again, you must try to check that – whether it remains within the legal context –* because, after all … [.] … you must find somewhere a consensus. *Now consensus is not only in the Parliament by majority, it is as well in the common law from judges*, *which is growing from beneath* and, it's a rather broad ideal of democracy; *representative, deliberative* democracy. Everything which helps, and we should single out none of these tactics because all of that helps … [microphone crashes].
>
> [emphasis added]

Saved by the bell? Or rather, by too short a cord on the external microphone? No, because the point is remorselessly reiterated:

> A consensus can also be present in case law. If not, a judge does not get elected. You have heard the expression the voice of '*la juge le roi'*. As Montesquieu would say the voice of the law as well as the elected representatives are … [sentence unfinished]

Are our European judges elected? Is law a simple matter of consensus between Europe's judge-kings? Has the classical separation of powers principle, at least as it applies to a judiciary, not only been excluded from European treaties, but also been thoroughly wiped from European legal minds? What of Montesquieu? Surely, he argued that law should be raised above a fray of political contest? Have centuries of careful constitutional development been dispensed with? Are our judges our kings?

No. Hesitation and grammatical incoherence should not be singled out as instances of revolutionary prevarication, or as a broken semantic that mirrors disintegration within the judicial function. Certainly, loss of argumentative and expressive clarity is an indication of judicial perplexity, a reaction to the clear disjunction between the demands placed upon a modern supranational law and the limits to formalist legal understandings. It is not, however, a betrayal of law and legal ideals. Quite the contrary: the vital legal function is one of 'remaining within the legal context'. However, the challenges of law-giving within a contested supranational polity are immense. The judge is necessarily thrust into the position of the judge-king. He or she must make sense of the realities of a contested polity, must ascertain what is growing 'from beneath'. He or she must engage in the task of rooting law within shifting social reality, including its own

constructed social and political mores, such as democratic expression. At this level, then, disjointed judicial pronouncement is not about the veiling of illegitimate judicial political activism. Instead, it is all about a difficult and complex effort to 'democratize' law.

Application of the 'traditional' canon of legal principles is not a convincing mode to overcome transcendental nonsense within formal jurisprudence and the demand for 'principled' (ethical and moral) adjudication remains an overwhelming one. Nonetheless, the political and social justice demands of an extra-legal environment must still be met with a degree of legal impartiality. Consequently, the 'principled' mechanics of constitutional adjudication turns to more experimental methods both to identify the social and political mores that arise within the reality of the integration process and to maintain legal authority.

Systemic legal consensus

The feeling that the European Parliament 'should have its place in the sun' is one shared by most interviewees within the data-set. Judges and Commission agree that the strengthening of the position of Parliament is key to ensuring the legitimacy of the Union: 'If you want to ensure legitimacy of what we are doing the way to go … [.] … is to strengthen the role of the European Parliament in all this.' However, could 'simple agreement' between non-elected officials and a judiciary ever be sufficient to justify an increase in parliamentary competences outside the 'constitutive' deliberations of constitutional conventions? Clearly, as one judge notes, other more personal reasons may have led some European judges to promote greater protection for parliamentary prerogatives:

> [Y]es, of course, there's a political aspect. And it's unquestionable that some judges, more than others, saw it as a point of importance that the European Parliament should have, um, should have its place in the sun, yes. However, I would also say that, in general, those judges were judges who had … [.] … as children or young men been in a country which did not have a Parliament – and where democracy didn't work. And so I think that again, yes, it was a political point of view if you like, but it was also a *moral* point of view for many of them.
>
> [emphasis added]

The appeal to 'morality' is telling. Yes, politics may play its role in judicial reasoning. But this is not the murky politics of personal self-advancement or promotion of a political programme: 'I really do not remember any of them urging a particular point of view because of party politics'. Instead, the reality mirroring and reality forming procedural principles of *Rechtsverfassungsrecht* (proportionality, rationality and subsidiarity) are left behind and a substantive principle of 'democratic constitutional balance' is embraced in the service of 'moral politics'.

Judicial morality

Are we to be satisfied, however, that the simple personal morality of the ECJ is sufficient justification for judicially managed constitutional development? Personal morality is undoubtedly a good thing, but it is also indeterminate and prone to excesses of its own. Who, after all, would really like to see the appointments to the ECJ managed with the same degree of moral horse-trading that marks appointments to the US Supreme Court? However, is there, perhaps, a degree of 'shared' historical morality both within Europe and within Europe's many laws that could constitute sufficient justification for constitutional development? More particularly, can constitutional development by justified with reference to a shared European experience of historical constitutional failures and triumphs?

The notion of 'shared' constitutional experience can, therefore, be argued to be a vital self-disciplining judicial key, a reality proximate principle within processes of constitutional development. 'Consensus', or agreement that constitutional morality is shared amongst European polities, because the historical experience from which that morality derives, is also shared, should lessen the danger that principles such as 'democratic constitutional balance' are simple nonsensical expressions of formal legal reasoning, or are merely a reflection of personal historical experience and moral peccadilloes of individual judges.

Counter-intuitively, however, such consensus and shared morality can only be divined out of constitutional diversity. One judge's polemic against the harmonizing human rights jurisdiction of the Strasbourg Court of European Human Rights because it 'doesn't allow for diversity of values' is telling. The point is not simply that a European Court has no business straying into national moral issues such as abortion, but is, instead, the far deeper one that 'harmonization for the sake of harmonization' undermines 'national constitutional culture and tradition and competence'. Where, after all, are we to find shared history and shared morality, or points of substantial common constitutional reference if not within divergent constitutional traditions? From this vantage point, concepts of a 'shared European constitutional heritage' cease to be indistinct 'organic' or 'romantic' notions and begin to take on a 'neutral' justificatory role: the moral and ethical principles of judicial adjudication within Europe will be mined out of the pit of shared European history.

Deliberative democratic experimentalism

The strengthening of the position of the European Parliament is not the end of legal democratization efforts within European law. Quite the contrary: both judges and bureaucrats are explicit in their recognition of a democratic malaise within the European Union, and even more explicit in their expression of great doubt as to whether representative democracy, or an increase in parliamentary powers, can ever fully compensate for the democratic deficit experienced by the

individual European citizen. One Commission official doubts the ability of a European Parliament, as well as Europe as a whole, ever to gain the loyalty of the European Citizen:

> My mother does not know how laws are made in Westminster, but what she knows is … [.] … the Queen is in the palace signing them and everything is lovely. When it comes to Europe, we don't have that instinctive loyalty.

More importantly, however, one judge chooses to dismiss the workings of the European Parliament in its entirety:

> And they vaunt this mantra that we've increased powers to the Parliament. The Parliament is disconnected from the ordinary people … [.] … They are never elected on European policies … [.] … And they are consumed by getting more powers for the Parliament rather than exercising the ones they have. And that's my frank view.

'Frank' and unflattering, but a widely held view: within the effort to democratize law then, whilst the parliamentary position has certainly been strengthened, judges remain open to the potential for other democratization strategies: '[E]verything which helps.' As our perennially flustered judge reminds us, a degree of openness should always be maintained with regard to newer forms of democracy, while, in particular, law and politics may form a partnership, within which law itself can be part of democratic process. Accordingly, the analysis now turns to an examination of how judges have played their part within a process of democratic experimentalism within Europe, and more particularly, how they have sought to serve the cause of 'deliberative democratic experimentalism'.

Clearly, at one level, the pure procedural principles identified as making up a putative European *Rechtsverfassungsrecht* are, at core, also all about support for deliberative democracy. Proportionality, subsidiarity and rationality all play their prime role in ensuring that, whilst decision-making is not necessarily representative, it is, nonetheless, 'democratic', or, at least is so to the degree that the imposition of a 'rule of reason' requires that egotistic self-interest must be tested against objective 'reality-revealing' rationality criteria. Decision-making is, therefore, founded in 'arguing rather than bargaining'. Taking the analysis one level further, however, a question must also be posed as to whether European law plays any further role in encouraging deliberative experimentalism within Europe; more particularly, through the introduction of a measure of participatory democracy, or the opening up of European decision-making processes to review by other 'rationalizing' forces, or 'interested' parties who might have been excluded from a legislative process.

In the light of the latter question, analysis upon the institutional balance therefore intersects with more general problems of judicial review, and, more particularly, with the issue of individual standing under Article 230 EC. In other

words, given the fact that the individual European citizen is poorly 'represented' within the substantive institutional balance – or rather, that the European Parliament has only a limited impact on decision-making – can the individual citizen be given an alternative place within the balance by means of a right to challenge the 'rationality' of 'deliberative' EU decision-making before the Courts? Can deliberative democracy be strengthened within the mechanics of judicial review?

Individual standing under Article 230 EC is restricted, indeed. Significantly, the Court of First Instance has slightly widened individual standing to allow for the inclusion of regional governments within the circle of parties fortunate enough to be allowed to challenge EU decision-making.[8] Recent liberality, however, is more than matched by the intransigent jurisprudence of the ECJ, an intransigence confirmed by the current data-set. Asked whether the ECJ should allow class or interest group actions, one judge is adamant: 'unless and until the treaty-makers decide that there should be class actions, there isn't scope for class actions.' Strict formalism indeed. But, what, then, of the demand that Europe be democratized? Is the ECJ wholly unwilling to try out the different forms of democratic experimentalism which might furnish an emerging European polity with an added degree of legitimacy? Perhaps not – however, the considered grounds for continuing judicial intransigence are revealing:

IE: I think this is due, in one sense, to Sovereignty of Parliament … [.] … But, actually, it's to do with the practicality of legislation. There has to come a point at which various interest groups cease to have a right to interfere with the process of legislation. Because any form of legislation is bound to hurt somebody. And that's what legislators are supposed to take into account. And there are, nowadays, all sorts of lobbies to make sure that the interests of particular groups are recognized in the pre-legislative stage. And the Community system is extraordinarily transparent to lobbying and consultation. It takes so long that it is inconceivable that anybody's point of view – who has made any effort to make it known – has not been made known.

IR: So do you mean that this is a conscious decision by the Court?

IE: No … [.] I think that … [.] … any system has to say 'enough is enough, at this point we stop. We have made a political choice and that's the end of it' … [.] … Right, two questions. Is it desirable that judges, rather than legislators, should decide that question? The second question. *What are the criteria against which judges are going to test it? Because, at the end of the day, choice is truly a political choice and not a judicial choice*.

[emphasis added]

A long, but illuminating, passage: any formalist treatment of Article 230 EC masks refined judicial understanding of democratic theory, as well as a similarly startling appreciation of social, political and legal reality. The point is not simply the abstract theoretical one that pluralist democratic conceptions are inconsistent

with majoritarian government. Instead, the point is also made in full awareness of the realities of a pluralist, self-nominating European polity and the institutional structures that such a polity requires.

Not only is the judicial mind aware of lobbying and plural representation at the legislative stage, it also approves of it, as lobbying is prescribed a positive value of 'transparency'. Significantly, the Court is thus in agreement with Commission officials who feel that lobbying by interest groups, has, on balance, a positive impact upon the rationality and legitimacy of EU decision-making. Thus, whilst 'the influence of NGOs is far beyond what you would think appropriate in a democracy', and they likewise have a tendency to 'overshoot', they are nonetheless an aid to 'rational' decision-making, providing technical expertise, and reflecting, 'to some extent, views within the public who do not feel represented by … [the] … European Parliament'. The Court and the Commission agree. The plural self-nominating European polity is a reality, and it is a positive reality. Lobbying, or the presence of interests groups, can improve the quality of 'deliberative' decision-making.

Judicial knowledge of, and sensitivity towards, the Commission's reliance on the plural self-nominating European polity may be decried as too cosy a relationship between the 'activist' supranational institutions of European integration. As one lawyer opines: 'the Court sometimes shows too much deference to the institutions.' Nonetheless, the Court's unwillingness to extend standing seems also to derive from more realistic factors. First, constant challenge to legislative acts is time-consuming. Second, if the Court were to intervene directly in order to decide who might challenge legislative acts, it would be making a clear political decision on the substantive nature of the European polity.

Once again, the procedural contours of *Rechtsverfassungsrecht* are visible, even in relation to a substantive value of democratic expression. Law opens up its mirror to a substantive reality. It sees and approves of the process of deliberative democratic experimentalism in which the Commission is engaging. At the same time, however, it itself retreats into formalism and maintains its neutrality. It cannot nominate parties to deliberation without being itself embroiled in a political act. Instead, its politically constitutive role must be limited to the review of the rationality of decision-making through procedural principles that act both to reveal the reality underlying decision-making *and* constitute that reality – the prime criteria remain those of proportionality, subsidiarity and rational decision-making. However, rationality might also be argued to be served by one further criterion: have all parties that are affected by a political decision been given their chance to play a part within the political process? Generally, this is a matter for the Commission. However, on a case-by-case basis, adjustments may be made. Accordingly, the recent increase in the standing of CFI jurisprudence may also be argued to be procedural in nature: rights of standing are not afforded to individuals or to regional governments by virtue of judicial promotion of a rights discourse. Instead, individual and regional parties are allowed standing

since they have been denied access to political (or executive) decision-making processes.[9]

Conclusion: dynamic proceduralism

'*Le juge le Roi*': 'we, the court', indeed. The readiness of European judges to further European constitutionalism far beyond the will of a (lacking) European polity must surely raise some doubts about the legitimacy of the European project. But should it? After all, legal indeterminacy is a fact of life. All constitutional jurisdictions are necessarily marked by failings in traditional constitutional adjudication and by adjudicational processes carried on beyond the 'formalist veil'. European law is no exception, or rather, it is *sui generis*, since the disputed integration *telos* intensifies the problems of legal indeterminacy as the provisions of European law, including the treaties remain necessarily vague, a part of the effort to keep 'everyone on board'.

Rechtsverfassungsrecht: between facts and norms, adjudicational struggle around an indeterminate principle of institutional balance is not an unusual judicial operation. Granted, European judges have been thrust very forcefully into the 'danger zone' within which Max Weber, at least, felt that the task of 'democratizing' law was impossible, a simultaneous pursuit and an undermining of the civilizing certainties of the rule of law. Thus, for all that the members of the ECJ may opine that, 'well, the rule of law is trying to compensate … [.] … [the] rule of law will do that', legal democratization efforts are a chimera, a headlong descent into the constitutional turpitude that marked the dying days of the Weimar Republic. Far better the judge who demands the final settlement of Europe and the creation of a 'normal' constitutional jurisdiction:

> [N]ational courts are obliged to give precedence to European law. So what you have is national courts acting as federal courts. The public don't really appreciate that this has happened … [.] … That is a division between federal power and state power that is disguised. I think that, at some stage, people are going to have to face up to the fact that if there is to be a European Community, it has to be a federal community. And it's better that the powers of the various entities be spelled out so the people know where they stand, rather than relying upon judges like me to apply our creative instincts to situations [laughs].

Once again, the laughter reveals all: we really should not be doing this – we are undemocratic. By the same token, however, laughter was also indicative of the limits to traditional adjudication. Is law caught in a cleft stick, forever called upon to fulfil a function which it is ill-equipped to perform? Perhaps not: certainly, formalist veils should be drawn aside. Judicial opinion that an institutional balance of powers should not be set in stone should be highlighted, together with its underlying rationale:

> And my feeling is that when you start being too prescriptive – you can do this, but you mustn't do that – there, the reality is that you actually cut yourself off from quite a lot of things which might have been useful.

Indeterminacy is ascribed a positive value, not for the unfortunate reason that we, in Europe, have failed to agree upon our 'constitution'. Instead, indeterminacy is also a force for positive good, because it enables the vital and democratic process of legal materialization and reception of reality within law.

> I think, on the whole, the court has managed to preserve a pretty good balance between the two extremes, the extreme of prescription to the letter and the extreme of, umm, really the letter doesn't matter, we are going to say, we're going to go for the spirit.

Rechtverfassungsrecht walks a dangerous tightrope. Nonetheless, the ECJ has walked that tightrope and has, perhaps, also bequeathed us various concrete elements of *Rechtsverfassungsrecht*:

- Core procedural principles of proportionality, rationality and subsidiarity, which, together with the legal process of explanation, both reveal reality to law and simultaneously constitute it.
- Dialogue between constitutional traditions. Europe's diversity remains its strength. Shared historical experiences inform common substantively-flavoured constitutional principles. No one court can claim a moral high-ground. Acting together, however, Europe's individual legal orders can identify those substantive principles which should inform its overarching law.
- Democratic experimentalism. Once again, Europe's democratic deficit remains its bugbear. Nonetheless, rather than pursue damaging corrective notions of individual substantive right, Europe's law can contribute to processes of democratic, and, in particular, deliberative democratic experimentalism without being drawn into brute politics.

Notes

1 Quotations are taken from questionnaires filled in by, and interviews conducted with members of the European Constitutional Convention, past and present members of the ECJ (CFI) and current members of the European Commission. In the following, 'IR' denotes interviewer; 'IE', denotes interviewee.
2 See, E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', *American Journal of International Law*, 1981, vol. 75, no. 1, 1–27.
3 R. Wiethölter, 'Just-ifications of a Law of Society', in O. Perez and G. Teubner (eds), *Paradoxes and Inconsistencies in the Law*, Oxford: Hart, 2005.
4 Case 26/62 *van Gend en Loos* v. *Netherlands Inland Revenue Association*, 1963, ECR 1.
5 W. van Gerven, 'Of Rights, Remedies and Procedures', *Common Market Law Review*, 2000, vol. 37, no. 3, 501–536.

6 Case-III 77/64 *Re: Tax on Malt Barley*, 1964, CMLR 130 FG (Rheinland-Pfalz), para 20.
7 See cases, Case C-302/87 *European Parliament* v. *Council of the European Communities*, 1988, ECR 05615, and Case C-70/88 *European Parliament* v. *Council of the European Communities*, 1991, ECR 1–04529.
8 Case T-37/04, *Região Atonóma dos Açores* v. *Council of the European Union*, 7 July 2004, not yet reported.
9 See, for full details, A. Ward, 'The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures', in T. Tridimas and P. Nebbia (eds), *European Union Law for the Twenty-First Century*, Oxford: Hart, 2005.

5 Judicial governance in the European Union

The ECJ as a constitutional and a private law court

Christoph U. Schmid

> [In European private law], there is the need of a coherent overall framework into which single decisions may be integrated constructively.
>
> *Ernst Steindorff*[1]

Introduction

The notion of judicial governance addresses the prominent phenomenon of courts assuming tasks which are, under the classic separation of powers doctrine, reserved to the executive and legislative powers.[2] Yet, the phenomenon of activist courts does not amount to an anomaly, but instead reflects the very nature of adjudication. This is so for both methodological and social reasons. Methodologically, there is no clear borderline between the application of the law and its creative development; the application of general norms to specific fact patterns always adds new meaning to the former. Socially, adjudication is always embedded in a wider societal context, and is therefore always influenced by the political, economic and social circumstances under which it operates and which influence the minds of jurists and inform their decisions. Such influence is not undesirable, but is instead indispensable in order to adapt the law to its changing social environment. Thus, there is no clear borderline between judicial and political governance. Accordingly, modern governance theory is right in assessing both from the perspective of the general criteria of effectiveness and legitimacy.[3]

Whereas the role of judicial governance is clearly less significant than political governance in the Member States, this is not necessarily so in the European context where judicial activism has reached a novel, historically unknown, dimension.[4] Here, the role of adjudication has always been much more important than in the Member States, as the degree of political consensus is much more limited. Thus, issues which could be decided politically have had – and often still have – to be solved legally in the European context.[5] In filling this 'decision-making gap', the European Court of Justice (ECJ) has famously implemented a strongly European agenda and become the motor of the integration process, even in years of political stagnation, by gradually developing the European treaties into a federal, or as many prefer to say today, multi-level constitution.[6] As impressively reconstructed by Joseph Weiler and others,[7] judicial

constitution-building has extended to the structural constitution (i.e. the relationship of European and national law, including the famous doctrines of direct effect, supremacy and state liability), the substantive constitution (mainly composed of the free trade provisions, converted into the basic market freedoms by the Court, competition law, and the protection of human rights invented by the Court), and the institutional constitution (setting forth the competencies and the rules of interaction of the various European institutions). On the whole, despite the occasional resistance of national high or constitutional courts in the fields of competences and human rights, these instances of judicial governance have met with acceptance by the Member States and the legal community.[8] This is probably so because they are primarily related to the initial European project of market integration through the abolition of national restrictions and the establishment of a system of undistorted competition – on which there has always been a firm consensus, and which has led to economic benefits for most of the Member States. In the case of human rights protection, this only replicated a more or less common standard which reflected the common historical and cultural heritage and achievements such as the jurisprudence of the European Court of Human Rights (ECHR), and thus did not meet with strong criticism.

However, alongside the ECJ's function as a motor of integration and a constitutional court, its role as an ordinary court has, since 1985, become increasingly important. The Single Market Programme entailed the introduction of qualified-majority voting and new institutional arrangements. These changes ended the former institutional *lourdeur* of the European Community's (EC) political branch, and enabled the proliferation of European legislation in many fields of economic and social regulation. Given its central role as the guardian of all European law, these new fields had to be administered by the ECJ as well. The example chosen for analysis here is private law, which is a relative newcomer among European legal disciplines and has developed only slowly since 1985, though at greater speed in recent years. In this field, European adjudication has proven to be far less successful than in constitutional law, and this raises serious problems of effectiveness and legitimacy.[9]

This contribution aims to explain this phenomenon by comparing judicial governance in European constitutional and private law. Specifically, I will distinguish differences regarding the systematic state of the legislation, interpretative meta-principles and legal method, and the effects on private parties in terms of judicial protection. As a result, it will be shown that in general, constitutional and private law adjudication displays meaningful differences which necessitate a completely new alternative approach. Yet, this approach may be borrowed, albeit in an adapted form, from a specific line of constitutional adjudication which is based on reflexive balancing.

A comparison of constitutional and private law adjudication

The systematic state of the legislation

Generally, the term 'system' refers to the ideal-type features of unity and order.[10] Unity may be understood as completeness, order as coherence, i.e. the absence of contradictions. The legal system of a polity – which may be divided into sub-systems including private and constitutional law – constitutes the methodological paradigm, as it were, for the enactment of law by the legislator and its interpretation by courts: The external system is based on the abstract ordering concepts of a legal text (e.g. contract or tort), reflects its structure and serves the meaningful order of the legal material.[11] The internal system is based on the idea of consistency with fundamental values and principles, and thus constitutes a teleological order, whose most abstract components are general principles of law.[12] In private law, the most important ones are autonomy and solidarity, from which more precise principles may be derived in a 'genealogic tree-kind' fashion.[13] The existence of internal coherence is the most important precondition for courts to treat equal cases equally – and thus to realize the ultimate aim of all law: that of justice.

It lies in the very nature of law as a social medium exposed to constant social change that a legal system designed by the legislator is never fully complete, and always needs to be concretized and complemented by the courts, so as to provide answers to specific cases. Normally, however, systems or sub-systems designed by the legislator possess at least a certain degree of completeness. By this, I do not mean completeness at the level of norms (which would indeed mean that each factual situation would be covered by a norm) but of principles. Indeed, in national codifications, which do not contain any deliberate exemptions in scope, courts may uncover encompassing sets of guiding principles beneath the existing norms, which enable them to deal with gaps or situations which are not regulated directly. By doing so, the legal system is, in turn, 'woven tighter' by each and every decision. It is precisely this feature which is critical in European law. Because of its relative incompleteness, European law always needs to be complemented by national law in order to function effectively. However, there are significant differences between various fields in terms of completeness, in particular between constitutional and private law.

Constitutional law

It is true that the EC Treaty was, and even after many reforms remains, incomplete and sketchy on many issues. However, a basic systematic structure existed in most fields, enabling the Court to develop them gradually by means of relatively coherent reasoning. In the substantive constitution, the provisions on free trade were developed from commands directed to Member States, firstly into subjective rights which excluded discrimination, then into prohibitions of limitations and positive action commands, and finally were even extended

horizontally, i.e. among private parties. Yet, throughout all these phases, the Court was able to follow a relatively coherent overall logic, which it could often borrow from the similar methodological developments of human rights under national constitutions.[14]

Only at first glance does the structural constitution represent an exception. The crucial questions of direct effect and supremacy were not settled in the Treaties, but were solved by the ECJ distinguishing the EC treaties from traditional public international law instruments – under which supremacy is also the rule, but is not generally effective without direct effect. The EC treaties thus became a rare exception. Notwithstanding the politically revolutionary character of doing so, in methodological terms the ECJ just had to convert the public international law exception into a new European law rule. Combined with the universally recognized principle of *venire factum proprium* in the Roman Law tradition, which is similar to estoppel in Common Law, the same reasoning could be applied to justify direct effect of directives.[15]

Against this background, the methodologically most revolutionary instance of law-making in the field of constitutional law was probably the state liability doctrine which the ECJ deduced from nothing more than 'the system of the Treaty'.[16] Admittedly, this doctrine has models in the national law of all European countries, encompassing a much more limited field than, say, contract law, and is therefore easier to design systematically. But still, also due to the limited number of cases referred, the ECJ was not able to elaborate the doctrine into a complete sub-system. Instead, among the elements for a liability claim, only the violation of a right guaranteed in EC law has been defined exhaustively at the European level, whereas both the causality and the scope of the recoverable damage still needs to be defined to a certain extent by national law, which is resorted to for the purpose of gap-filling.[17] However, the ECJ controls whether the national provisions enable the effective implementation of European provisos, and by doing so demands selective changes of national law (mainly the non-application of provisions, or parts thereof, which might hamper the effective implementation of European law). Taken together, state liability law in Europe constitutes a complex mixture of European and national law. However, its ever more elaborate development by means of European adjudication is possible, and is not ruled out on the grounds of competence. Moreover, because of the somewhat general character of its own previous rulings, the ECJ is not bound to give answers to marginal details, but may pick and choose key issues and decide on the intensity of European intervention according to its own overall conception ('master plan') of the field.[18]

All in all, constitutional law adjudication may, in most cases, be based on a sufficiently elaborate systematic structure which allows the ECJ to develop and gradually refine a coherent system according to a relatively consistent overall concept.

Private law

The situation is quite different in European private law, the bulk of which sails under the consumer law flag.[19] European consumer law directives cover not only many different types of transactions, such as doorstep sales,[20] consumer credit,[21] distance sales,[22] package tours[23] and time-sharing rights,[24] but also single fields of tort law, such as product liability.[25] Besides, there are two important directives with a larger scope of application, namely the Unfair Terms Directive[26] and the Consumer Sales Directive.[27]

Moreover, there are private law acts based on other treaty objectives, such as the Late Payment Directive[28] (internal market and small and medium-sized enterprises (SMEs)), The Commercial Agents Directive,[29] and a set of banking and insurance law provisions. Beyond this, there are plans for a wider and more systematically coherent contract law instrument, which is currently being elaborated as a soft law 'common framework of reference' and might one day become the core of a European Civil Code – but these plans have not, of course, affected standing law up until now. To sum up, there is to date still only a limited coverage of contract law, mainly by European consumer law instruments, which resemble, so to speak, European islands, or perhaps archipelagos, in an ocean of national law.

From a system-based perspective, this situation is problematic in several respects; there are coherence problems among different European sources, which include the 'one-sided teleology' of European instruments, as well as in the interplay of European and national sources.

INTERNAL COHERENCE PROBLEMS

First, there are technical problems of coherence within EC law.[30] In fact, there are lots of gaps, frictions and exemptions within single instruments, which are caused by their sectoral regulatory approach and political compromise. For example, the Product Liability Directive defines its central notions of defect and damage only in a fragmentary way. The same is true for issues of causality, concurring liability and the scope of recoverable damage. But there are also more artificial limitations, such as Article 9 para. 1 lit. b) of the Product Liability Directive, which lays down a lower threshold for the awarding of damages, with the effect that courts must also always examine a case according to national law – as denying a claim below the lower threshold would amount to a denial of justice.

More coherence problems are created by the different use of identical terminology. Thus, as mentioned above, the notion of damage is defined only vaguely in the Product Liability and the Commercial Agents' Directives, but not even that vague definition is uniform. In this context, the Advocate General (AG) has, in the *Leitner* Case,[31] implicitly invoked the topos of the 'interpretative unity of EC law'. This postulate is not, however, tenable, as identical notions may be, and frequently are, used with different objectives, in particular when they are

used in primary and secondary law. More pressing than the terminology problem is the often missing co-ordination among related European instruments which may be applicable to similar fact patterns. Such friction may be of a technical or conceptual nature. Thus, without any justification being given by the European legislator, there are different timeframes and modes of calculation of these for the revocation of a contract according to the Doorstep, the Time-sharing and the Distance Sales Directives. This problem is aggravated by the finding in the *Travel Vac* Decision,[32] according to which several directives may be applicable cumulatively. The laudable effort of the German legislator to harmonize these timeframes in § 355 paragraph 3 BGB, under the so-called minimum harmonization principle (according to which a national legislator may unilaterally opt for a higher degree of consumer protection), was dismissed by the ECJ in the *Heininger* Decision,[33] which excludes the prescription of revocation rights in the event that the consumer was not properly informed about it. This decision is unfortunately, in line with the general strategy of abolishing minimum harmonization clauses, which the Commission has espoused in its recent strategy papers and in the Directive on Distance Sales of Financial Services.[34] Whilst the gain in terms of uniform market conditions will be limited because of the fragmented state of European legislation, the loss of 'coherence resources' by the national legislator in the implementation stage will be considerable.

Whereas the coherence problems just mentioned are of a more technical nature, there are even more serious conflicts caused by conceptual contradictions, in particular by what may be called the one-sided teleology of European instruments. To explain this problem, one needs to establish a basic comparison between the concept of classic (national) and European private law. Classic private law is based on three fundamental concepts: freedom and equality of all citizens, and justice as the key criterion to govern legal relationships – which, in private law, predominantly means commutative, not distributive justice.[35] The concepts of freedom and equality require that every human being be capable of participating in legal relationships at his or her will and on equal terms. Capacity is no longer restricted, and there is no longer privileged treatment of certain individuals or social classes – in short, private law takes on a universal character. In its strong version, commutative justice means that the exchange of performances in contract law and the redress of damages in tort law should be equivalent; in its weaker and perhaps more important version, it means that private law relationships should be governed only by criteria which originate in the relationship between the parties themselves – and not by reference to external political, social or economic goals. To sum up, classic private law is fundamentally about the balancing of interests between two or several parties.

By contrast, the conceptual basis of European private law always rests in integration policies – consumer policy being the most frequent case – which are not primarily governed by the interests of the parties, but by some collective interest of integration. From the outset, such a one-sided teleological concept (which the ECJ usually hastens to realize in its case law) is an ill-suited basis for a Court to balance the interests of two or more parties in a just way. Things are

even worse when two concepts of 'the collective interest' collide, as may for example happen with the Late Payment Directive,[36] which aims to support SMEs, and the consumer directives containing consumer protection instruments – which typically act against traders, including SMEs. In the provisions of the Late Payment Directive such conflicts are counteracted by the exemption of consumer transactions from its scope of application. However, through a minimum harmonization clause, it does allow for stricter national standards of protection of SMEs. This has, for example, enabled German law to extend its scope of application to all kinds of transactions, including consumer transactions.[37] These contradictory minimum harmonization clauses constitute nothing less than the declaration of bankruptcy of a private law which wants to protect everyone against everyone, instead of focusing on its principal task of balancing competing interests in a way which is fair and just. As a result, the one-sided teleology of this legislation renders coherent jurisprudence difficult from the outset.

COHERENCE PROBLEMS IN THE INTERPLAY OF EUROPEAN AND NATIONAL SOURCES

Even more serious coherence problems exist in the interplay of European and national sources.[38] This vertical conflict of laws scenario leads to a European–national multilevel arrangement that no longer deserves to be called a system. Instead, the gaze of the person applying the law must, to alter Karl Engisch's famous formulation, continually shift back and forth between the various strata of law in order to disclose possible overlaps between national law and Community law – often hard to find, given that they are systematically designed differently.[39] Complicated contradictions in valuations and unforeseen constraints to co-ordination *in casu* are the unavoidable consequence of this situation,[40] and the methodological advantages of the external and internal system existing in national law are lost.

Moreover, due to the limited coverage of private law and the problems of internal coherence just mentioned, ECJ decisions involve little systematic gain. The vast majority concern the delimitation of the scope of application of European instruments, without a final decision on the merits of the case. To quote just one example, in the *Easy Car* Decision[41] the ECJ decided that car hire contracts were not services contracts in the sense of Article 3 para. 2 of the Distance Sales Directive (with the main effect that the revocation right contained in this directive did not apply), but that the case was to be left to national law. Similar questions could be asked about a high number of other types of contracts. Yet, the answers do not develop the system very much, they do not concern the basic task of private law, i.e. that of refining and concretizing the balancing of competing party interests. In short, such procedures not only entail no meaningful systematic gains, but also delay the rendering of justice to the parties.

Alongside these general problems, one may describe a set of specific co-ordination problems between European and national law in more detail.[42] From

the outset, the interplay of European and national law has been burdened by the unclear relationship between the directive-conforming interpretation of national law and the direct applicability of directives.[43] In principle, it has long been recognized that among private parties there is no direct 'horizontal' effect of directives, but that only the directive-conforming interpretation of national law within the limits of national interpretation rules (the wording being the most important limitation) is possible; in the event that these limits are exceeded, there is a state liability claim. However, the ECJ has frequently asked national courts for *interprétation conforme* even where they did not have the interpretative leeway to do so. One may read in this respect cases such as *von Colson*,[44] *Marleasing*,[45] *Faccini Dori*,[46] *Ruiz Bernaldez*[47] and *Océano*.[48] To further complicate the picture, the ECJ has, in some other constellations, accepted direct horizontal effect, namely, in the case of unfair competition provisions[49] and national prohibitions which render the performance of a contract impossible.[50] This uncertainty is all the more regrettable as private citizens may risk sanctions for violating national law when relying on the direct application of European directive provisions.

Another co-ordination problem lies in the division of the jurisdiction of European and national courts in interpretation and gap-filling, in particular in the 'concretization' of general clauses.[51] Whereas no limits on ECJ jurisdiction are foreseen in the Treaty, they have nevertheless been recommended in the literature, and in some cases have even been accepted by the ECJ. For example, the unfairness of contractual clauses was exhaustively scrutinized by the ECJ in the *Oceano*[52] and *Cofidis*[53] Cases, but left to national courts in the *Freiburger Kommunalbauten*[54] Case – probably also because of the ECJ's lack of capacity to deal with the potential flood of submissions of this kind. However, it is not clear how the different cases may be meaningfully distinguished. Instead, it seems that the issue of 'concretization competence' should not be separated from the 'content of concretization', i.e. the specific substantive law answer.

Alongside general clauses, there are also problems of cumulative application and pre-emption in the interplay of European and national private law.[55] On the one hand, concurring national norms may negatively affect the effectiveness of European norms by stipulating additional conditions, while on the other, European norms are, in the first place, generally incapable of deploying effectiveness without being appropriately co-ordinated and supplemented by national norms. Instances of cumulative application or pre-emption may be pre-determined by conflict of law rules contained in European directives – a prominent case being minimum harmonization clauses – failing which they need to be developed on a case-by-case basis by the ECJ. To quote a prominent example, problems of cumulative application of European and national sources had to be solved by the ECJ in a series of Product Liability cases. In contrast to most consumer contract law directives, the 1985 Product Liability Directive[56] does not contain a minimum harmonization clause, though most commentators read such a clause into it on account of its framework character and large number of gaps.[57] However, the ECJ found that no minimum harmonization principle could be

read into the directive in the light of its paramount goal of establishing uniform regulation of product liability – so as to prevent market distortions when undertakings in one Member State are forced to pay more to the victims of dangerous products than in others.[58]

The inverse constellation of pre-emption is constituted by the fragmentation of national law, when national norms with a wide scope of application collide with European norms with a narrow scope of application.[59] Such fragmentations may lead to European enclaves in national law when the national legislator introduces European segments into national provisions – as happened in the German transposition of the Unfair Terms Directive in § 310 para. 3 BGB and the Consumer Sales Directive in §§ 474–479 BGB. The alternative of an 'over-obligatory' implementation of European norms (extending them on a voluntary basis to the wider scope of application of national norms) leads to the difficult and controversial question of whether the ECJ is competent to decide even upon national segments of the implementation norm (which go beyond the scope of application of the provisions of the directive) when cases are referred to it (which is of course not prescribed by Article 234 TEC). The Court has, with one exception,[60] affirmed this question in its jurisprudence.[61]

Finally, all these co-ordination problems are rendered worse by a particular instance of judicial self-restraint by the ECJ. Indeed, when answering reference questions brought to it by national courts in the procedure under Article 234 TEC, its interpretive perspective is strictly limited to European measures, without considering their (25 different!) private law surroundings and the effect that the combined application of European and national law may have in a specific case. It is of course true that the ECJ has no competence to interpret national law. However, when interpreting European law, it could very well take into account its national law surroundings and their interpretation by national courts, even though this would render its task much more difficult. This would actually be the only possibility for this court to engage in system-building in the European multi-level regime of private law – which does not deserve the term 'system' in its present state.

Conclusion

Whereas every decision in European constitutional law may reinforce the overall system and 'weave its patches ever tighter', this potential is barely existent in private law. Its division into the European and national sources which make up a multi-level regime, coherence problems within European sources, as well as in the interplay between European and national sources, render the gradual formation of a system and, consequently, system-oriented adjudication, hardly possible. This is plausibly shown by the fact that most ECJ cases in private law concern the delimitation of the scope of application of European directives, i.e. decisions which do not generate meaningful systematic gains.

Judicial method and interpretative meta-principles

Other important differences attach to the field of judicial method. For present purposes, this may be divided into two phenomena: first, the interpretative tools in use; second, the 'background agenda' pursued by a court which may be rephrased as 'interpretative meta-principles'.

Regarding the first category, the ECJ essentially resorts to the traditional methods of interpretation also used in the Member States, but attaches a somewhat different weight to them.[62] Grammatical, systematical, and historical interpretation is of course used, but teleological interpretation is often the most important method. It is geared towards the famous '*effet utile*' principle, according to which the Court seeks to achieve the maximum of practical effectiveness of European law. Inspired by the model of the French Conseil d'Etat, the ECJ's method of argumentation is usually quite succinct and formalistic, and leaves little space for discussion – drawing, as it were, on the legal formalist fallacy that the answers to all legal questions are already contained in the text of the law, and only need to be identified and applied by the interpreter.[63] Apparently, the ECJ never openly reflects on the political dimension of its decisions, let alone their political, social and economic consequences.[64] This, again, reflects a widespread formalist conviction according to which the legitimacy of law is threatened if it does not draw a clear borderline between itself and politics. And yet this borderline is itself a fallacy, as the political dimension of adjudication has always been, and still is, undeniable. Thus, denying it may be politically understandable, but is, to say the least, methodologically dishonest.

Notwithstanding this silence on the part of the Court, it is by examining the development of its jurisprudence over years that one may find meta-principles at an abstract level, which reflect its more general agenda. As such principles are never explicated, it is unclear to what extent the Court pursues them actively and in a reflective manner, or whether instead they constitute a secret 'master plan' ('*geheimer Entwurf*' in the words of Franz Wieacker[65]) which may remain hidden, even to the judges themselves, due to the official formalistic methodology, becoming visible only in a scientific reconstruction of the decade-long evolution of the case law.

Constitutional law

The building up of a European constitutional system was enabled by coherent meta-principles, in other words, a sound overall design of the structural and substantive constitution. In the former, the guiding principle may be labelled 'approximation towards a federal system'. Yet, to achieve this, an explicit choice in favour of, let alone a political debate on, a federal Europe was not necessary and never took place.[66] Instead, the 'federalization' of Europe was simply achieved through the effective application of direct effect and supremacy, combined with the judicial device of the preliminary reference procedure. This led to the effective implementation of European law before national

courts by interested private parties – whereas under traditional international law no comparable tools existed, and the non-compliance of a Member State could only be found by a judicial body *ex post* and, at best, give rise to liability.

The ECJ's approach in the substantive constitution is more complex. The two most important baselines are, on the one hand, an activist, expansionist approach, and on the other, a more reticent, 'procedural-balancing' one. These will now be sketched out in relation to the area of the basic freedoms.

CONSTITUTIONAL ACTIVISM

The complement of the federalization of the structural constitution through direct effect and supremacy was the upgrading of the free trade provisions into subjective rights. These became constitutional-like basic freedoms and covered not only all forms of discrimination but also simple restrictions, and were finally extended horizontally among private parties. The interpretation of the Treaty provisions on competition law similarly elevated them to basic tenets of an economic constitution. This prohibited not only private distortions of competition, but – in its so-called 'public turn' which started in the late 1980s – also extended to distortions brought about by the state – i.e. by monopolies, exclusivity rights or the tolerance or even promotion of private anti-competitive behaviour. Whereas the Court generally followed an expansionist agenda, both in the structural and the substantive constitution, there have also been occasional steps backwards, however, mainly in order to correct former excessive expansions – as, for example, the famous limitation on the scope of the application of the free movement of goods (Article 28 TEC) in the *Keck*[67] decision, or in competition law; the rule of reason doctrine, which excludes certain agreements from the scope of Article 81 para. 1 TEC, thus rendering an individual or block exemption under Article 81 para. 3 TEC superfluous.[68]

SUBSTANTIVE CORE AND PROCEDURAL 'HALO'

A second methodological meta-principle in the jurisprudence on the basic freedoms may be called rational balancing. It applies in particular when the basic freedoms conflict with national provisions serving different regulatory objectives, typically non-trade issues. Technically, such cases are either about an exemption from the scope of application of the freedom rights or the application of the proportionality test. In substance, one may find a two-tier structure in such cases. At the first level, there is the mandatory hard core of freedom rights which corrects 'nation state failures', such as protectionism or other forms of discrimination or excessive limitation of the legal position of foreigners.[69] Beyond this substantive core, there is a kind of procedural 'halo' within which the basic freedoms no longer determine the content of national regulation, but only mandate a rational balancing process within which Member States are supposed to give good reasons if they want to uphold regulations which negatively affect a European freedom right. Rational balancing understood in this sense favours

innovation, rationalization and deliberation of adequate solutions. This trend may be detected in a long line of case law reaching from *Cassis* to more recent cases, such as *Altmark Trans*.[70]

In private law, the most famous case one may read along these lines is probably the *Centros* judgment.[71] In this case, a Danish couple was allowed, by drawing on the freedom of establishment, to escape Danish social capital requirements on private limited companies by establishing an English company and then founding a Danish branch from which all the commercial activity of the company was carried out. As the ECJ implied – both in this and in later cases – a company is subject to the law of its place of incorporation (*Gründungstheorie*). These cases are frequently read as an example of regulatory competition close to a 'European Delaware effect'.[72] But there is a more attractive alternative interpretation.[73] The ECJ did not deny Denmark's right to enact mandatory corporate regulation; however, Denmark was required to give good reasons to explain why its restrictions on the establishment of a branch of English private limited companies, including the provisions on minimum capital, were conducive to its alleged regulatory objective of creditor protection. As Denmark did not refuse the registration of a branch of English-style private limited companies in general, but did so only in the present case in which the company had no commercial activity at its place of incorporation (a fact which is completely irrelevant to creditor protection in Denmark), its approach was found to be inconsistent and therefore in breach of the proportionality principle. As a result, the Danish regulation was not forbidden unconditionally, but only because it lacked an adequate and reasonable justification. All in all, the meta-principle called the substantive core and procedural 'halo' here seems to enable a well-tuned and balanced co-ordination of European and national law.

Private law

Moving back to the field of private law, whilst there are few specificities regarding the use of methods of interpretation, the search for meta-principles is more difficult. At an abstract level, classic private law in the continental tradition may be ascribed to the meta-principle of realizing a constitution of free and equal citizens. Due to the instrumentalist character of European private law, not even that abstract meta-principle exists at the European level. Instead, the basic, perhaps frustrating, thesis to be expounded here is that a general vision of the ECJ being capable of materializing in interpretative meta-principles does not exist. What remains is a kind of 'schematic *effet utile*' which has been counteracted in the more recent past by tendencies of formalistic self-restraint which may even go against the *effet utile* of single European instruments. This incertitude is complemented by the, often bad, technical quality of private law decisions.

'Schematic *effet utile*' means that the Court tries to maximize the practical effectiveness of EC law, without adequately reflecting upon its systematic embedment in its national law environment and the overall objective of private law justice. This phenomenon reflects what has been referred to above as the

one-sided teleology of European legislation and perpetuates it at the level of interpretation. This tendency may be seen within the Court's consumer model, which is not coherent. Indeed, in *European* consumer contract law, the ECJ often seems to base itself on a rather paternalistic model of a consumer who may ignore his or her rights. Conversely, in competition law, when *national* provisions on, say, misleading advertising are invoked as limitations to the basic market freedoms, the ECJ tends to favour the model of a well-informed consumer in need of less protection – so as to limit national defences against the market freedom and to increase their *effet utile*.[74]

Alongside what is called 'schematic *effet utile*' here, the ECJ has in recent years also practised, with no clear distinction from *effet utile* 'expansionism' being possible, another approach which may be characterized as a kind of formalistic self-restraint. This is certainly motivated by the idea of limiting the number of references in private law. In addition, the conviction may also exist on the part of the Court that the responsibility for private law systems remains with the national legislator, whilst the European input is still limited to selective interventions.

A pertinent example of this tendency of self-restraint is provided by AG Léger's opinion in the so-called *Heininger* follow-up cases of *Schulte* and *Crailsheimer Volksbank*.[75] In *Heininger*, the ECJ had acknowledged the applicability of the Doorstep Sales Directive to real credit transactions, which gives doorstep buyers the right to revoke the credit agreement. The crucial issue here concerned the destiny of the contract on the purchase of the house and the provision of a mortgage following the cancellation of the credit agreement. The German Federal High Court (BGH) found that the latter did not affect the former.[76] This rather formalistic and wholesale *obiter dictum* was convincingly criticized in the literature.[77] Indeed, if confined to the credit contract, the right of cancellation is not worth a great deal, as the consumer's debt for the purchase of the house remains; the only effective remedy would be to transfer the house to the bank in return for the credit, as is actually possible in German law in such interconnected transactions. In addition, the banks involved had often financed up to 100 per cent of the sales price, thereby giving the investors the impression that the price was market-oriented and that the whole deal had been checked by the banks and had been approved as economically reasonable. This comes very close to the requirements formulated in other court decisions for the assumption of 'interconnected transactions' in the above sense. Against this background, the BGH decision certainly amounted to a tremendous relief for the involved banks, as they would otherwise have received thousands of hardly marketable flats in return for their credits. However, effective consumer protection had not been achieved in this case. This dubious jurisprudence of the BGH has, however, been accepted by AG Léger.[78] In his opinions, he emphasizes that Article 7 of the Directive, according to which 'the legal effects of such renunciation shall be governed by national laws', is unambiguous and leaves no scope for interpretation. The concept of *effet utile* would not be used by the Court on every occasion, but only when the provision in question is open to several interpretations.

As a result the BGH can, according to the AG, freely decide on national law consequences. This entails a true 'consumer trap' – i.e. the danger for the consumer of incurring substantial financial losses in the exercise of consumer protection rights! This consequence is incompatible not only with the *effet utile* of the Doorstep Sales Directive, but also with both European and national constitutional principles. It does, in effect, constitute a nation state failure which legitimizes European intervention. Fortunately enough, in its judgment, the ECJ has, against its AG, paid heed to these arguments and found the German provisions and case law to be in violation of the directive – however, only to the extent that the information obligations laid down by the directive had not been respected.[79]

The incertitude about *effet utile*-oriented activism and self-restraint is complemented by the often poor technical quality of private law decisions. Indeed, this is often worse than that of constitutional law decisions, in which the ECJ has gained a high degree of expertise over the years. It is becoming increasingly clear that judges are quite simply overtaxed by the universal competence of the Court in all areas of Community law – from customs law via constitutional law to private law. One pertinent example from private law of a manifest judicial error is the *Dietzinger* Case.[80] Here, the ECJ had to delimit the scope of the Doorstep Sales Directive. By doing so, the Court interpreted the so-called principle of 'accessoriness' (the cogent nexus between the debt to be guaranteed and the validity of the guarantee contract) in a teleologically absurd way:[81] The son would only have been allowed to revoke the guarantee agreement concluded by himself under doorstep conditions if the father had entered into the main contract under doorstep conditions as well – as if an insane surety could only invoke the invalidity of the guarantee contract if the principal debtor was insane, too.[82]

Conclusion

All in all, the ECJ's methodological approach in private law lacks coherent orientation towards any interpretative meta-principle. Its usual preference for *effet utile*-oriented decisions is increasingly coupled with formalistic judicial self-restraint, with no clear distinction between the two approaches. Consequently, legal certainty suffers as ECJ decisions are difficult to predict. This incertitude is further exacerbated by the often poor technical quality of private law decisions. On these grounds, European court decisions in private law may be said to enjoy little methodological legitimacy.

The effects on private parties

Further differences between constitutional and private law exist with regard to the actual consequences of decisions on private parties. In both fields, access to justice problems, in particular the now excessive length of the reference procedure of about two years, need to be criticized. The importance of the famous slogan 'justice delayed is justice denied' can hardly be overstated. Yet, even

against this negative background, one may find meaningful differences with regard to the effect of constitutional and private law decisions on private parties.

Constitutional law

The majority of both private and constitutional law cases originate from preliminary reference procedures, though other forms of actions, such as treaty infringement procedures against a Member State by the Commission, or nullity actions of national governments against European law acts, have also played an important role. The most famous constitutional law cases – to name but *van Gend*,[83] *Costa* v. *Enel*,[84] *Simmenthal*,[85] *Cassis de Dijon*[86] – result from the burdens imposed by national law on individuals, which were then attacked by the affected individuals on grounds of European law, in particular the four market freedoms. It is this particular feature that explains why access to justice problems seems to be somewhat less urgent and less severe here. In fact, in the most frequent instance of import duties or quantitative restrictions, these are typical public law burdens, which are motivated by the legislator following rationales of distributive justice. Such burdens do not generally entail direct gains or advantages for other individuals, which are repealed once the burden is abolished. If there are disadvantages, these are generally of an indirect kind, such as the loss of market shares when the products of a foreign competitor may be imported on better conditions. Thus, in many, if not most, constitutional law cases, private parties may only win, i.e. enhance their legal position as compared to national law. In the worst case, EU law does not trump national law, which continues to be applied – something the parties had to reckon with anyway. Clearly, this statement is not valid in all fields of constitutional law. For example, regarding competition law, whose basic tenets according to Article 81f. TEC belong to the EU's economic constitutional law, the blockage of agreements among undertakings or mergers through pending procedures may entail considerable financial losses and thus also lead to a factual denial of justice.

Private law

The situation in private law is similar to that in competition law. However, access to justice problems may have more serious effects here. Typical private law cases deal with issues of commutative justice, which is essentially about the equivalence of claims (performance, damages, restitution, etc.) among the parties to a private law relationship, with contract and tort being the two principal categories. In this situation, the gain of one party usually equals the loss of the other. It follows that both parties are normally negatively affected by the delay of decisions. Indeed, the winner or loser is only known after the end of the procedure, and neither party is able to rely on the results of the transaction beforehand. As a consequence, speedy conflict solution, which is an essential element and advantage of most Western European economies, is threatened, as the number and influence of ECJ decisions in private law increases.

This situation is aggravated by what may be called the 'pingpong game' among European and national courts, which is the unavoidable consequence of the preliminary reference procedure. Under this procedure, the ECJ, similar to an expert witness, does not decide entire cases, but only makes a finding on those European law issues referred to it by the national court, after which the final decision must be taken by the national court itself. The *Heininger* saga, referred to above, constitutes a particularly bad example of what may happen in this interplay of European and national courts. This case was pursued on three instances in national law – first instance, appeal[87] and appeal on the grounds of law (revision) at the BGH. Whereas the Court of First Instance and the Court of Appeal did not check whether the contract was concluded in a doorstep situation, as the Doorstep Sales Directive had, in their view, been displaced by the Consumer Credit Directive, the BGH was not sure about that result under European law, and referred the question to the ECJ.[88] The latter, however, assumed that the Doorstep Sales Directive had to be applied,[89] after which the BGH annulled the lower court's decision[90] and referred the matter back to the Court of Appeal.[91] Here, for the first time, it was examined whether there had actually been a doorstep situation. The Court's decision was that there had not. As a result, the whole procedure had become a castle in the air, the courts had *in extensu* dealt with a hypothetical question which turned out to be completely irrelevant for the solution of the case, and the parties had to wait for more than five years for a final decision!

In conclusion, it may therefore be stated that adverse effects on private parties arising out of delays and co-ordination problems among European and national courts are particularly worrying in private law.

Overall conclusion

Taken together, this analysis shows that the current type of adjudication in European private law is generally defective. This is so on account of its fragmentary and inconsistent systematic structures, the co-ordination problems among European and national sources, which do not provide the necessary preconditions for judicial system-building, the lack of a coherent interpretative meta-principle on the part of the ECJ (which oscillates between *effet utile* maximization and formalistic judicial self-restraint) and, finally, pressing access to justice problems, which are mainly due to the excessive length and the 'pingpong' character of the preliminary reference procedure as well as the often poor technical quality of ECJ decisions in private law.

An alternative constitutional meta-principle for judicial governance in European private law

In the face of the problems outlined above, it is clear that a completely new approach to judicial governance in European private law is needed. This new approach should first be guided by the insight that the ECJ cannot be the

appropriate actor for doctrinal fine-tuning in the European multilevel system. As we have seen, due to the fragmentary state of European private law and its self-imposed limitation of not considering the national law context of European provisions, the ECJ is not capable of system-building and system-oriented adjudication. This becomes particularly clear from the fact that most ECJ decisions are (only) about delimiting the scope of application of European instruments, from which very little systematic gain may be derived. Also, it should be considered that doctrinal fine-tuning – with the result that each case might be resolved exhaustively and uniformly at the European level – may cause legitimacy problems, as the persisting social, political and economic differences between the Member States cannot be adequately taken into account.

Against this background, it would be wise were the ECJ to act not as an ordinary private law court, but as a constitutional court in private law. This means that it should apply to private law, something similar to its constitutional law 'substantive core and procedural halo' approach, described above. To this end, it should – in a first step – not only challenge 'nation state failures', in particular the violation of freedom and equality rights and the shifting of externalities of one's own action to neighbours ('beggar my neighbour politics'), but also challenge self-evident irrational or inefficient instances of national governance which harm national citizens in their status as European citizens. Thus, contrary to the opinion of AG Léger in the *Schulte* and *Krailheimer Volksbank* Cases, the possibility that a consumer may incur his or her financial ruin by exercising a European consumer protection right (!), i.e. the revocation right laid down in the Doorstep Sales Directive, constitutes an instance of nation state failure which should trigger European intervention. Equally, the interventions against unfair national procedural requirements in the *Océano* and *Cofidis* Cases may be justified on account of common European standards of due process, which belong, as it were, to the European constitutional *acquis*.

However, beyond this substantive hard core, the ECJ should leave doctrinal fine-tuning (which involves connecting single decisions to an overall system) to national courts, and limit itself to 'procedural frameworksetting', including instigating and monitoring learning- and rationalization processes in national law. This approach should at the very least prevail as long as the current fragmented state of European private law persists and judicial system-building is hardly possible. In this sense, one may welcome instances of judicial self-restraint, such as the *Dietzinger* Case. Even though the Court's technical reasoning in this case was, as shown, very much worthy of criticism, it is plausible that the credit markets on the one hand, and the public and private law instruments protecting sureties and creditors on the other, are still so different that completely uniform adjudication might lead to socially inadequate, and therefore illegitimate, results. Equally, the decision in the *Freiburger Kommunalbauten* Case, in which the determination of abusive standard terms in contracts lacking any European implications was left to national courts, is fully plausible from this constitutional-perspective approach. However, single 'hits' of a convincing approach by the ECJ are not sufficient. It is necessary for the ECJ to become

aware of the differences between European constitutional and private law and to tune its general approach accordingly. In summary, it is by behaving like a constitutional court for private law that the ECJ might replicate its constitutional law success story in that field.

Notes

1 E. Steindorff, *EG-Vertrag und Privatrecht*, Baden-Baden: Nomos, 1996, p. 471.
2 See, for example, M. Cappelletti, *Giudici Legislatori?* Milan: Giuffrè, 1984; M. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialisation*, Oxford: Oxford University Press, 2002; for a recent view from the European Court of Justice itself, see K. Schiemann, 'Judicial Governance – a Judge's Perspective', in: A. Furrer (ed.), *Europäisches Privatrecht im rechtswissenschaftlichen Diskurs*, Bern: Stämpfli, 2006, p. 1.
3 F. W. Scharpf, *Regieren in Europa*, Frankfurt aM: Hoffmann and Campe, 1999; *Notes Toward a Theory of Multilevel Governing in Europe*, MPIfG Discussion Paper 2000 no. 5.
4 See, generally, J. H. H. Weiler, 'The Community System: The Dual Character of Supranationalism', *Yearbook of European Law 1*, 1981, 268–306; 'A Quiet Revolution: The ECJ and its Interlocutors', *Comparative Political Studies*, 1994, vol. 26, no. 4, 510–534.
5 C. D. Ehlermann, 'The Second Wilberforce Lecture: The European Community, its Laws and Lawyers', *Common Market Law Review*, 1992, vol. 29, 213–227.
6 E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, 1981, vol. 75, no. 1, 1–27.
7 J. H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes have an Emperor?' and other Essays on European Integration*, Cambridge, UK: Cambridge University Press, 1999.
8 See, generally, A. M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence*, Oxford: Hart Publishing, 1998.
9 See, generally, C. Joerges, *Rethinking European Law's Supremacy*, EUI Working Paper Law no. 2005/12, 2005; *Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin*, ZERP-Diskussionspapier 1/2006; C. Jetzlsperger, *Legitimacy through Jurisprudence*, EUI Working Paper Law no. 2003/12.
10 On the following, see the classic accounts by C. W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (2nd ed.), Berlin: Duncker and Humblot, 1983, pp. 19ff., and F. Bydlinski, *System und Prinzipien des Privatrechts*, Vienna and New York: Springer, 1996, pp. 1ff.
11 The distinction between external and internal systems goes back to P. Heck, *Begriffsbildung und Interessenjurisprudenz*, Tübingen: Mohr, 1932.
12 C. W. Canaris, above note 10, pp. 40ff.
13 Ibid., pp. 52ff.
14 C. Schmid, *Die Instrumentalisierung des Privatrechts durch die EU*, typescript, Munich, 2004, pp. 125ff., 159ff., 202ff., and 273ff.
15 Ibid., pp. 118ff., 145ff., 198ff., 253ff.
16 Case C-6/90 and C 9/90, *Francovich*, ECR 1991, 5537. See e.g. R. Caranta, 'Judicial Protection against Member States: A New "Jus Commune" takes Shape', *Common Market Law Review*, 1995, vol. 32, pp. 703–726.
17 See, for details, W. Wurmnest, *Grundzüge eines europäischen Haftungsrechts*, Tübingen: Mohr, 2003, p. 43ff.
18 In this sense, see M. Herdegen and T. Rensmann, 'Die neuen Konturen der Gemein-

schaftlichen Staatshaftung', *Zeitschrift für das gesamte Handelsrecht und Wirtschafstrecht*, 1997, vol. 161, 522–555.

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20 Directive 85/577/EEC, 1985 O. J. (L 372) 31.
21 Directive 87/102/EEC, 1987 O. J. (L 042) 48 (as modified by Directives 90/88/EEC, 1990 O. J. (L 061) 14, and 98/7/EEC, 1998 O. J. (L 101) 17.
22 Directive 97/7/EC, 1997 O. J. (L 144) 19.
23 Directive 90/314/EEC, 1990 O. J. (L 158) 59.
24 Directive 94/47/EC, 1994 O. J. (L 280) 83.
25 Directive 85/374/EEC, 1988 O. J. (L 307) 54 (Amended by Directive 1999/34/EC, 1999 O. J. (L 283) 20).
26 Directive 93/13/EEC, 1993 O. J. (L 095) 29.
27 Directive 1999/44/EC, 1999 O. J. (L 171) 12.
28 Directive 2000/35/EC, 2000 O. J. (L 200) 35.
29 Directive 86/653/EEC, 1986 O. J. (L 382) 17.
30 On the following, see C. Schmid, above note 14, pp. 597ff.
31 Case C-168/00, *Leitner*, ECR 2002, I-2631, in *Neue Juristische Wochenschrift*, 2002, 1244. Comment by K. Tonner and B. Lindner on p. 1475.
32 Case C-423/97, *Travel Vac*, ECR 1999, I-2195.
33 Case C-481/99, *Heininger*, ECR 2001, I-234. For an instructive comment, see M. Franzen, '"Heininger" und die Folgen: ein Lehrstück zum Gemeinschaftsprivatrecht', *Juristenzeitung* 2003, vol. 58, no. 7, 321–331; in English, G. P. Calliess, 'The Limits of Eclecticism in Consumer Law: National Struggles and the Hope for a Coherent European Contract Law. A Comment on the ECJ's and the German Federal Highcourt's "Heininger"-decisions', *German Law Journal*, 2002, vol. 3, no. 8 (e-journal).
34 Directive no. 2002/65/EEC, OJ EC 2002 (L 271) 16.
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36 OJ EC 2000 (L 200) 35.
37 For details, see A. Colombi Ciacchi, 'Die EG-Richtlinie über den Zahlungsverzug und ihre Umsetzung durch das Schuldrechtsmodernisierungsgesetz', *EWS*, 2002, 306–320.
38 On the following, see Schmid, above note 14, pp. 622ff.
39 Similarly, T. Wilhelmson, 'Private Law in the EU: Harmonized or Fragmented Europeanization?', *European Review of Private Law*, 2002, vol. 10, no. 1, 77–94, referring to a 'Jack-in-the-box effect' of Community law.
40 See P. Hommelhoff, 'Zivilrecht unter dem Einfluß Europäischer Rechtsangleichung', *Archiv für die civilistische Praxis*, 1992, vol. 192, no. 1–2, 71–107, pp. 71 and 102; C. Joerges, 'Die Europäisierung des Privatrechts als Rationalisierungsprozeß und als Streit der Disziplinen', *Zeitschrift für europäisches Privatrecht*, 1995, no. 2, 181–201, p. 199.
41 Case C-336/03, ECJ of 10 March 2005.
42 Above note 14, pp. 622ff.
43 Ibid., pp. 623ff.
44 Case 14/83, *von Colson*, ECR 1984, 1891.
45 Case 106/89, *Marleasing*, ECR 1990, I-4135.
46 Case 91/92, *Faccini Dori*, ECR 1994, I-1281.
47 Case C-129/94, *Ruiz Bernaldez*, I-1829.
48 Cases C-240/98 – C-244/98, *Océano*, ECR 2000, I-4941. For more details on these cases, see above note 14, pp. 626ff.
49 Case C-194/94, *CIA Security*, ECR 1996, I-2201.

50 See Case 150/88, *Glockengasse*, ECR 1989, 3891; Case C-443/98, *Unilever*, ECR 2000, I-7535. On this line of cases, see J. Gundel, 'Neue Grenzlinien für die Direktwirkung nicht umgesetzter EG-Richtlinien unter Privaten', *Europäische Zeitschrift für Wirtschaftsrecht*, 2001, no. 5, 143–149. and C. Schmid, above note 14, pp. 634ff.
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52 Cases C-240/98 – C-244/98, *Océano*, ECR 2000, I-4941.
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Part II

The social deficit of the Union

6 Can there be a European social model?

Waltraud Schelkle

A 'European social model' is typically referred to as a villain to be locked up or as an endangered species dying out, but never as something that has a future. Yet, both the fierce critics[1] and the anxious fans[2] of the European social model address only specific institutionalizations of the welfare state in continental Europe, such as forms of employment protection or the generosity of benefits. These institutionalizations characterize existing families or worlds of national welfare states but not necessarily a European social model.[3]

A social model as I will understand the term here is about the political norms and economic functions that a certain welfare state arrangement satisfies primarily. Institutionally, the arrangements may look rather different even though they are manifestations of the same model, insofar as they are functionally equivalent and borne by the same norm. Historical trajectories or institutions like the electoral system may account for these institutional differences. We can identify social models in times of reform when there is a need for guidance and for justification of abandoning the status quo.

The unity of a European model, if discernible, would derive from the functionalist, technocratic-normative consensus that social policy in the European Union (EU) – polity has a particular problem-solving role for the economy. The Lisbon Agenda explicitly states that social policy has to serve competitiveness and flexible adjustment of integrating economies and that reform should realize the potential of 'social policy as a productive factor'.

One way of analysing whether the Lisbon Agenda makes a difference to national welfare state transformations is to study reforms that are at its core, namely those supposed to make labour market regulations and tax-transfer systems more employment-friendly.[4] If these reforms go against the momentum of the existing national models, such as income stabilization or basic safety while reflecting a consensus of 'social policy as a productive factor', we can interpret these reforms as welfare state transformations that bring about a European social model. Specifically, I will look at reforms of employment protection and unemployment benefits undertaken since the late 1980s in four Member States (Germany, Greece, Sweden, United Kingdom) which have quite different institutional setups of social policy. The empirical question is whether there is a convergence of the norms and functions of social policies across these

countries which can be related to the implementing of the EU's social policy agenda.

The answer to the title question that results from this empirical analysis is a qualified 'yes': A European social model (ESM) has become conceivable although it is far from certain to emerge. Obstacles to the emergence of an ESM are both economic and political. First, the institutional shift from 'social policy as effective income maintenance' or 'as a basic safety net provider' to 'social policy as a productive factor' has economic costs in terms of effective stabilization and universal coverage. Second, the problem-solving legitimization of social policy coordination is a political liability for European integration if reform efforts are not rewarded as promised by an increase in trend growth and social partners get a less constitutive role in reform processes. Policymakers may therefore refrain from further moves towards an ESM based on the 'productivist' Lisbon consensus.

My contribution shares its point of departure with the theoretical framework of the CIDEL project, namely, that the European social model consists of guiding norms, rather than a set of specific institutions. It is a legitimizing strategy and a '*Leitbild*', rather than an operational goal.[5] However, my interpretation also implies that there is no 'disengagement of the social from the economic constitution'[6] in the utilitarian or problem-solving path. On the contrary, the two are closely linked in that social policy is instrumentalized for economic growth. Moreover, I do not foresee that the EU involvement in social policy-making would be granted on any other grounds than as some sort of 'problem-solving capacity'. If this EU involvement does not prove useful for the reasons just mentioned, which are discussed in more detail below, I would expect a re-nationalization of social policy-making, and not more ambitious legitimizing strategies at EU level.[7]

The outline of my contribution is as follows: the next section discusses in what sense a European social model is conceivable if Lisbon-type reforms take place; and what difference this would make to existing welfare states. This is followed by an empirical part which looks at four countries with different income support systems (Germany, Greece, Sweden, and the United Kingdom) and whether the changes they have undergone since the mid-1980s are in line with the evolution of a European social model: I look at reforms that have required the policy-makers to make choices between different models. As expected, the evidence is indicative but not clear-cut, which is why we then explore the obstacles to the emergence of such a model. The conclusions position the main arguments within the CIDEL project.

What is the European social model projected by the Lisbon Agenda?

This section makes the argument that a European social model can emerge in three steps: I first argue that the idea of a European social model only makes sense if we do not take it as an ideal-type of a welfare regime in the Titmuss or

Esping-Andersen tradition. Second, I spell out the sense in which the Lisbon Agenda embodies a European social model, and then, third, contrast it with two other models of social policy norms and functions that exist at the national level.

A common understanding of what constitutes a European social model is, for instance, expressed by Martin and Ross, who argue that it

> [R]efers to the institutional arrangements comprising the welfare state (transfer payments, collective social services, their financing) and the employment relations system (labour law, unions, collective bargaining). The general term 'social model' refers to 'ideal-types' in the Weberian sense, conceptual abstractions of distinctive and central commonalities derived from a variety of empirical situations. Ideal-types [elucidate] the underlying similarities and differences across a range of complex social phenomena.[8]

If we understand this concept in this Weberian sense, the title question has by now been answered with a resounding 'no'. The evidence that we do not find convergence between the families or worlds of welfare capitalism, in whatever classification, is now so overwhelming that we can consider it a stylized fact.[9] Curiously, Martin and Ross admit this much when they write only shortly afterwards: 'Moving from ideal-type to reality reveals as many variants of the European model as there are Western European countries, each reflecting distinctive historical and political developments.'[10] This leaves the reader wondering what the unity of the model is if each of its manifestations is a variety in its own right.

Moreover, this finding of no convergence is not just an empirical regularity. There are some good reasons why we should not expect convergence to result from the co-ordination of social reform at EU level. One is implied by the general lessons that Featherstone[11] draws from his comparative study of how the EMU acted as a reform lever and a stimulus to a shift in norms in different regimes. Successful adaptation to the same challenges may actually reinforce the differences between welfare regimes because success means that the respective political economies were able to mobilize their comparative institutional advantages to respond. Some utilized their traditions of social partnership, while others promoted effective targeting combined with absorptive labour markets. A similar general explanation is provided by the 'Varieties of capitalism' approach[12] with its key concept of institutional complementarity suggesting that different national production regimes can be equally successful as long as they consist of coherent packages, so if they adapt they must do so not by upsetting, but by exploiting these linkages. In other words, not only do we know now that welfare regimes have not converged over the last two decades, even though some of them have changed considerably, but we also have plausible theoretical explanations of why convergence did not occur.

The question 'Can there be a European social model?' that was formulated by

the conveners of the CIDEL project remains interesting all the same, even if it is difficult to answer through academic research, when we consider a European social model as a collective legitimizing strategy of European integration.[13] Such a model may emerge through the incremental but persistent implementation of Lisbon-type reforms at the Member State level. The thrust of these reforms is to increase economic incentives for more labour supply and job creation.[14] They comprise measures to make fiscal systems more 'employment friendly' or 'activating', in particular, by lowering taxes, re-regulation to make employment contracts more flexible, as well as various reforms to raise the employment rate among women and the elderly, such as support for child care or removing early retirement schemes, respectively.

Until recently, the Lisbon Agenda was portrayed as a natural extension of the Maastricht process of creating an economic and monetary union based on sound public finances.[15] However, the reform of the Stability and Growth Pact in March 2005 granted exceptions to the achievement of the medium-term objective of 'close-to-balance-or-in-surplus' in cases where governments can claim that they need to bear upfront costs of structural reforms, in particular, pension reforms.[16] This reform concedes that the Lisbon process is a separate, and possibly more difficult, reform agenda to achieve than that called for by the Maastricht Treaty.[17] Thus, it cannot be taken for granted.

The evolution of a European social model would be comparable to the evolving Maastricht consensus on macro-economic management that McNamara[18] traced, namely a shift in the norms and beliefs of policy-makers about the priorities of social risk management. The report of the High-Level Group on 'the future of social policy in an enlarged European Union', published in 2004, summarizes the consensus thus:

> Despite the diversity between national systems, there is a distinct European social model in that all national systems of EU countries are marked by the consistency between economic efficiency and social progress. The model requires a developed insurance component. At the same time, the social dimension functions as a productive factor. For instance, good health or good labour law partly accounts for good economic results.[19]

This Lisbon consensus, the explicit aim of which is to modernize or 'adapt' European welfare regimes, proposes that social policy has to be a dynamizing force, activating all members of society and operating as a 'productive factor' for the economy. For instance, it tries to achieve a 'universal breadwinner' model by explicitly stipulating a female employment rate of 60 per cent in all Member States by 2010.[20]

The difference that the Lisbon Agenda would make can best be illustrated by contrasting it with the other social models that underpinned institutional settings in the post-war era. To narrow this down, I contrast the social model enshrined in the Lisbon Agenda with two other models: the income maintenance model borne in the New Deal, and the basic safety model first formulated in the Bev-

eridge Report, both to stress that there is not just one alternative, and to explain in what sense there are alternative models which are not synonymous with regimes of welfare capitalism.

One powerful model might be called the 'income maintenance consensus' that is only partially institutionalized in its homeland, the US, but characterizes the overarching norm of many Continental European and Scandinavian welfare states: stability, both in a macro-economic and in a socio-political sense. It is geared towards ensuring a stable family income through the employment of one male breadwinner (Continental Europe) or one and a half breadwinners in terms of earnings (Scandinavia) as well as income transfers which safeguard living standards for some time. This stability guarantee is maintained by a relatively generous level of social entitlements, contingent on employment status or universal, as well as active, macro-policies that were mindful of competitiveness. The generosity provides high incentives to seek paid employment for those able to seize the opportunity. But the high standards for profitable job creation thus created also exclude individuals with low skills (for example, immigrants with language difficulties), low productivity (for example, persons with disabilities) or time constraints (for example, caregivers, typically female). This pattern of gainful employment and social entitlements for what was once a clear majority, but exclusion for other identifiable groups within the labour market, contributed, somewhat perversely, to the sense of socio-economic stability that the New Deal model conveys: two thirds of citizens did not expect to become threatened by the vagaries of market forces. This changed in the 1980s when the experience of unemployment, lasting exclusion from stable employment and the threat of impoverishment came to be an experience that was no longer confined to an 'underclass' or female carers.

Another powerful model is what we might call the Beveridge consensus of 'Insurance for All and Everything'.[21] It is much less widespread than the income maintenance model, but the norm has prevailed even though Beveridge's specific institutionalization has been abandoned. It is a powerful '*Leitbild*' in any reform debate, and provides an interesting and subtle contrast to the Lisbon consensus. Its overarching norm is basic safety for residents; it is universal with regard to eligibility, and encompassing with regard to scope (National Insurance covers old age, unemployment, accidents, sickness and maternity)[22] and highly redistributive, in the original version, only with regard to delivery or provision, although not on the revenue side (financed out of a flat rate tax or lump-sum contribution by employees and employers). This model is deliberately not generous, the services provided, such as tax-financed health care, are rather basic, and both the means-tested income support for those not covered by National Insurance as well as the National Insurance benefits themselves are equally low if measured against an accepted poverty standard of 50 per cent of median income. The lack of generosity and the need for aspiring middle-class families to buy services such as child care or education in (semi-) private markets here works as an incentive to seek gainful employment, preferably for both breadwinners of a

household. Instability of employment, however, remains a virtual experience for many; in particular since the basic safety model avoids interfering with market income formation through employment protection.

Having distinguished these models, it is also worth noting what makes them similar and comparable. First, and, perhaps, contentious in the context of the CIDEL project,[23] what the productivist Lisbon consensus shares with the other models is that it establishes a link between social policy and the economy. So did the other two models, i.e. this link is not a distinguishing feature of the productivist consensus. What may be different is that the productivist consensus, in particular as expressed in the mid-term review of the Lisbon Agenda by the Barroso Commission,[24] tends to legitimize social policy by pointing out its ability to bolster market forces and not its ability to compensate deficiencies of markets as the other two models imply.

Second, the normative emphasis on social policy as a productive factor, as an income stabilizer or as a basic security provider, respectively, does not mean that these social models completely neglect the other two imperatives. The generous entitlements of the income maintenance model provide positive rewards for seeking highly paid, stable employment that encourages on the job training and the acquisition of specific skills; the less generous entitlements of the basic safety model make the seeking of employment imperative to escape poverty. But the norms of productivity, stability and safety may not always be compatible or easily reconciled and thus choices have to be made. This is key to the interpretation of the changes involved if a European social model were to emerge in the sense outlined above. For the empirical part, we can therefore ask what reforms would indicate that there is a new emphasis on employment and productivity, de-emphasizing or even jeopardizing income stability or basic security? If we can identify these choices, we may also be able to identify the moves which are indicative of a new consensus.

The Lisbon consensus and stability

The Lisbon goal of increasing the employment intensity of the economy overall and that of women and the elderly in particular, both connects and distinguishes its underlying productivist norm compared with the stability norm of the income maintenance model. Higher employment, in particular, leads to higher female participation and a larger share of households with two earners, which potentially increases the self-insurance capacity of families and thus the stability of household incomes. But the measures to bring about this increase in the employment rate, namely to lower marginal and average tax rates, may at the same time weaken the effectiveness of taxes and benefits as automatic stabilizers, thus reducing the stability of aggregate income. The same ambiguous relationship characterizes the drive to raise productivity that the Lisbon Agenda envisages. If a new emphasis on education and skill formation pays off, increasing the added value that a better qualified workforce can create, then this amounts to a preventive social policy that should stabilize output and thus incomes *ex ante*. For

instance, free education is redistribution which prevents income inequality among parents being translated into inequality of access to education, and thus to the prospect of unstable, marginal jobs for their children. Good education also increases their individual self-insurance capacity later on (an academic can take up a cleaning job, while it is difficult for a typical cleaner to enter academia). But again, the means for achieving higher productivity which the Lisbon Agenda proposes may jeopardize stability. Making more flexible, i.e. de-regulating, employment protection, may improve the allocation of labour, but it also increases the turnover within the labour markets and thus destabilizes employment (and unemployment).

The Lisbon consensus and security

Similarly, there are connecting and distinguishing elements in the Lisbon Agenda and in the basic safety model. If we again take the Lisbon goal of raising employment through a 'modernized' social policy as an example, basic security can also be raised if this means that particularly low-income households or single parents find work. The Lisbon Agenda stipulates a shift from 'passive' measures, such as social assistance, to 'welfare-to-work' measures, such as tax credits or active labour market policies that condition transfers of work or training, and thus promotes a shift of resources in order to provide social security at the lower end of the income distribution. However, some of the means that the Lisbon Agenda advocates for the lowering of labour costs may jeopardize basic security, at least in a universal sense. This is especially the case if some parts of public health and old age security become privatized; care may then become unavailable to some, or become available only in very different qualities. The productivity goal of the Lisbon Agenda to restructure the welfare state is compatible with the norm of providing basic security if the supply-side oriented upgrading of skills among low-qualified workers succeeds. It would lead to the social inclusion of the outsiders of the present employment arrangements. But the increasing flexibility of employment contracts or the privatization of public services to raise productivity will predominantly affect workers in low wage sectors, i.e. their jobs become disproportionately more part-time, fixed term or marginalized, and with few social benefits attached. This problem has already been noted in the EU's joint assessment of National Action Plans on Employment.[25]

This general outline has identified reforms that can be interpreted as an evolving Lisbon consensus in four different worlds of welfare capitalism; the next section explores whether we find them empirically.

Are there signs of a European social model emerging in the Member States?

This section will explore whether the ongoing structural reforms in the Member States make the productivist norm slowly but persistently an institutional reality, albeit in different, nationally adapted ways. To understand the latter, I will look

at four EU Member States that are considered to represent the conservative Continental European welfare regime (Germany), the Southern European traditionalist regime (Greece), the Scandinavian social-democratic regime (Sweden), and the Anglo-Saxon liberal regime (UK), respectively.[26] The empirical sketch tries to discover to what extent these countries have undertaken Lisbon-type reforms, and whether these reforms can be interpreted as contributing to the emergence of a European social model, rather than a simple overhauling of the income maintenance or the basic security models. Since the purpose here is only illustrative, the analysis is confined to reforms of employment protection, non-employment benefits and – to take a fiscally pressing social policy area – old age security, specifically the employment of older workers and early retirement. These reforms are covered, for the period of 1986–2002, by the Social Reforms Database that the *Fondazione Rodolfo Debenedetti* maintains[27] and updated by the labour market reform database of the European Commission for 2004. Unfortunately, there is no data on reforms in 2003.

What are the reforms that allow us to distinguish between the European and other social models? The defining difference between the three models is how they relate to the labour market. In the productivist model, social policy tries to achieve inclusion through employment and therefore even subsidizes work that would otherwise not pay enough to make it worthwhile for the employed. In the income maintenance model, social policy tries to set standards for gainful employment through earnings-related benefits or regulation, and therefore deliberately influences the primary income distribution (before taxes and transfers). In the basic security model, social policy tries to interfere as little as possible with primary income distribution as determined by labour markets, with low benefits only setting a uniform reservation wage, and successively supplements income mainly on the basis of family, rather than employment, status. The Lisbon model thus distinguishes itself from the other two models in that it sees the labour market less as a resource for social policy and more as an addressee for transfers.

- Certain tax reforms 'to make work pay' would bring about a European social model in contrast to, and in tension with, the stabilization imperative of the income model: lower average income tax rates decrease the impact of automatic stabilizers because they simply have less weight in (taxable) household income. The same holds for lower marginal taxes, as a decrease in progressivity makes the automatic stabilizers less responsive to fluctuations in the business cycle.[28] These tax reforms are also, albeit for different reasons, at odds with the basic safety model in so far as the model favoured a flat rate tax in order to finance redistributive benefits. The Lisbon Agenda, by contrast, encourages differential tax relief for low-income households. This makes the tax system more selective and progressive at the lower end of the earnings spectrum, thus creating poverty traps that replace unemployment traps at the margin.
- Some de-regulation of employment protection legislation (EPL) to 'flexibi-

lize labour markets' may be at odds with the norms of income maintenance and basic universal safety, such as increasing the threshold of the firm size at which EPL applies, or allowing for an extension of unregulated casual work in contrast to well-defined fixed-term contracts. They will lower reservation wages and make earnings at the lower end of the income distribution more volatile, thus increasing the volatility of household spending and affect these workers disproportionately. To the extent that the de-regulations are limited to firms which hire previously unemployed persons, they may be compatible with providing basic security. But it depends on the extent to which the crowding out effects on previously employed low wage earners undo the intended result of integrating disadvantaged groups into the labour market.

- Finally, old age security reforms that withdraw early retirement schemes are in line with the productivist consensus, but at odds with the income maintenance model that prioritizes stability. This withdrawal replaces stable pension incomes for 55–64 year olds with inherently more volatile earnings, which may be mixed with unemployment benefits. The same holds for privatization, or moves towards a funded system, since that would make the part of pensioners' income which depends on asset returns fluctuate with the stock markets.[29] The withdrawal of early retirement schemes is not necessarily at odds with the basic safety model; pension privatization, however, would be at odds with it if it reduced basic safety below the subsistence level of an average pensioner and thus jeopardized the old age security of low income households disproportionately.[30]

Table 6.1 lists the goals of the Lisbon reforms to be looked at and how the three models would realize them in different ways.

The appendix contains an attempt to get an empirical hold on how strong the drive towards a European social model has been. Tables 6.2–6.5 show what reforms have been undertaken to 'make work pay', to encourage the 'flexibilization of labour markets' and 'active ageing' since the mid-1980s in the four countries chosen. The picture that emerges is not one-dimensional. Germany and Sweden seem to be cases where clear steps towards a European social model are discernible, in contrast to modernized versions of the income maintenance or the basic safety consensus. This is also true for the UK but with the exception of EPL, while reforms in Greece are more in line with the Beveridge norm of providing basic universal security.

Measures to 'make work pay', i.e. to increase the returns from employment: There have been reforms in Sweden and the UK that are classified as 'structural' by the FRDB database, i.e. as affecting the system. They made the Swedish system less universal (for instance, no more re-qualifying for unemployment benefits through participation in subsidized jobs), and in the UK entailed a decisive move towards a welfare-to-work system, both targets which are very much in line with the Lisbon Agenda. Reforms classified as 'incremental' have taken place in Germany, Sweden and Britain, all countries where unemployment

Table 6.1 Goals of the Lisbon Agenda in the three different models

Lisbon Agenda	*European social model (productive factor)*	*New Deal model (income maintenance)*	*Beveridge model (basic security)*
'Make work pay'	Short unemployment benefit duration In-work benefits for target groups Lower average and less progressive taxes	Employment-related benefits as a 'carrot' Progressive tax structure	Low, short and targeted non-employment benefits as a 'stick' Low flat rate taxes
'Flexibilize labour markets'	Liberal Employment protection legislation (EPL) Temporary and fixed-term contracts, possibly tailored to target groups and firms Shift to active labour market policies	Strict EPL or high replacement rate for unemployment benefits Standardized contracts Passive and active labour market policies necessary	Liberal EPL Flexible standardized contracts Active labour market policies not essential
'Promote active ageing'	No early retirement schemes Promotion of privately funded sources of old age security	Early retirement schemes to maintain income and high value added jobs Privately funded pensions only as top-up	No early retirement schemes Basic state pension

benefits have been made uniformly less generous. This is contrary to what a model which prioritized stability would do. In Germany and Sweden, this is not necessarily at odds with a move towards a basic safety model, because unemployment benefits are still comparatively generous in these countries, while there is a tension in Britain since benefit entitlements were not very generous to begin with. Reforms of unemployment benefits in Greece, which have extended duration and made payments less generous or flat rate, can be interpreted as being in compliance with a model that prioritizes basic security while it complies only partially with the Lisbon Agenda, as longer benefit duration reduces work incentives. Reforms of income taxes and social insurance contributions in Germany, Greece and Britain have all been in favour of making the tax and contribution system more 'employment-friendly' at the lower end of the earnings scale, by exempting low-wage earners from social insurance contributions (SICs) or by increasing tax credits or earnings allowances for people on benefits.[31] Exempting low wage earners from paying SICs, as occurred on a

large scale with the creation of 'mini-jobs' in Germany, is against the norm of the income maintenance model since it excludes them from the social insurance system that makes employment worthwhile in this model. SIC exemptions do not conflict with the basic safety models since there is not much difference between the benefit levels from the means-tested and the insurance system, and so beneficiaries receive basic safety either way. In contrast, earnings disregard and tax credits are compatible with the income maintenance model which endeavours to set standards for primary income distribution, in this case by making income tax more progressive for low-income earners; however, these making-work-pay-measures are at odds with the basic safety model which endeavours not to interfere with the income distribution as determined in lightly regulated labour markets.

Measures to 'flexibilize labour markets', i.e. to liberalize employment protection: Reforms have mainly been incremental, with the exception of Germany, where employment protection was de-regulated to a considerable extent in 1996. Some of these measures were reversed when the Schroeder government came to power in 1998, only to be reversed again by the recent Hartz reforms (not covered by the Fondazione database). With the exception of the UK, employment protection has, in general, been liberalized. However, in all countries, including the UK, this has been combined with active measures for target groups, namely programmes to subsidize or otherwise facilitate the employment of the long-term unemployed or unemployed youth. This is very much in line with the Lisbon Agenda, although it is at odds with the income maintenance norm which favours gainful employment and not 'employment at any rate'. The likely increase of turnover in labour markets, and the introduction of transfers that fluctuate less with the business cycle than contribution-based unemployment benefits, reduces the stability of household incomes. The UK, on the other hand, combined such activation programmes with the introduction of a national statutory minimum wage and made parental leave more generous (which was, to some extent, induced by an EU Directive). The UK case is thus compatible with the Lisbon Agenda, neutral as regards a basic safety model that simply has no need for a minimum rate since the reservation wage is set by universal low benefits; finally, the UK reforms are ambiguous as regards the income maintenance norm since a minimum wage may exercise a downward convergence of wages close to that standard, but, at the same time, protect low wage earners more – although it has to be said that, even so, the UK still has the least protective regulation among European countries.[32]

Measures to promote 'active ageing', i.e. to encourage or force workers over the age of 54 to stay in full- or part-time employment:[33] The structural reforms that took place in Germany and Sweden, cautiously moving the systems away from entrenched principles, had in common that they made old-age social security less generous. In the German case, the reforms undermined the implicit guarantee of ensuring relative living standards between wage earners and pensioners (gross-wage adjustment), and introduced an adjustment that guaranteed the absolute purchasing power of pensions (by moving towards net-wage or

inflation adjustment). In the Swedish case, the reforms brought about a pre-funded system that marginally replaced the universal tax-based pay-as-you-go system. Both reforms are compatible with both the productivist and the security consensus. The German reform is fairly neutral as regards the New Deal model, in so far as it only attempts to limit spending on pensions overall; in contrast, the Swedish steps towards a funded system accepted the somewhat higher volatility of pensioners' income in order to obtain a gain in fiscal sustainability. The record on early retirement schemes is that the UK did not do anything about them because there was no public scheme to begin with; in the other three cases, the entitlements became more generous in the late 1980s (Sweden) and early 1990s (Germany and Greece), and have rigorously been curtailed since 1993, Sweden being the front-runner. Again, the curtailment is compatible with the Lisbon goal of activating the hidden unemployed and the Beveridge model of providing only basic security to able-bodied adults of working age; but it is at odds with prioritizing stability by increasing the share of incomes that fluctuate with the business cycle. The reforms that affected the mixture of public–private risk-sharing were bold in the UK and allowed households to contract out of the state pension scheme; in Germany, such reforms have been considerably more cautious and the *Riester Rente* is only meant to supplement public pensions. Both are in line with the Lisbon model, but, given the risks involved, do not focus on income maintenance; they are neutral as regards basic safety. This has become particularly apparent in the UK, where a large share of private pension schemes is technically insolvent[34], and the government has already been forced to step in to ensure a basic retirement income but is unwilling to make up for the full loss of entitlements. Reforms in Greece have the common theme of trying to make the public system more universal and all encompassing by treating civil servants and employees in the private sector equally, and by taking more care of poorer pensioners, such as agricultural labourers. This is very much in line with the basic safety model. Sweden has seen reforms that make both private and public pensions less generous, largely by means of measures that are compatible with an income maintenance norm, such as taxing pensions or conditioning their level more strictly on life-time earnings.

To sum up and highlight the changes: The move away from the income maintenance norm is more noticeable than that from a focus on basic and universal safety; thus, there is relatively strong evidence of Lisbon-type reforms having been implemented. However, the reforms are often equivalent to the bringing about of a basic security model. It is also worth noting that the record of reforms in these three policy areas suggests that the reform process in Germany appears to be the one most coherently in line with a productivist consensus, although it was briefly interrupted in the late 1990s when the Red–Green coalition first came into power. The Hartz reforms subsequently introduced in the period covered by the Fondazione database underline this further. At the other end of the spectrum is Greece, which seems to build a universal, basic security system. Finally, it might be noted that reforms in different policy areas can follow different norms.[35]

What obstacles are there for the evolution of a European social model?

It is unlikely that the empirical evidence of complex reform processes either neatly fits or clearly rejects a simple conceptual framework. What it can do, even in the sketchy form presented here, is to give direction to the search for developing the conceptual framework. The evidence presented in Tables 6.2–6.5 in the main supports the answer that there can be a European social model as defined here, namely, a model of productivist consensus. However, the evidence is still mixed and the changes that have been made are not always distinguishable from reforms that only aim at modernizing the existing social models. The direction that I take from this mixed evidence is to look at the inherent obstacles that governments face when they try to implement what they have signed up to in the Lisbon Agenda. Such obstacles may favour reforms that are ambiguous in their normative emphasis and can serve a productivist imperative as well as the existing norm.

One obstacle is the fact that the Lisbon Agenda is not a free lunch, as prioritizing productivity and employment over income maintenance and basic security has economic costs. The costs in terms of stability are that the effectiveness of tax-benefit systems to reduce the volatility of household incomes may be weakened.[36] This is mainly a consequence of the attempt to lower average and marginal taxes in order to increase work incentives. At least within the range relevant to most European fiscal systems, a larger size of government makes for more stabilizing capacity, partly because it has a greater weight in household income and partly because it provides a larger sector of safe employment. Progressive taxes also make for more stabilizing capacity provided that high marginal tax rates do not lead to endemic tax evasion; these higher marginal taxes make the automatic stabilizer of taxes more responsive to income fluctuations in the business cycle. There are also some a priori reasons to expect that Lisbon-type reforms increase the volatility of employment and income, in that these reforms give the automatic stabilizers more to stabilize. As already mentioned, one robust finding in empirical studies of labour market reforms is that they increase the turnover, i.e. some long-term unemployment becomes short-term unemployment without much impact on the overall level of employment.[37]

The economic costs in terms of less security can be comprehended by 'the risks of jobless growth'.[38] GDP growth of between 1 and 3 per cent is, for most people, a barely fathomable statistical phenomenon, while an increase in actual or potential unemployment is a tangible, often traumatic experience that may even be subjectively perceived as more threatening than it actually is. Ever since the visible onset of the European Monetary Union (EMU) in 2001, unemployment has increased, while employment has also risen albeit more slowly than GDP. While structural reforms and wage moderation seem to have paid off in terms of increasing employment, moderate GDP growth has still led to more unemployment in its wake, in that the 'structural increase in the labour supply (mainly due to women wanting to enter the labour market) has taken place at a

faster pace than the creation of additional jobs'.[39] Greece, Germany and Sweden in particular have seen large increases in unemployment.[40] While it is too early to obtain hard evidence, it seems that the most likely explanation for this 'jobless-ness' of growth is a combination of more flexible work organization and macro-economic uncertainty.[41] In other words, firms were not as fast as they had been in earlier recoveries in responding to the moderate recovery in 2004, in terms of hiring permanent employees (in Germany and the UK), and opted to employ temporary and part-time workers, instead. And firms responded to the last recession more strongly in terms of the tendency to reduce their workforce. Thus, if these responses were facilitated by Lisbon-type reforms, many workers must have found that the early years of the EMU have provided considerably less job security and, if the risk materialized, less generous safety nets to which to take recourse.

Closely related to the obstacle of economic costs, with regard to both stability of income maintenance and individual security, is the second, political obstacle. The Lisbon Agenda makes reforms a hostage to economic success. In particular, in its recent interpretation of the Mid-term Review by the Commission[42] or the Kok Report[43] that preceded it, a benchmark was established that the success of social policy reforms was to be measured in terms of an increase in economic growth and a consequent reduction in unemployment. However, if growth is not perceived to be increasing or if the threat of unemployment remains, this benchmark becomes a political liability.

Moreover, the implementation of the productivist model has institutional consequences for labour market arrangements.[44] It uses labour markets much less as a financial and political resource for social policy, be it through revenues from employment or by making social partners the stakeholders of the welfare state. This is of particular relevance for the income maintenance model. Countries such as Germany, which seem to move slowly but surely away from it, will have to find alternative ways of financing social expenditure, for instance by taxes on consumption and pensions. Not only will this shift of tax bases away from earnings and SICs be contentious, it will also weaken the nexus between the costs and benefits of social security perceived by workers and the direct link to labour costs that can be used for political exchanges in social pacts and collective wage agreements. Thus, the transition to the Lisbon model intended to spread less generous benefits more widely, is therefore prone to lose the traditional political support of the social partners in the process, while it is not yet clear how the support from the new stakeholders can become strong and institutionally embedded.

Finally, the reliance on output legitimacy is precarious, as Eriksen and Fossum rightly point out,[45] all the more so if the perceived success of policies depends on outcomes which governments cannot fully control or generate. The authors are optimistic that other sources of legitimation are available and can, and indeed should, be tapped. However, policy-makers do not appear to be very enthusiastic and tend to avoid the overt attempts at post-national community building that an alternative, more robust legitimation would require. An amelio-

rating factor here is that the thrust of the Lisbon Agenda is, to some extent, compatible with, or less distinguishable from, reforms that would promote a basic security model. If so, the Lisbon Agenda disposes of some in-built safeguards against becoming too much of a political liability, at least with regard to low-income households for whom basic safety nets are crucial. But again, it will be no easy political task to make this potential advantage of more targeted social inclusion an asset in electoral terms.

The existence of these economic and political obstacles indicates just how challenging the Lisbon Agenda is for governments. They are not only asked to make their electorate tolerate the loss of basic assurances, the same reforms may also make income and employment individually less stable and/or fiscal stabilization less effective. This hardly gives the impression of effective government bolstered by the benign force of European integration.

Conclusion

The affirmative, if qualified, answer to the question 'can there be a European social model?' may be re-stated more clearly with reference to key articles of the CIDEL project.[46] Like to Eriksen and Fossum[47] and Joerges and Roedl,[48] it seems to me that this question has to be discussed in its normative dimension rather than at an institutional level. Institutionalist approaches have been very useful for the comparative study of welfare state reforms. But in this context, they entail either a trivial answer – that there cannot be such a model – or a contradictory one since, by definition, an ideal-type cannot evolve empirically and yet, in reality, the ideal-type seems to be challenged or even undermined. However, the answer is neither trivial nor contradictory if we conceptualize the European social model as one which focuses on a functionalist consensus that social policy should, above all, operate as a productive factor for the economy. This is in contrast to the normative models that prioritize either social and economic stability through income maintenance, or basic, universal safety in an industrial society.

My conclusion that there appears to be a discernible trend towards a productivist, specific problem-solving consensus is, possibly, still in agreement with the CIDEL authors. This holds at least for the reforms between 1986 and 2004 in such different welfare regimes as those of Germany, Sweden and the UK; the reforms in Greece were more compatible with a basic safety model. However, the emergence of such a consensus does not presuppose institutional convergence. It would be most remarkable if the formation of a Lisbon consensus could be confirmed in future, more systematic, research, since it would come about against the odds of formidable economic and political obstacles.

The CIDEL authors interpret these obstacles as pressure to seek alternative normative foundations for social policy integration, namely, norms that are less functionalist, utilitarian and consequentialist. It is here that I depart from their viewpoint. This presupposes that what is contested and what is perhaps even an inherent contradiction – such as the EU's practice of benchmarking against out-

comes for which policy-makers cannot be held fully responsible – must move to a more harmonious state of affairs in which the contradictions will be resolved. To a (non-Marxist) political economist, this sounds somewhat voluntaristic and apolitical. Democracies live with contradictions. In fact, being able to integrate and not suppress them may be seen as the basis of their legitimacy, because it maintains the promise or illusion that every citizen has a chance to get his or her preferred political arrangement, policy or solution some time in the future. Too obvious and contentious a thrust of a reforming social policy in line with the productivist imperative would, therefore, be highly risky, both economically and politically. But a clear shift to any other legitimizing strategy would suffer the same problems.

This entails a last issue for debate. Underlying my contribution is the contention that the motives of governments for giving the EU a say in domestic welfare state reforms are utilitarian or instrumental, even if they are not without risks both for themselves and for the legitimacy of European integration.[49] What makes me expect that this will be the case for the time being is that one can discern a 'commerce clause' logic in this EU mandate. This clause allows central intervention and assignments of competency if there is an 'externality' or 'spillover' that jeopardizes the common good of free exchange (in the case of a negative externality) or would enhance its usefulness (if positive). Thus, whenever a fundamental common good, interstate free trade in the case of the US, or more broadly economic welfare and cohesion in the case of the EU, is potentially affected, the central governance level may come in and push the members to behave in ways they have signed up to as it is in their long-term interest. Such utilitarian rationales are political instruments, especially for law-makers and courts, which put the burden of proof for intervention on the federal government, just like the more political and institutionalist subsidiarity principle. The commerce clause has the advantage of sounding less principled or ideological than the subsidiarity principle, but is rather interest-based in its promise to protect a common good. The commerce clause as it actually exists in the US seems to give the federal or central level of government a narrow mandate, namely, when free trade between Member States is threatened, but has been applied liberally or strictly in line with the broad political consensus of the time, for instance, it can be used to justify federal responsibilities for social assistance.

The perception of what is in the Member States' long-term interest may not always be accurate and is itself contestable, of course. But if politicians in EU Member States stop using the political instrument of arguing that Europe has an important problem-solving function for the nation, a powerful legitimizing strategy of European integration ceases to operate. The commerce clause rationale for an EU mandate in social policy may be the least attractive for those who support ever deeper European integration, but it may be the only one for which there is a virtual democratic majority.

Appendix: reforms discriminating between social models

Table 6.2 Germany

Reform area	*Measures 1987–2004*	*ESM?*
Unemployment benefits	1994 UB reduced by 3 per cent 1995 duration of payments limited 1997 rules on job refusal and eligibility criteria tightened 1999 eligibility criteria slackened for carers 2004 merger of UB and social assistance means cut in average level of UB; cut in duration of UB; tightening of means-testing; tightening of work requirement	Yes
Taxes and social insurance contributions (SICs)	1987, 1995, 2000 reduction of SICs 1991, 1994, 1996, 1997 increase of SICs 1997 admissible wage base to count subsidies lowered 1999 earnings allowance of up to 20 per cent of UB 1999 obligation to pay SICs extended to casual employment and 'apparently self-employed'	Not clear
EPL for all workers	1993 notice period for blue-collar workers extended to that of white-collar workers	No (Beveridge)
Measures for target groups	1997 more flexible employment contract in case of hiring longterm unemployed 1997, 2000 part-time employment of elderly and older workers subsidized and made possible, respectively 1999 access to job creation schemes facilitated; employer subsidies for new jobs of up to five years; action programme to reduce youth unemployment through public offers 2001 active measures to fight unemployment of disabled persons 2002 Job Aqutive Act to increase employment and training 2004 new category of very low-paying jobs introduced for recipients of UB (new ALGII), refusal can lead to suspension of assistance	Yes
Early retirement schemes	1990,1991 ER made easier 1994, 1996, 1997 ER made more difficult, gradual withdrawal agreed in 1996 1999 reversed previous increase in ER age 2004 increase of minimum entry age from 60 to 63 years	Yes (overall, but uneven progress)
Private–public risk-sharing in old-age security	1997 phased decline in average replacement rate from 1999 onwards 2001 voluntary funded system to complement gradual reduction of replacement ratios for new retirees from 70 per cent to 67–68 per cent in 2030 2004 phasing in of taxes on all pensions and earnings	Yes (but not distinct from New Deal)

Sources: FRDB Social Reforms Database (1987–2002) www.frdb.org/documentazione/scheda.php?id=55&doc_pk=9027
European Commission LABREF database (2004) http://europa.eu.int/comm/economy_finance/indicators/labref/

Table 6.3 Greece

Reform area	*Measures 1987–2004*	*ESM?*
Unemployment benefits	1990 duration of UB raised from seven to 12 months 1996 UB set at less generous flat rate	No (Beveridge)
Taxes and social insurance contributions	1998 small reduction of non-wage labour costs for youth hirings 2000 2 per cent reduction of employers' SICs for low-wage workers 2004 tax reductions for low income earners, divorced parents and those working in lagging regions	Yes
EPL for all workers	1990, 1991, 1998 liberalization of collective agreements and arbitration of labour disputes 1998, 2000 promotion of part-time employment 2001 practice of temporary employment introduced 2004 overall duration of successive contracts in public sector must not exceed 24 months; facilitate conditions for renewal of fixed-term contracts in the private sector but also for converting fixed-term contracts into contracts of indefinite duration	No (Beveridge)
Measures for target groups	1997 active measures to fight unemployment of disabled persons 1998 employment subsidy programme for young and longterm unemployed 2004 provision of job placement incentives for UB recipients; incentives for employers to hire women, youth and elderly	Yes
Early retirement schemes	1990 ER introduced for elder unemployed workers 1992 back-loaded pension formula to encourage later retirement	No (New Deal)
Private–public risk-sharing in old-age security	1996, 1997, 1999 new means-tested pension supplement; access facilitated and increased by about 50 per cent 1997 new contributory scheme for agricultural sector 2002, 2004 general contribution rules for wage earners, extended to self-employed	No (Beveridge)

Sources: FRDB Social Reforms Database (1987–2002) www.frdb.org/documentazione/scheda.php?id=55&doc_pk=9027
European Commission LABREF database (2004) http://europa.eu.int/comm/economy_finance/indicators/labref/

Table 6.4 Sweden

Reform area	*Measures 1987–2004*	*ESM?*
Unemployment benefits	1993 UB replacement rate reduced from 90 to 80 per cent; five day waiting period 1995 replacement rate reduced from 80 to 75 per cent; 1995, 2001 tighter rules for refusal of job offers and active job-seeking 1997 Employment Bill: structure of UB changed, flat rate component in addition to earnings-related part; no more re-qualification for UB through subsidized jobs 2002 child care incentive to seek or extend employment	Yes
Taxes and social insurance contributions	2004 tax reduction on labour income by lump-sum for rise in energy taxes	Yes
EPL for all workers	1992 government wage guarantee in case of firm's bankruptcy lowered 1996, 1997 liberalization and decentralization of collective agreements 1997 length of notice periods determined on the basis of tenure rather than age 1997 12 months fixed term contracts available without restrictions; after three years to be turned into permanent contracts 2001 EU Directive facilitates part-time work	Yes (but not distinct from New Deal)
Measures for target groups	1986, 1987 training participation qualifies for UB; public job offer for unemployed close to benefit exhaustion 1994 training participation to qualify for UB abolished; youth practice labour market scheme phased out 2000 longterm unemployed required to participate in full-time activation measures 2001, 2004 adjustment insurance scheme for blue-collar older workers facing redundancy made more generous	Yes (except reform in 2004: New Deal)
Early retirement schemes	1987 semi-retirement pensions increased from 50 to 65 per cent of last income 1993 rules for ER tightened 1994 age limit for part-time retirement raised from 65 to 66, replacement rate lowered from 65 to 55 per cent 1999 reduction of ER benefits by 6 per cent 2000 new rules allow early retired return to work	Yes
Private–public risk-sharing in old-age security	1994 increase of tax on private pension schemes 1998 introduction of prefunded element; retirement age made flexible without upper age limit; guaranteed minimum pension for those with insufficient rights 1999 lower benefits and less favourable indexing of current old-age benefits 2001 size of pension payments more strongly linked to total life income than previously	Yes (but not distinct from New Deal)

Sources: FRDB Social Reforms Database (1987–2002) www.frdb.org/documentazione/scheda.php?id=55&doc_pk=9027
European Commission LABREF database (2004) http://europa.eu.int/comm/economy_finance/indicators/labref/

Table 6.5 United Kingdom

Reform area	*Measures 1987–2004*	*ESM?*
Unemployment benefits	1987, 1988, 1989 UB reduced by various measures (longer waiting periods, net rather than gross earnings) 1989 rules on job refusal made tighter 1996 UB replaced by Job-Seekers' Allowance; duration halved from 12 to six months; replacement rate lowered; 100 per cent marginal withdrawal in case of earnings	Yes
Taxes and social insurance contributions	1999, 2001 significant increases in tax credits for low income families 2004 tax exemptions for provision of childcare contracted by employer	Yes
EPL for all workers	1998 national statutory minimum wage 1999, 2001 entitlement to unpaid three months parental leave; transposition of EU Directive; flexible working arrangements for parents with young children	Yes (but not distinct from other models)
Measures for target groups	1996 minimum income guarantee for disabled persons to move them into job 1997 job-search and training measures for lone parents 1998 Welfare to Work programme, covering longterm unemployed, disadvantaged and disabled persons, lone parents 2004 enhanced financial incentives for helping lone parents into work of at least 16 hours p.w.	Yes
Early retirement schemes	n.a.	n.a.
Private–public risk-sharing in old-age security	1987 employees allowed to contract out of State Earnings Related Pension by joining an individual pension scheme to which State Dept. pays minimum contribution 1989 employers allowed to set up 'top-up' pension schemes for their employees 1995, 1999 new private pension schemes 1999 minimum income guarantee for pensioners 2004 new retirement options providing greater flexibility to employers and employees; facilitate development of pan-European occupational pension schemes	Yes

Sources: FRDB Social Reforms Database (1987–2002) www.frdb.org/documentazione/scheda.php?id=55&doc_pk=9027
European Commission LABREF database (2004) http://europa.eu.int/comm/economy_finance/indicators/labref/

Notes

1 OECD, *The OECD Jobs Study: Facts, Analysis, Strategies*, Paris: OECD, 1994. Online, available at: www1.oecd.org/sge/min/job94/tabcont.htm.
2 For example J. Grahl and P. Teague, 'Is the European Social Model Fragmenting?', *New Political Economy*, 1997, vol. 2, no. 3, 405–426.
3 See G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Princeton, NJ: Princeton University Press, 1990; F. G. Castles, *Families of Nations: Patterns of Public Policy in Western Democracies*, Aldershot, UK and Brookfield, US: Dartmouth, 1993; and M. Ferrera, 'The Southern Model of Welfare in Social Europe', *Journal of European Social Policy*, 1996, vol. 6, no. 1, 17–37, for accounts that refute the implicit assumption of these scenarios, namely to see one European model.
4 See, for a rigorous attempt, F. G. Castles, 'Developing New Measures of Welfare State Change and Reform', *European Journal of Political Research*, 2002, vol. 41, no. 5, 613–641.
5 E. O. Eriksen and J. E. Fossum, 'Europe in Search of Legitimacy: Strategies of Legitimation Assessed', *International Political Science Review*, 2004, vol. 25, no. 4, 435–459; C. Joerges and F. Rödl, *'Social Market Economy' as Europe's Social Model?*, EUI Working Paper LAW 2004/8, Florence: European University Institute, p. 19.
6 Joerges and Rödl, above note 5, pp. 9, 22, 25.
7 Eriksen and Fossum, above note 5, p. 441.
8 A. Martin and G. Ross, 'Introduction: EMU and the European Social Model', in A. Martin and G. Ross (eds), *Euros and the Europeans: Monetary Integration and the European Model of Society*, Cambridge, UK: Cambridge University Press, 2004, p. 11. For further references, see A. Hemerijck and M. Ferrera, 'Welfare Reform in the Shadow of EMU', in the same volume, who later talk about the 'fine structures of the European social model', structures that, however, imply that there is not one model in this sense (pp. 249, 252).
9 See, to name a few authoritative studies, the contributions in F. W. Scharpf and V. A. Schmidt (eds), *Welfare and Work in the Open Economy: Diverse Responses to Common Challenges*, 2 vols, Oxford: Oxford University Press, 2000; in M. Ferrera, A. Hemerijck and M. Rhodes, *The Future of Social Europe*, Oeiras: Celta Editora, 2000; or in P. Pierson (ed.), *The New Politics of the Welfare State*, Oxford: Oxford University Press, 2001. Castles, 'Developing New Measures of Welfare State Change and Reform' is a straightforward quantitative study showing that changes in the social expenditure patterns of the different 'families' of welfare regimes do not suggest convergence (above note 4).
10 Martin and Ross conclude that 'transition to EMU and EMU's subsequent operation could threaten the European social model'. But they add: 'If present tendencies continue, they might not necessarily result in the erosion of the national variants of the European social model.' Thus, they remain consistent with their distinction between European ideal-type and national realities; however, it is difficult to imagine the erosion of a model of which the variants survive (above note 8, pp. 12 and 18).
11 K. Featherstone, 'The Political Dynamics of External Empowerment: The Emergence of the European Social Model and the Challenge to the European Social Model', in Martin and Ross (eds), above note 8, pp. 246–247.
12 P. Hall and D. Soskice, *Varieties of Capitalism*, Oxford: Oxford University Press, 2001.
13 Eriksen and Fossum, above note 5.
14 The High Level Group chaired by W. Kok, *Facing the Challenge: The Lisbon Strategy for Growth and Employment*, Report from the High Level Group chaired by Wim Kok, November 2004. Online, available at: http://ec.europa.eu/growthandjobs/pdf/kok_en.pdf.

15 See P. C. Padoan and M. J. Rodrigues, *A 'Good Quality Finance Rule'*, EPC Issue Paper no. 12, 2004, Online, available at: www.epc.eu/TEWN/pdf/863661684_ EPC%20Issue%20Paper%2012%20%20A%20Good%20Quality%20Finance%20Rule.pdf

16 Council of the European Union, *Joint Employment Report 2004/05*, March 2005, 7010/05, SOC 102, ECOFIN 77, para. 2.3 of Annex II, Online, available at: http://register.consilium.eu.int/pdf/en/05/st07/st07010.en05.pdf.

17 Featherstone proposes that this may be the case because the labour market and welfare reforms required for the Lisbon Agenda have more stakeholders and are more entrenched in particular institutional settings while the reforms required for the Maastricht Treaty were 'handled in a relatively closed policy community, seemingly opaque and rarefied to the wider public' (above note 11, p. 236).

18 K. McNamara, *The Currency of Ideas: Monetary Politics in the European Union*, Ithaca and London: Cornell University Press, 1998.

19 European Commission Directorate General for Employment and Social Affairs, *Report of the High-Level Group on the Future of Social Policy in an Enlarged European Union*, May 2004, p. 21, online, available at http://ec.europa.eu/employment_social/news/2004/jun/hlg_social_elarg_en.pdf

20 Modernization could also have meant to go for a 'universal care-giver model' that allows women and men to share equally the duties of parenthood or long-term care for dependent family members; see I. Ostner and J. Lewis, 'Gender and the Evolution of European Social Policies', in S. Leibfried and P. Pierson (eds), *European Social Policy*, Washington, DC: The Brookings Institution, 1995; M. Threlfall, *The European Employment Strategy and Guidelines: Towards an All-Working Society?*, paper presented to the European Community Studies Association of Canada, Toronto, 29 May–2 June 2002. Needless to say, the extensive Lisbon Agenda contains guidelines asking for improved child care and leave arrangements, but this is more part of the general objective of equal opportunity, not a headline indicator like the 60 per cent employment goal for women. It has to be said, however, that governments responded to the guideline on child care and parental leave more attentively than to other equal opportunity goals; see J. Rubery, 'Gender Mainstreaming and the Open Method of Co-ordination', in J. Zeitlin and P. Pochet (eds), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, Brussels: P. I. E. Peter Lang, 2005), p. 401.

21 W. Beveridge, *Insurance for All and Everything*, London: Daily News, 1924.

22 The Swedish welfare state follows the basic security model with regard to eligibility and scope, but is more generous in benefit levels.

23 See Joerges and Rödl, above note 5, pp. 3, 20.

24 European Commission, *Working Together for Growth and Jobs: A New Start for the Lisbon Strategy*, Communication to the Spring European Council, 2 February 2005, COM, 2005, 24, online, available at: http://ec.europa.eu/growthandjobs/pdf/COM2005_024_en.pdf

25 Above note 16, p. 12.

26 But, see H. Bolderson and D. Mabbett, 'Mongrels or Thoroughbreds: A Cross-national Look at Social Security Systems', *European Journal of Political Research*, 1995, vol. 28, 119–139, for good arguments as to why this standard classification may be overly stylized; they show that, for political and functional reasons, different parts of the social security systems in OECD countries are characterized by different allocative principles (market, public goods, and taxation principles).

27 The password protected database of the Fondazione can be found at: www.frdb.org/documentazione/scheda.php?id=55anddoc_pk=9027.

28 A. J. Auerbach and D. Feenberg, *The Significance of Federal Taxes as Automatic Stabilizers*, NBER Working Paper no 7662, Cambridge, MA: National Bureau of Economic Research, 2000, pp. 14–17; D. Mabbett and W. Schelkle, 'Bringing Macro-economics back into the Political Economy of Reform: The Lisbon Agenda

and the "Fiscal Philosophy" of EMU', *Journal of Common Market Studies*, 2007, vol. 45, no. 1, 81–104.

29 These stock market fluctuations can be mitigated to the extent that households hold well-diversified international portfolios, either directly or more likely indirectly, through institutional investors such as life insurers and hedge funds.

30 The latter is certainly not the result of a deliberate design. But it is arguable that the UK pension system entails that risk for low-income households which have, on top of their state pension, some stake in occupational schemes only – firms' pension obligations are unlikely to be honoured in the aggregate according to repeated warnings by the pensions watchdog (Pensions Commission, *Pensions: Challenges and Choices*, London: Pensions Commission, 2004). There will be strong political pressures to bail out such pensioners and thus transform the notional funded system into an actual pay-as-you-go system.

31 In Germany, this overlapped with endless fiddling with the level and composition of SICs that are earmarked, a sign that the contribution-based system is alive, even if it is not well (see Table 6.1).

32 According to the OECD Employment Outlook (OECD, *Employment Outlook*, Paris: OECD, 2004), the UK ranks first among the EU-14 countries (excluding Luxembourg; second among OECD countries behind the US) in the OECD Employment Protection Strictness Indicator, while Germany has rank 8 (slightly more liberal than rank 9 in 1997), Greece ranks 12 (down from 13) and Sweden ranks 10 (up from 8 in 1997); the Swedish employment protection becoming more restrictive is not indicated by the FRDB database which tends to interpret reforms in Sweden as all supporting the Lisbon Agenda.

33 Directorate General for Economic and Financial Affairs attributes the 'very significant increases in the employment rates of older workers' to reforms in early retirement schemes and coming into effect of pension reforms in the 1990s ('Labour Market and Wage Developments in 2004, with Special Focus on Risk of Jobless Growth', preliminary version of *European Economy Special Report* no. 3, 2005, p. 12).

34 Above note 30.

35 This resonates with the more systematic but also static analysis of Bolderson and Mabbett which finds different parts of the social security system following different, even competing or contradictory principles. The authors explain these tensions as the legacy of the prevailing political forces at the time of their implementation (above note 26, pp. 123–124).

36 Mabbett and Schelkle, above note 28.

37 D. Young, *Employment Protection Legislation: Its Economic Impact and the Case for Reform*, European Economy Economic Papers no. 186, Brussels: European Commission, Directorate General for Economic and Financial Affairs, 2003.

38 Ibid.

39 Ibid., pp. 10, 16.

40 Ibid., p. 15.

41 Ibid., pp. 55–56.

42 Commission of the European Communities, *op. cit.*

43 Above note 14.

44 I am grateful to D. Mabbett (Birkbeck) for pointing this out to me.

45 Eriksen and Fossum, above note 5, pp. 440–441.

46 See also the various contributions in: E. O. Eriksen (ed.), *Making the European Polity: Reflexive Integration in the EU*, London: Routledge, 2005.

47 Eriksen and Fossum, above note 5.

48 C. Joerges and F. Rödl, above note 6.

49 W. Schelkle, 'Understanding New Forms of European Integration: A Study in Competing Political Economy Explanations', in E. Jones and A. Verdun (eds), *Political Economy Approaches to the Study of European Integration*, London, Routledge, 2005, chapter 9.

7 Approaching the 'Social Union'?

Alexander Graser

The 'Social Union' is surrounded by open questions: How do we get there? What exactly are we aiming at? Why should we pursue this goal at all? There seems to be no answer to any of these questions – or maybe there are too many answers. There is uncertainty and disagreement on almost every issue, and every question just generates the next, more fundamental one.

This contribution tries to tackle the issue anew, and it does so bottom-up, reviewing and reassessing the reasons why there should be a 'Social Union'. In a first step, the aim of a 'Social Union' is split into two components: the pursuit of social policy on the one hand, and European integration on the other (section one). Second, a summary case is made as to why it might make sense to combine the two components (section two), followed by a more thorough discussion of the core arguments involved (section three). The article then turns to the other two questions and, in extrapolating from current law, tries to identify components for the future development of a 'Social Union' (section four).

A marriage of the moribund?

The development of a 'social dimension' features prominently on 'Europe's Unfinished Agenda'. At least, this is what the conference outline suggests. But who would doubt that this claim is correct? There is a wealth of material to support it, including official documents from EU institutions, political statements on both the national and the supranational level, and academic discourses across various disciplines. And this is not just a recent development. It would hardly be an exaggeration to maintain that the creation and advancement of a genuinely European social policy has continuously been on the agenda – certainly for more than a decade now, arguably ever since the very beginning of European integration.

But is it not astonishing that we are still discussing the same project, even today? The mission, without doubt, has not been accomplished, independently of how we conceive of the mission. Instead, it is the enterprise itself that appears to have turned into a nostalgic, maybe even anachronistic, endeavour. For is not both the Welfare State and European Integration in an appalling condition today, despite the capital letters that these concepts have been awarded in better times?

First, let us take the Welfare State: the provision against the 'social' risks, the prevention of poverty, and, more generally, the mitigation of substantive inequality – these aims have long been considered the *raisons d'être* of the Welfare State,[1] and none of them have lost their relevance. The fact that some of these aims have been achieved does not render the respective policies dispensable, but instead calls for their continuation, while the fact that some have not yet been achieved might even be taken to suggest an intensified effort in this field, an extension, that is, of current social policies.

However, this is obviously not the direction in which today's debates point. Curtailment is on the agenda, even on that of the political left. This is because the dominant analysis has it that the Welfare State has grown beyond all sustainable measures, that it is now struggling with its own sclerotic administration, thus strangling the economic activities upon which it feeds. In this condition, the Welfare State is judged unfit for survival, especially in a globalized world of heightened transnational competition.

The other big project, European Integration, appears to be in similar shape: hypertrophic due to its repeated extensions, sprawling bureaucracies inside, and fading popular support – and this had been the diagnosis long before the failed referenda of 2005. However, as with the Welfare State, the foundational aspirations are still in place. Peace and prosperity may have come to be taken for granted and thus have lost a bit of the appeal they had in Europe in the early post-war period.[2] But they no doubt continue to offer a firm basis for the supranational community that we have today, and they may also serve as forceful arguments for its spatial extension.

The problem, though, is that peace and prosperity cannot carry much further than what has already been accomplished. In particular, the ideal of 'an ever closer Union', which is at the core of the integration project, is not supported by these aspirations anymore, at least not to the extent it used to be in the project's earlier stages. Against this background, it is all but surprising that, for years now, there has been a vivid debate on Europe's *finalité*.[3] What is needed, however, is not just an answer to the question of *where* Europe could go. On this, we have heard many answers. What we would also need is a compelling reason as to *why* Europe should go in any of the suggested directions.

The Constitutional Treaty had no determinate message on either question; no ground-breaking reform, but merely consolidation; no unequivocal commitment to any specific vision, but mere scene-setting for future choices, providing various stepping stones, so to speak, for the EU institutions to use, but leaving much leeway as to whether, when, and in which precise direction the integration process should continue.[4] This is where the integration project stood when it took the blow from the Dutch and French voters. It may have recently taken some modest steps towards recovery, at least as regards the prospects for a consolidated codification as is currently envisaged anew by the Reform Treaty. A compelling vision, however, is still absent.

Let us leave it for now with these simplistic sketches. The main point should have become clear: we are dealing with two grand projects – not outdated ones,

to be sure, but the two projects are both crisis-ridden and tattered, if not doomed. So what is the idea, one might ask, behind tying them to one another? To have them join forces and perish together?

Two patients – one joint therapy?

On a closer look, it might not be that absurd to connect the two projects after all. In fact, there are reasons to believe that this could be an important step towards their recovery. So, in what respects could our patients benefit from a joint therapy?

With regard to the Welfare State, the argument is well-known.[5] Transnational competition puts national regulations under pressure. Interventionist policies become harder to pursue because, on the one hand, policies perceived as burdensome run the risk of being evaded, or at least of being punished by the bad market performance of local actors. Supportive interventions, on the other hand, face the problem of attracting free riders. Moreover, it might not just be such market mechanisms which loosen the regulatory grip of local jurisdictions. It might also be a weakening of the respective collective identities that could be entailed in such processes of transnationalization.[6]

Social policies, the argument continues, are particularly vulnerable to these mechanisms. Not only do they typically involve both types of regulatory interventions, burdensome and supportive ones, but they are also generally said to rest upon – and are justified by appeals to – solidaristic attitudes within a community, which, in turn, may be viewed as a precondition for the viability of social policy.[7]

The bottom line is that in order to survive, Welfare States need borders – and probably boundaries as well. And, as European Integration has done a lot to dissolve them at the national level, it is almost self-suggesting to explore what can be done at the European level to restore them. If the problem arises from the disconnection of market and polity, why not try to reconnect them one level further up? This would imply, in particular, the Europeanization of social policy.

So far, our attention has been directed to the attempt to substantiate the hope that the Welfare State could benefit from a joint therapy. Let us now turn to our second patient's prospects. In which ways could it be beneficial for European Integration if its social dimension were to be strengthened? The arguments here are manifold, even though they are probably more speculative than the previous ones.

As a starting point, we might take the big quest which has been mentioned before, namely, the quest for a new vision to (re-) animate European Integration. Striving for a Social Union could, indeed, be a way to fill this blank. However, this could be true for many other goals as well – provided they are sufficiently broad, demanding, and maybe also indeterminate. So, is there any quality which distinguishes this specific aspiration from others?

One possible answer might point to the fact that the Welfare State has repeatedly been referred to when looking for a common and genuinely European set of

values.[8] It could be a cornerstone, so to speak, for the foundations of a value-based European polity. Admittedly, this suggestion is contestable, especially from a comparative perspective. Entrenched structures of institutionalized solidarity can be found in many places of the world nowadays, and it is more than doubtful whether there is any meaningful criterion by which we can distinguish (all) European (let alone, EU) systems from (all those of) the rest of the world. Just take, by way of example, Japan,[9] Canada,[10] or Israel[11] on the one hand, and the UK[12] on the other.

However, even if, strictly speaking, there is no 'distinctiveness', it is still possible, when it comes to defining a common ground for further integration, to rely on the Welfare State and the values embodied in it. Especially from a historical perspective, there is a good case to be made in favour of this choice. This is because it could, without doubt, be read as the continuation of a genuinely – and in this case, distinctive – European heritage, a deliberate collective appropriation, thus, of one of the better traditions of 'ours'.[13]

Furthermore, one would have to expect there to be a strong prospective component as well. The mere 'conservation' of past accomplishments would certainly not qualify as the 'new vision' that is now sought to revitalize the integration project. But it seems that the aim of creating a 'Social Union' could meet this requirement as well. At least if it held true that the Welfare State could not be maintained in the way it has been at national level, but would require regulation at supranational level – and this is what the term 'Social Union' encapsulates – there would be a huge reformatory challenge involved in this ostensibly 'conservative' project.

And there are further hopes that might be placed in such a project, hopes that extend well beyond the field of social policy and go to the core of the European malaise. Maybe Brussels would gain a good deal of popularity if it were to run a fully-fledged social benefits programme – similar, say, to the former effect of Roosevelt's Social Security Act, which, for decades, earned the federal US government much credit. And if 'popularity' should sound too profane, why not try 'legitimacy' instead?

Moreover, could this not be a way to tackle even the infamous democracy deficit? There have been suggestions to use the high visibility and contestation of redistributive policies as a catalyst for the generation of public interest in politics at the EU level – for the creation of a 'European public'.[14] It was in this vein that Joseph Weiler once contemplated whether there could be any (true democratic) representation without taxation in the EU.[15]

And there seems to be a point to this. Just imagine that the level of pension benefits or contributions were determined by the EU. Would this not be likely to raise public attention significantly, and thus better acquaint people with supranational institutions and procedures; furthermore, would it not be likely to promote debates and alliances across national borders, and thus help to defragmentize the public sphere in Europe? Admittedly, this is only a thought experiment. Pension politics is not (yet) a serious candidate for such Europeanization. But there is no reason why smaller steps could not do as well.

Now, this might indeed all sound very speculative, but could it be otherwise when speaking about 'visions'? And one would not have to buy into every single prong of the argument to accept at least the overall plausibility of the claim that the goal of a 'Social Union' could be one way to fill the vacuum.

Against this background, it becomes more understandable why it might still make sense, even today, to connect the two projects of (continuing) European Integration and of (preserving) 'the Social Union', despite, or indeed precisely because of, their respective ills. For there is at least some hope that they could contribute to one another's recovery.

The patients' prospects of mutual cure

The reasoning has so far still been rather sketchy, and certainly far from compelling. But in the light of the above, it seems at least worthwhile to undertake a more thorough assessment of what could be gained from such a joint therapy for both the Welfare State and European Integration. And as the previous section stated the respective cases in favour of such a therapy, the next one will take the opposite perspective and start out from the objections to it.

(Why) should the Welfare State go European?

Starting again with the social policy perspective, the assessment is largely determined by the initial diagnosis of what exactly the Welfare State is suffering from. This has already become apparent in the above. If it were mainly endogenous problems – namely, the premise in the first section – then there would be little reason to have trust in the Welfare State's salvation at the EU level. Things would look different, though, if transnational competition were the core problem – namely, the starting assumption of section two. And these are just two of the innumerable variations which are conceivable – and actually also observable – when it comes to analysing the current problems of the Welfare State.

It will therefore not be possible to present any comprehensive and well-balanced diagnosis here. Instead, the approach, again, has to be selective. Only a few issues which are specifically relevant for the given context of a Europeanization of social policy will be touched upon.

To what extent can the problem be explained by regulatory competition?

First of all, there are the problems of the Welfare State which have not been caused by transnationalization, and these are certainly not just minor ones. Take, for example, the steep increase of health care costs.[16] To a large extent, this is a consequence of progress made with regard to new or improved forms of treatment, many of which are very expensive. The policy choice here is either to restrict access to such forms of treatment, or to levy more money in order to

finance them. Regardless of the level at which social policy takes place, it would, nonetheless, be faced with this trade-off.

Or consider, as another example, the effects of expanded lifespans on pension systems.[17] If people live longer – and life expectancy has been increasing constantly in the industrialized countries for more than a century now[18] – then either the overall output of old age benefits has to be cut or the input raised. Again, this has nothing to do with the political level at which the problem has to be solved.

However, it is another question whether governmental capacities to respond to these challenges are being reduced by competitive pressures from outside. This may well be the case. A polity with completely impermeable borders will find it easier to react to these changes by increasing the burdens on those who finance the respective system, whereas this option might be more limited in an open economy.

Furthermore, the above should not be taken to mean that the Welfare States were not also suffering from problems which are caused exogenously. In particular, regulatory competition cannot only operate as an aggravator, but can also be the source of problems for social policy. Consider, for example, the field of basic income support. Even if there were such a programme, which was not perceived as problematical in itself, it would still be susceptible to pressures from outside as they are predicted by the paradigm of regulatory competition.

However, it is worth noting that, even within this theoretical model, the degree of predicted pressure varies depending on the specific type of social regulation. It depends, first, on the extent to which the individual who bears the burden receives something in return. Compared to purely tax-financed programmes, social insurance should thus be affected less. For even though it involves significant burdens, it offers some benefits in return – namely, services, which otherwise would – at least to some extent – have to be purchased elsewhere.

Second, it is not only individual returns which mitigate the pressure, but also collective ones, such as an improvement of the competitive potential of the respective polity. So, even within the field of (broadly-speaking) re-distributive policies, the predicted pressure is not always the same. Educational grants, for example, can be considered as a long-term investment in this competitive potential of the community, and even basic poverty alleviation might be read as an (even short-term) investment in a community's political stability.

Third, one should bear in mind that, under this paradigm, the transmitter of competitive pressure is the potential mobility of both things and persons, and capital and goods, in other words, of welfare recipients, tax payers, etc. It would not make sense, however, even under a theoretical model, to presume that there were no differences in such mobility. Employees still tend to be less mobile than machines, and this implies that different sectors of the economy also differ in their susceptibility to competitive pressures.

So, the analysis offered in section two needs to be qualified in some important respects. The dissolution of borders accounts only for a part of the Welfare State's problems. And it does not affect all areas of social policy and all sectors of the economy in the same way.

To what extent could the problem be solved by Europeanization?

It is not only the analysis, but also the remedy suggested in section two that calls for closer scrutiny. The question is whether a Europeanization of social policy would really suffice to win back the regulatory grip that has been lost at the national level. For would not social policy at the European level be exposed to similar – global – pressures?

In order to answer this question, one would have to assess how large a share of the competitive pressure felt by national Welfare States is to be ascribed to global, as opposed to European, market integration. This is not an easy task because the empirical quantification of such pressure is difficult. And undoubtedly, the results would have to differentiate between different types of social policy and between different sectors of the economy.

So, there is no way to get into the realm of concrete answers here.[19] Suffice it, thus, to underscore that the Europeanization of social policy might mitigate competitive pressures, but not totally overcome them. And even if such mitigation should today seem sufficiently promising to advocate Europeanization, one should bear in mind that this might only be a temporary solution. For the EU could soon be faced with a future trend towards further market integration on a larger scale, and resisting this could then prove a very costly choice.

To what extent is regulatory competition beneficial?

A third issue is to what extent regulatory competition calls for any such response at all. For – if once again, we go back to the diagnosis from section one – such competition need not, in all instances, be harmful. Quite to the contrary, some of the Welfare State's ills might even be cured through exposure to competitive pressure: excessive growth, sclerotic administrations, and strangled economies – does this not look exactly like the type of inefficiencies against which (opening) the market is said to be the first-choice remedy? So, in the light of this, would it not seem best to leave the Welfare State where it is, and would not Europeanization be but a short-sighted attempt to spare it the necessary regimen?

Take, for example, the German public health insurance system.[20] As a general rule, insured persons are free to choose where to get their treatment, medication, etc. However, they do not themselves negotiate the terms of the provision of these services. Instead, it is the insurers who determine these terms by way of collective agreements with the providers. Accordingly, the freedom to choose a provider of health services is, in principle, limited to the pool of (typically national) providers with whom such collective agreements have been concluded. Of course, provisions are made so that services can also be obtained abroad if necessary, in particular when the need for health services arises during the course of travelling. But this is an exception.

There are quite a few cases in which these structures may be viewed as protectionist, inefficient, and unduly restrictive. It is, for example, hard to see why people should not be entitled to insurance coverage when they deliberately

choose to go to another country in order to buy their glasses.[21] Arguably, competitive pressures from outside would not call for any Europeanization. All that is needed are open borders and the patience to wait for the beneficial effects of competition to take effect.

The problem, however, lies in distinguishing such cases from others in which competitive pressure is detrimental. At times, this might just be an exercise of confronting opposing *Weltanschauungen*, such as in the case of, say, determining the levels of basic income support, public pensions, etc. Those who consider the current level too high will welcome any downward pressure from outside, whereas those who consider them too low will accordingly think the opposite about the effects of competition.

But, typically, the choices to be taken are, in practice, not that straightforward. What, for example, if we are dealing with a regulation which is restrictive on competition, but which, at the same time, is supported by some reasonable consideration? What if, to follow up on the above health care example, internet pharmacies are not admitted to the pool of providers so that there is no refund for medication purchased from them?[22] This has an impact mainly on foreign providers, and it may be viewed as inefficient in that internet pharmacies are likely to be cheaper. On the other hand, they will not be able to offer any individualized advice. Although not everybody will need such advice, the mere presence of the 'virtual' competitor on the market might also force 'real life' pharmacies to reduce such service across the board and thus undermine the regulatory goal of providing counselling services within the system.

So, in this example, the decision as to whether or not the effects of competition from outside are desirable requires a balancing of countervailing goals, namely on the one hand, the efficiency-enhancing effects of increased competition, and, on the other, the detrimental consequences for the said aspect of quality maintenance within the health care system. No different from a wealth of similar cases from many fields of European integration, such balancing involves not only basic value judgements on the merits of the regulation at hand, but also a good deal of factual assessment, much of which will, moreover, be quite uncertain.

Or, to mention another current example, take the case of the German system of insurance against workplace accidents.[23] This is a mandatory social insurance scheme which is run by the social partners in sector-specific corporations. Again, it might increase efficiency to open the system to market forces by means of allowing private insurance companies from abroad to offer similar services. On the other hand, under the traditional social insurance system, the corporations do not only administer insurance services, but are entrusted with other tasks as well. In particular, they have the authority to issue and control regulations in the field of workplace safety. So, again, if one has to appraise the effects of competitive pressure on this specific social insurance scheme, there is no simple answer. Would it mean finally cutting back on the sprawling corporatist structures which the national system itself has lacked sufficient resources to fight? Or would it mean running down a highly functional, well-balanced institutionalization of legitimate social policy goals?[24]

To what extent is regulatory competition a real phenomenon?

The above examples may be taken to illustrate yet another point. In both of them, transnational competition has not been a long-established reality, but is instead a recent or current development, or even just a future option. This shows that welfare states are, in fact, still surrounded by borders, even in Europe, after decades of market integration. Undoubtedly, these borders have become increasingly permeable, but important parts of them are still in place to shield national social policy.

This is by no means surprising, given the historical background of significantly greater national enclosure. From a legal perspective, this observation might seem so evident as to be trivial. But it is often overlooked in today's political debates.[25] The discussions on the recent EU enlargement were a case in point. Many of the concerns about an immediate erosion of the welfare systems of the old Member States were based on the false assumption that none of their benefits could be restricted to national citizens. Apparently, the paradigm of regulatory competition is so pervasive as to obscure that we do not (yet) live in a world of completely open markets.

And it is not only with regard to legal rules that it is worth questioning how much reality there is behind this paradigm. Also with regard to the presumed market mechanisms which underlie the model, it could well be that its theoretical plausibility sometimes replaces empirical evidence. Clearly, this is only a suspicion, and there is no way to prove it here because such proof would require the very kind of empirical evidence on the actual effects of the alleged competitive pressure which the model's proponents have largely failed to adduce so far. But the suspicion can at least be substantiated.

There is an example from the field of US welfare law, which has been studied quite thoroughly[26] and seems to offer exceptionally meaningful data on this point. It is about a tax-financed cash benefit for 'incomplete' needy families with minor children. This benefit had existed for many decades up until the mid-1990s.[27] It was based on federal regulation and co-financed by the state and federal governments. However, the states were free to determine the level of the benefit. And, in fact, there was considerable variation in this respect across the states. From the recipients' perspective, this meant that, by moving to a more generous state, they could raise their level of income support. And the states, accordingly, feared that if they were to set the benefit level too high, they would become a magnet for all recipients in the US.

Clearly, these are ideal conditions to put the paradigm of regulatory competition to an empirical test. And the results seem to be quite in line with the theoretical predictions, at least at first glance. There was no indication that, at any point in time, the states had engaged in a ruinous race to the bottom. Instead, there seems to have been something like a 'stately walk'[28] downwards, a slow, yet steady, trend towards lower benefits which could be observed over a period of more than two decades.[29]

Furthermore, it could be shown that a change of the benefit level in one state would typically induce neighbouring states also to change their benefit levels.

The average impulse was found to amount to some 30 per cent of the initial change.[30] Again, this matches quite well with the theoretical predictions and with the above results. Apparently, regulatory competition does not sweep everything away at once. But there are considerable effects, especially in the long-term.

A puzzling question, however, is how the pressure was conveyed. At first glance, one might expect the mechanism to be the type of benefit-related migration which underlies the cited fear that the states had of becoming a 'welfare magnet'. On a closer look, however, there is little to support this interpretation. Quite to the contrary, the evidence seems to point in the opposite direction, i.e. that there were only negligible numbers of such migrants. Admittedly, it might be hard to establish the motivation of any single migrant. But even if one looks at all potential recipients who moved to a state with higher benefit levels, the numbers are still very small. For example, there are relatively recent data for California,[31] which was among the states with the most generous benefit levels. The immigration of welfare recipients was so little that it would have sufficed to cut the benefit level by less than 1 per cent per year in order to leave overall spending unchanged. This seems to suggest that regulatory competition did work here, but it did so regardless of real migration.[32] Apparently, it is sufficient for such migration to be feared or used as an argument in the political debate.

Without doubt, this does not falsify the paradigm of regulatory competition, but rather supports it. It only suggests that, first, the mechanisms which the model is generally claimed to rest upon might not be as effective as is commonly believed, and that, second, these beliefs might operate in such a way as to replace the mechanisms themselves. In other words: it is a 'real' phenomenon, and, to the extent that this phenomenon is perceived as a problem, taking it less seriously might be part of its solution.

Interim summary

This first part of section three was meant to scrutinize the argument presented in section two in favour of a Europeanization of the Welfare State as a reaction to the pressures of regulatory competition. It has been shown that the argument has to be qualified in some important respects. The effects of regulatory competition are not always detrimental, but can also be beneficial to the Welfare State. Also, there is reason to believe that either type of these effects tends to be overestimated. Furthermore, Europeanization could not put an end to, but only reduce, regulatory competition. And finally, some of the most important problems of the Welfare State do not arise from, but may only be aggravated by, regulatory competition.

All these objections, however, do not require a complete rejection of the initial argument. Regulatory competition does, indeed, seem to account for a good deal of the problems of the Welfare State. And Europeanization is at least one plausible response to this – at least, from a social policy perspective. From an integration perspective, the plausibility has yet to be discussed.

(Why) should European Integration become social?

In the second part of section two, the argument in favour of creating a Social Union was made from the perspective of European Integration. The speculative nature of this reasoning has already been acknowledged. But there are more objections to this vision. For alluring though the prospect of reanimating European Integration might be, it is doubtful whether the suggestion to forge a 'Social Union' would be compatible with some of the other aspirations which have been connected with the integration project so far. Such objections can be directed at three tendencies, in particular, which the creation of a Social Union might imply.

Centralization

First of all, a more social Europe seems almost tantamount to a more centralized one. At least, in the above context in which 'Europeanization' was suggested as a response to regulatory competition, it seems to be virtually synonymous with 'centralization' within the EU. Such centralization, however, is likely to raise concerns about the preservation of heterogeneity among the Member States. And it has long been one of the core values of European Integration to respect the uniqueness of the cultures of the Member States and to foster such diversity.

One conceivable reply to this concern might be to ask whether, in the field of social regulation, we are really dealing with a type of diversity which is worth preserving. For undoubtedly not every minuscule regulation can qualify as a dignified expression of a community's cultural uniqueness. The amount of co-payment required under public health insurance for a certain medication appears to be such an example, and so does the treatment of old age pensions under tax law, and even the benefit levels within, say, the unemployment insurance scheme. It is well conceivable that such regulations become subject to significant changes in day-to-day politics within the respective Member States, and this might indicate that they do not really call for that much respect.

However, there are at least two objections to this reply. One is that these examples clearly prove little as long as counter-examples can be found, and the case of the German insurance system for the coverage of workplace accidents may be such an example. The transfer of regulatory authority, the established practice of the co-operation of the social partners in this field, is a feature which might support a reading which would consider such institutional arrangements to be within the reach of the diversity ideal. Moreover, by referring to an arrangement rather than to a single norm, the example illustrates that even the type of ostensibly minuscule regulation cited above may be found to form a part of some larger arrangement which may well be an expression of the respective 'culture', as it were. So, again, the line might be difficult to draw.

The second objection, however, would imply that such line-drawing might not even be important. For it is not only the concern about diversity which militates against centralization, it is also a problem of political autonomy. The

argument behind this is well-known from the subsidiarity discourse. Even if we leave aside the intricate questions of collective identity and social legitimacy,[33] there remains an issue of sheer size. The larger a community, the lower the potential impact of local (and individual) preference. And from this perspective, centralization may be problematical even in regard to a rather mundane issue like the actual benefit level in any social insurance scheme.

There is no way around this; to the extent that the pursuit of a Social Union entails centralization, it would require a compromise on one or both of the other two goals. This may be a high price to pay. However, it does not mean that centralization might not still be the right thing to do.

Those, for example, who believe that the major threat to the Welfare State is regulatory competition, could argue that there is not much left to lose, anyway. For, according to this paradigm, one would have to expect that, once markets have been opened, they will start levelling off regional differences and narrowing down the scope for decentralized autonomy. So, we would have to ask our-(national) selves why 'we' should insist on remaining free to have it 'our' way, if 'we' cannot afford to make use of this freedom anymore. And even those who are more reluctant to go along with this paradigm might find that there are ways of partial centralization which could strike a reasonable balance between the problems associated with such centralization and the gains to be expected from it.[34]

Fortification

It has been said before that Welfare States need to have borders, as shields against pressures from outside and as ties to enhance cohesion within the community – although the latter statement has, admittedly, not been developed here as thoroughly as perhaps required. But if we assume that the overall point is accepted, then there is no reason why this should apply only to national Welfare States, and not to a supranational version. So, it seems that the EU would need such borders as well, if it were to become a Social Union.

One might reply that there is nothing wrong with this. In fact, the EU has borders already, very visible ones relating to immigration or international trade, and others which may be less visible, relating to third-country nationals within the EU.[35] Arguably, this is merely an inescapable necessity for every polity. Moreover, we are dealing not with additional borders here, but just substitutes for the former national ones. So why should it be a problem if, along the same lines, in exchange for tearing down the borders protecting the national Welfare States, the EU established and reinforced such borders for the supranational community?

The objection to such a 'fortification' of the European Union (EU) is based on a specific reading of European Integration. For some, this project has been about the absolute opposite. They conceive of supranationalism[36] as the civilizing response to nationalism, a permanent check, that is, on tendencies of national enclosure, a recurrent institutionalized exercise in tolerance across borders. Probably, even on taking such a view, the EU could not do completely

without external borders.[37] But they would have to be kept low, with the internal ones in place, in order to avoid the re-emergence of a monolithic, fenced-in community on an even larger scale. The creation of a supranational clone of the national Welfare State would certainly not be compatible with this reading.

Encapsulation

In a related interpretation, European Integration can be viewed as a means of preventing international conflict. This view is very common, maybe even more so among observers from outside of the EU. And indeed, the initial bonding of former enemies in the post-war decades, the recent enlargement across Cold War frontiers, the projected reach into the 'Muslim world' – all these steps can very well be explained as attempts to stabilize the respective regions by binding the involved national actors, first economically and then, to an increasing extent, also politically.

However, with increasing integration, the capacity to apply this strategy is likely to decrease. The current enlargement process has illustrated how demanding it has already become to join the EU. For even now, taking over the *acquis communautaire* requires a reception of 'foreign' law on a scale and at a pace that is unprecedented to date.

But there is not just this technical problem. Integration is not just about the accumulation of legal norms, but also about the formation of a community. Accordingly, a gradual enhancement of social cohesion within the EU can pose similar obstacles to any future widening of its borders. And the vision of creating a Social Union is particularly liable to this objection as, arguably, it would require a heightened degree of such cohesion.[38] So there is concern that pursuing this vision would foreclose the option to use European Integration for securing regional stability.

Another summary, still preliminary

What does this mean for the initial question: is the 'Social Union' a project worth pursuing? Or in other words: would our patients benefit from a joint therapy?

We have seen that we should not expect them to be cured from all the ills they are currently suffering from, and we have been cautioned not to take the joint therapy too far. To create a fully-fledged supranational Welfare State is but a theoretical option anyway, but it has, moreover, turned out neither to be necessary from a social policy perspective nor to be desirable from an integrationist point of view. So, if anything, it would have to be a more moderate form of joint therapy.

With regard to this more practicable option, we have seen that the case in favour of it might not be compelling. For there are a lot of value choices and factual uncertainties involved. But it can be maintained in principle, and to the extent that it is accepted, it opens up the discussion on the next – and arguably

much more complex – questions of what kind of 'Social Union' should be envisaged and how it could be reached.

The discussion of the first question, however, does little to answer the next ones. The case for a Social Union does not determine what exactly it should look like. So, if we are thinking about a therapy, we have to do so without having in mind a specific image of the recovered patients. However, there is some guidance at least. The above discussion might have helped identify the problems which need to be solved, as well as the trade-offs involved in doing so. So, the overall direction is discernible. And so is the starting point. For underdeveloped though the social dimension of the EU might still be, the Social Union need not be invented from scratch.

Trajectories of recovery

The current state of social policy in Europe has so far been presented in a gloomy narrative of erosion and decay. And whatever therapy there could be, it would still have to be started. However, this picture is over-simplified. For the threat which market integration might pose to social policy had been identified right at the outset of the integration project, and there have been continuous efforts to deal with it ever since. So, we can at least build upon existing structures, extrapolate from past achievements in substantive and procedural law, and thus, maybe imagine trajectories of recovery.

If we proceed from the assumption that the European level is not going to replace the national one in the field of social policy, and that, accordingly, the concept of a 'Social Union' implies an interaction of these (and maybe other) levels, then there seems to be at least three ways in which the European level can be involved in such interaction. These are:

- that it supplements national social policies
- that it protects them, and
- that it corrects them.

These ways are often inter-related and thus are not mutually exclusive. Each of them is traceable in current law and capable of being extended. This will be illustrated in the following, although it will not be possible to present a comprehensive analysis of the current law according to this categorization here.

Supplementation

Hypertrophic though the national Welfare States in Europe are often portrayed to be, there are social problems to which they do not respond in a sufficient manner or just not quickly enough. Typically, these will be problems which have arisen only recently or – to the extent that this is distinguishable – have only recently been perceived as problems. And it is in these areas that the European level can take the lead and supplement the traditional structures of the national Welfare States.

There are some examples of such supplementation in current law, the primary ones being employee- and consumer protection as well as anti-discrimination and equal opportunity regulation. The latter field, in particular, might well become paradigmatic for the successful supplementation of national social policy. This is because European regulation in this area – starting from the initial rules on gender discrimination[39] in employment up until the recent vast anti-discrimination directives[40] – seems to go to the core of even traditional Welfare State activity in that it is aimed at the promotion of substantive equality and targeted specifically at disadvantaged groups.

The regulatory techniques, however, are different. They are not the public provision of (predominantly) financial support and thus redistribution, but the abolition of discriminatory practices and structures, and are thus the advancement of factual inclusion and equal opportunity. And this difference illustrates both the potential and the limits of this approach.

On the one hand, such regulation is particularly apt for European regulation as it is not – at least not in an immediate sense – redistributive, and thus, arguably, does not require the same degree of legitimatory capacity as, for example, traditional welfare regulation would.[41] Nor does it call for any significant degree of administrative capacity at the European level.

On the other hand, it is limited both in its application as well as its reach. And it is far from being capable of functionally replacing the traditional activities of the national Welfare States. There is no functional equivalent to the broad-based redistributive policies which remain a defining feature of today's Welfare States. Consequently, a purely regulatory approach can only be a supplement to national social policies.

Protection

It has been seen that supplementation has not been extended to the area of redistributive policies to date. And it is here that the second mode of interaction, i.e. the protection of national social policies, has its major field of application, although it might also be employed to protect other types of national regulation which are subject to competitive pressures, such as unfair dismissal or other kinds of employee protection. In all these contexts, 'protection' translates into the alleviation of competitive pressure, and there are various ways of doing this.

The 'open method of co-ordination' (OMC) may be considered the most recent, and, arguably, also the least demanding, strategy to this end. Given its relative[42] novelty,[43] current assessments as to its effects are necessarily speculative. Still, it has triggered high expectations with some[44] – and quite surprisingly so. For, as of now, there seems to be little ground to consider this 'new mode of governance' as a device 'tailored to overcome Europe's social deficit',[45] unless, of course, this is taken just as a symptom of extreme modesty with regard to the aspirations of a 'Social Union'.

This does not mean, however, that the OMC could not prove instrumental at all. This is because there seems to be a chance, at least, that by fostering mutual

information, informal agreements, and also a more formal, albeit not legally-binding recognition of minimum standards, the OMC will contribute to the prevention of a competition-induced downward tendency of social standards – be it a literal race or just a creeping erosion. And possibly it might also generate consensus between the relevant actors across the Member States and thus, in the long run pave the way for future regulation at the central level, in particular with regard to the setting of minimum standards.

This prospect is closely related to the next and clearly more demanding way of protecting Member State policies. At the most general level, it might be called 'techniques of partial centralization', and there is a wide spectrum of measures which come under this heading.[46] Apart from the regulation of substantive minimum standards, it comprises 'softer' measures such as the provision of financial incentives for the Member States to meet certain standards, or 'harder' ones such as a co-funding of certain national benefit programmes at the EU level.

There is, however, no significant example for this kind of regulation in the law of the EU – and understandably so, one might say. For would this not entail a significant new encroachment upon national sovereignty? Maybe – or maybe not – depending upon the degree to which such sovereignty is de facto constrained by competitive pressures, anyway. And, after all, there are techniques of partial centralization that are quite sensitive to the concerns about Member State autonomy. The central financing of a benefit floor in the field of minimum protection, for example, would not seem too bold an assault on the freedom of Member States to design their own social policies, at least no more than the introduction of, say, a prohibition on age discrimination to a legal system which had not incorporated any such principle before. And, in fact, such European co-funding could be kept at a level just below the level in force in the most restrictive Member State so that virtually no changes would be required. It thus seems that the major 'threat' involved in such a proposal would be the leverage of the required means on central level. But, as we have seen before, this might also be considered to be a chance for the enhancement of public interest in European politics.

A third technique of alleviating competitive pressures and thus of protecting national social policies is to maintain what is still left of the national borders, or maybe even to reinforce what remains of them. This is not as 'utopian' an option as the previous one. This is because there are plenty of such rules present in current law. Some of them have already been mentioned.[47] Further examples include the restrictions on the free movement of persons, both those which apply specifically to the new Member States as well as the few general ones which are still in place.[48]

However, the viability of this third strategy may be doubtful. At least as far as a reinforcement of national borders is concerned, it seems that such an endeavour would, in most cases, be likely to encounter significant resistance. But viable or not – it should, in any event, be noted that, from an integrationist perspective (the endorsement of which has been one of our premises here), this

option seems to be the most problematical and should thus only be considered if there is no way of combining the pursuit of both social policy and integration.

Correction

The third mode of interaction is for the European level to correct national social policy. More specifically, we are dealing with the market-oriented, liberalizing effects which European law can have on national systems, thus welcoming the resulting competitive pressures as a necessary corrective device against the Welfare State's endogenous malaises. Admittedly, this kind of interaction hardly corresponds to the therapeutic concepts as they were spelled out before. This is because it is about the curtailment of existing structures of national social policy by the European level. But, on the other hand, there are cases where such curtailment seems to be beneficial to the national structures, as, for example, appears to be true for the case of the cross-border acquisition of glasses cited before.[49] And there is no reason why this efficiency-enhancing potential of the common market structures should not be a component of a European social policy – provided, of course, that sufficient sensitivity to legitimate Member State concerns be maintained.

Conclusion

Admittedly, these are only some possible components of an extended social policy at the European level. The collection, moreover, is not particularly inventive, as it mainly draws upon developments that have already been underway. Nor does it come anywhere near a comprehensive and specific plan upon which to assemble, step by step, the envisaged polity, the 'Social Union', as it were.

But, on the other hand, even if one day someone were to develop such a master plan – who should be the agent of the purposive social transformation required to implement it? If, indeed, Europe was to further approach a 'Social Union', such a transformation would come about incrementally, promoted by multiple actors, in various forums, with different interests. And this would suggest that we should direct primary attention to the study of these actors, their respective functional limitations and capacities, and the structures required for connecting and reflecting their respective actions.

Notes

1 For a general discussion of these basic aims, see H. F. Zacher, 'Das Soziale Staatsziel', in B. von Maydell and E. Eichenhofer (eds), *Abhandlungen zum Sozialrecht*, Heidelberg: C. F. Müller, 1993, pp. 18ff.
2 On these foundational 'ideals' of European integration and their failure to carry the project any further, see J. H. H. Weiler, *The Constitution of Europe*, Cambridge UK: Cambridge University Press, 1999, pp. 240–246.
3 For a prominent contribution to this debate, see J. Fischer, *Vom Staatenverbund zur Föderation – Gedanken über die Finalität Europäischer Integration*, online, available

at: www.europa-digital.de/aktuell/dossier/fischer/rede1205.shtml; for a collection of reflections upon this topic, see C. Joerges, Y. Mény and J. H. H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer*, New York University, Jean-Monnet Working Paper 7/00, 2002.

4 For a critical evaluation of the Constitutional Treaty's openness with regard especially to the social dimension of the EU, see C. Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy', *European Law Review*, 2005, vol. 30, 461–489, pp. 485–487.

5 See, for example, H. W. Sinn, *The New Systems Competition*, Malden, MD: Blackwell, 2003. Clearly, the logics of the 'systems' or 'regulatory competition' argument are not as compelling as they are frequently presented to be. For a more differentiated study of the different 'vulnerabilities' of different types of welfare states, see F. W. Scharpf and V. A. Schmidt, *Welfare and Work in the Open Economy*, Oxford: Oxford University Press, 2000; for a discussion of the pertinent literature, see P. Genschel, *Die Globalisierung und der Wohlfahrtsstaat*, MPIfG Working Paper no. 5/2003, online, available at: www.mpi-fg-koeln.mpg.de/pu/workpap/wp03–5/wp03–5.html; for a recent account from a legal perspective, see U. Becker, 'Nationale Sozialleistungssysteme im Europäischen Systemwettbewerb', in U. Becker and W. Schön (eds), *Steuer- und Sozialstaat im Europäischen Systemwettbewerb*, Tübingen: Mohr Siebeck, 2005, pp. 3ff.

6 For a pessimistic scenario, see M. Walzer, *On Toleration*, New Haven: Yale University Press, 1997, pp. 88–91; D. Miller, *On Nationality*, Oxford: Clarendon Press, 1995, pp. 186–187; with a similar analysis, but a more positive reading, see U. Haltern, 'Europäische Verfassung und Europäische Identität', in R. Elm (ed.), *Europäische Identität: Paradigmen und Methodenfragen*, Baden-Baden: Nomos, 2002, pp. 278ff.

7 It is this assumption which Offe bases his sceptical assessment with respect to the development of a significantly stronger social dimension of the EU upon (C. Offe, 'Demokratie und Wohlfahrtsstaat: Eine Europäische Regimeform unter dem Stress der Europäischen Integration', in W. Streeck (ed.) *Internationale Wirtschaft, Nationale Demokratie*, Frankfurt aM: Campus, 1998, pp. 114–115).

8 For a recent example, see J. Derrida and J. Habermas, 'Unsere Erneuerung – Nach dem Krieg: Die Wiedergeburt Europas', in *Frankfurter Allgemeine Zeitung*, 31 May 2003, p. 34.

9 For a condensed description, see *Development of Japan's Social Security System*, study report by Japan International Cooperation Agency, 2004, online, available at: www.jica.go.jp/english/resources/publications/study/topical/index.html.

10 For a recent account, see A. Armitage, *Social Welfare in Canada*, 4th ed., Oxford: Oxford University Press, 2003.

11 For an overview, see *National Insurance Programmes in Israel*, report by the National Insurance Institute: Research and Planning Administration, Jerusalem, 2004, online, available at: www.btl.gov.il/English/pirsumim/publications.htm.

12 See N. Harris (ed.), *Social Security Law in Context*, Oxford: Oxford University Press, 2000.

13 The vocabulary is borrowed from J. Habermas; see, for example, Derrida and Habermas, above, note 8; for a more extensive reflection on the notion of identity building by a collective appropriation of shared traditions see J. Habermas, *Eine Art Schadensabwicklung*, Frankfurt aM: Suhrkamp, 1987, pp. 171–175.

14 For a sceptical assessment of the prospects for the formation of a European public sphere, see D. Grimm, 'Does Europe Need a Constitution?', in P. Gowan and P. Anderson (eds), *The Question of Europe*, London: Verso, 1997, pp. 251–255; for a more optimistic view, see P. Häberle, *Gibt es Eine Europäische Öffentlichkeit?*, Berlin: De Gruyter, 2000, pp. 12ff.

15 Weiler, *The Constitution of Europe*, pp. 354–355: 'taxation […] instils accountability,

it provokes citizen interest, it becomes an electoral issue [and establishes] a duty […] towards the polity!'; for an elaboration of this point, see A. Menéndez, 'Taxing Europe – Two Cases for a European Power to Tax', *Columbia Journal of European Law*, 2004, vol. 10, no. 2, 298–338; for a parallel case in the field of redistributive social policies, see A. Graser, *Dezentrale Wohlfahrtsstaatlichkeit im Föderalen Binnenmarkt?*, Berlin: Duncker and Humblot, 2001, final chapter.

16 For comparative data, see K. D. Henke and J. Schreyögg, *Towards sustainable health care systems*, Berlin: ISSA, 2004, pp. 27ff.

17 For a comparative account, see H. J. Reinhard (ed.), *Demographischer Wandel und Alterssicherung*, Baden-Baden: Nomos, 2001.

18 On the empirical data, see J. W. Vaupel and J. Oeppen, 'Broken Limits to Life Expectancy', *Science*, 2002, vol. 296, no. 5570, 1029–1031, pp. 1029ff.

19 For a highly differentiated account, see Scharpf and Schmidt, above note 5.

20 For an up-to-date overview see Bundesministerium für Arbeit und Soziales (ed.), *Übersicht über das Sozialrecht – Ausgabe 2007*, pp. 125–250; for a shorter description in English, see the ministry's web site at www.bmas.de/coremedia/generator/10120/property=pdf/social__security__at__a__glance__total__summary.pdf

21 On this issue and a similar one relating to dental care, see the decisions of the ECJ in *Decker*, C-120/95, and *Kohll*, C-158/96.

22 For an extensive analysis, see C. Malz, *Die Internet-Apotheke in Europa*, Frankfurt aM: Lang, 2003. More recently, the ECJ decided that internet trading may not be restricted as far as it relates to medication, the purchase of which does not require a prescription under national law; see *Deutscher Apothekerverband eV v. 0800 Doc-Morris NV and Jacques Waterval*, C-322/01.

23 For an up-to-date overview see Bundesministerium für Arbeit und Soziales (ed.), *Übersicht über das Sozialrecht – Ausgabe 2007*, pp. 435–457; for a shorter description in English, see the ministry's web site at www.bmas.de/coremedia/generator/10120/property=pdf/social__security__at__a__glance__total__summary.pdf

24 For a recent account, see R. Giesen, 'Wettbewerb und Berufsgenossenschaften', in *Berufsgenossenschaften und Wettbewerb*, Berlin: Stiftung Marktwirtschaft, 2003.

25 For a recent analysis of the law and some of the misperceptions in this field, see Becker, above note 5, sub. IV.

26 See the studies by P. Peterson, *The Price of Federalism*, Washington, DC: Brookings Institution, 1995; 'Devolution's Price', *Yale Law & Policy Review/Yale Journal on Regulation. Symposium: Constructing a New Federalism*, 1996, 111–121, pp. 111ff.; P. Peterson and M. Rom, *Welfare Magnets*, Washington, DC: Brookings Institution, 1990. For a more thorough discussion of these findings, see my own efforts in Graser, above note 15, Part II.

27 Until then, it was called 'Aid for Families with Dependent Children' (AFDC). The successor's name is 'Temporary Aid for Needy Families' (TANF).

28 See Peterson, 'Devolution's Price', above note 26, p. 120.

29 See Peterson and Rom, above note 26, pp. 8–9.

30 See Peterson, 'Devolution's Price', above note 26, p. 117.

31 The data were used in the 1999 US Supreme Court decision in *Saenz* v. *Roe and Doe*, 119 S. Ct. 1518.

32 The above statement refers to welfare-induced migration in the US. Somewhat surprisingly, Sinn *et al.*, seem to have empirical evidence which led them to expect much stronger migratory effects with regard to the recent EU enlargement (H. W. Sinn, G. Flaig, M. Werding, S. Munz and H. Hofman, *EU-Erweiterung und Arbeitskräftemigration*, Munich: Ifo Institut für Wirtschaftsforschung, 2001, pp. 5–23). If the above reading of the US experience should be of any relevance in this context, it would be to suggest that the empirical grounds of such estimates be thoroughly (re-)assessed.

33 For a succinct statement of the issues involved with regard specifically to European integration, see J. H. H. Weiler, *The State 'Über Alles' – Demos, Telos and the*

German Maastricht-Decision, New York University, Jean-Monnet Working Paper 6/95, 1995, sections II and III.

34 On such devices of partial centralization, see Section 4.2 below.

35 For a juxtaposition of the rights of third-country nationals and of EU citizens, see B. Laubach, *Bürgerrechte für Ausländer und Ausländerinnen in der Europäischen Union*, Baden-Baden: Nomos, 1999.

36 See above note 2, pp. 250–252.

37 It is on this ground that N. Barber has launched a vigorous critique against Weiler's reading of supranationalism and his corresponding construction of European citizenship, see Barber, 'Citizenship, Nationalism and the European Union', *European Law Review*, 2002, vol. 27, no. 3, 241–259, pp. 253ff.

38 On the necessity of such preconditions, see, for example, C. Offe, above note 7.

39 The remainders of this are still visible in today's Art. 141 TEC.

40 See, in particular, Council of the European Union, Directives 2000/43 EC and 2000/78 EC.

41 Lower demands in terms of legitimation entail, however, that such measures at the same time bear a lower potential for the enhancement of public interest in EU politics; on this 'integrationist strategy', see, above, notes 14 and 15 and related text.

42 For a study of the initial stages of the OMC in the context of its procedural precursors, see M. Göbel, *Von der Konvergenzstrategie zur offenen Methode der Koordinierung*, Baden-Baden: Nomos, 2002.

43 It has been only recently that a first wave of reports on the experiences in the various fields of application has been published; see, for example, B. Cantillon (ed.), *The Open Method of Co-Ordination and Minimum Income Protection in Europe*, Leuven: Acco, 2004; F. Ruland (ed.), *Open Method of Coordination in the Field of Pensions – Quo Vadis?*, Frankfurt aM: DRV-Schriften, 2003; related to health care: Y. Jorens (ed.), *Open Method of Co-ordination*, Baden-Baden: Nomos, 2003.

44 Joerges reports that it had 'become something like a *Leitbild* on the political Left' (above note 4, p. 479).

45 See the position referred to – and called into question – by Joerges, ibid.

46 For a comparative study of the various devices of such partial centralization as employed under the co-operative structures of US federalism, see A. Graser, 'Confidence and the Question of Political Levels – Towards a Multilevel System of Social Security in Europe?', in D. Pieters (ed.), *Confidence and Changes: Managing Social Protection in the New Millennium*, The Hague: Kluwer, 2001, pp. 215ff.

47 See above, section 3.1.3. and 3.1.4.

48 For an overview, see Becker, above note 5.

49 See above note 21 and related text.

8 Constitutional integration of labour constitutions

Florian Rödl

Introduction

The normative vision of the CIDEL project is a rights-based post-national Union, in which the ideas of democracy, fundamental rights and the rule of law are reconstructed at the European level. This vision is compelling for all those who see themselves in a Kantian tradition of thinking about law, democracy and society. But the peoples of the Member States of the European Union (EU) are not – as we can guess not only from the failure of the Constitutional Treaty for Europe, but also from how the rejected Treaty was subsequently handled by Europe's political leaders – willing to endorse this vision of supranational law and democracy. As to the reasons, the underlying hypothesis of this chapter is that, to put it bluntly, socio-economics has a role to play in the analyses. And the relevant socio-economic structure is, first and foremost, the hierarchy between the Member States, which are competitors in an integrated market, with their national governments serving as their executives.

The problem is that this sociological structure cannot be adequately addressed in pure concepts of law and democracy. However, I do not suggest changing topics by switching from political philosophy to, for example, welfare economics. On the contrary, it is assumed that adapting a Kantian vision of a supranational democratic constitution to the socio-economic hierarchies of our modern world is a difficult problem even in conceptual terms. The conceptual task is to re-articulate the claims for 'Social Europe' in terms of law, constitution and democracy. This is what this chapter attempts to do for the sector of labour relations, and this is why the chapter endeavours to sketch out a 'labour constitution' for Europe.

The concept of a labour constitution

It was the renowned labour lawyer from Weimar, Hugo Sinzheimer, who coined the concept of a 'labour constitution' (*Arbeitsverfassung*) in 1927. A seminal remark reads as follows:

> Workers are also co-entitled with regard to the exercise of the power of economic control. This is where the idea of a labour constitution comes from,

> i.e. that order which constitutes, by law or agreement, the mandatory participation of workers in particular fields of power which were, in earlier times, exclusively reserved to the employer.[1]

Sinzheimer's concept of a labour constitution was apparently inspired by the model of constitutional monarchy. This is why Sinzheimer's idea of a labour constitution is dedicated to the legal norms which constitute the mandatory inclusion of workers in the processes wherein employers exercise their command and control of the process of production. The power to command and control is itself grounded in the individual labour relationship, which, as a consequence, forms no part of the concept therein. For my own purpose, however, I suggest an expansion of Sinzheimer's labour constitution and an integration of the constitutional dimensions of the individual relationship between employer and employee.[2]

The reason stems from my understanding of the term 'constitution'. My starting point is the idea, recently elucidated by Christoph Möllers, that a constitution grounds state power and determines the modes of its exercise.[3] But this is only one side of the coin. The constitutions of liberal democracies – in contrast to totalitarian systems[4] – create an autonomous sphere of society. This autonomous sphere has its grounding in individual and collective constitutional rights which confer power upon societal actors. Though the actors' powers are clearly, as fundamental rights, guaranteed, first and foremost against the exercise of state power, they equally represent powers inside society, powers guaranteed against other societal actors. From this perspective, the constitution of a state is not just a constitution of the state, but a constitution of both state *and* society, a 'societal overall-constitution' (*gesellschaftliche Gesamtverfassung*), to employ an apt term used by Helmut Ridder.[5] Power to societal actors is conferred by individual and collective rights. These rights are further articulated in legislative acts, i.e. the exercise of the inherent societal powers are thereby determined and limited. This is true for their dimension directed against state power, but remains equally important for their societal dimensions, where the rights, i.e. the powers of different actors, have to be reciprocally accommodated. However, it should be noted that the articulating legislation is not normatively arbitrary. Its substance has to be in line with both the content of the rights in question and with any additional substantive constitutional principles.

Starting from this conceptual ground, we can understand a 'labour constitution' as the entirety of the powers conferred to societal actors by individual or collective constitutional rights in the social field of dependant labour.[6] It is this understanding which suggests the inclusion of the individual labour relationship in its constitutional dimension within the concept of labour constitution. This is because it is constitutional rights which have a bearing on the individual labour relationship, and its character thus formed has a decisive impact on societal powers. Let me illustrate the latter claim: whether the constitution bases the individual labour relationship on bondage, on an administrative act or on private autonomy is of evident weight for the power relation of the involved societal actors.

As stated above, the powers of societal actors need to be articulated, shaped and limited by sub-constitutional legislation, and this legislation is guided by constitutional principles and norms. The same articulating function may be fulfilled by judicial adjudication. In any case, if such further articulation is missing, independently of its type, the significance of societal powers by conferred constitutional rights is void. If their content is not further determined in legislation or adjudication, they cannot be applied at all, i.e. they cannot have any practical significance. For this reason, the concept of a labour constitution has to take the constitutional rules on legislation or adjudication in labour law on board. Hence, what my understanding of a labour constitution finally comprises is, first, the constitutional rights which societal actors can mobilize – both individually and collectively – against each other in the social field of dependant labour relationships, second, the state's competences for the legislative or adjudicative articulation of these rights, which are, third, guided by the substantive principles.

In order to express this in a more concrete way, I will give a brief account of the German labour constitution. Starting with individual rights, the right to private property which includes the right to private property of the means of production has to be named first.[7] The right to the private property of the means of production constitutes an essential part of the nature of dependant labour. The equally essential part – from the worker's perspective – is represented by the prohibition of forced labour[8] and the worker's right to choose his or her work or occupation freely.[9] The labour relationship itself is then based on the individual freedom of contract inscribed in the right to the free development of one's personality.[10] The freedom of contract notwithstanding, the employer is held to respect the workers' right to non-discrimination.[11] Finally, workers enjoy the right to free movement (as do all citizens), i.e. they are granted the possibility of seeking employment throughout the national territory.[12]

Moving on to collective rights, the German Constitution provides for the right of trade unions to conclude collective bargaining agreements.[13] This represents the so-called autonomy of the social partners for collective bargaining (*Tarifautonomie*). This autonomy includes the right to collective action, which is the fundamental source of the societal power of trade unions. These rights were further articulated for the conclusion and the legal status of collective bargaining agreements in a corresponding Act (*Tarifvertragsgesetz*) and for the determining of legal collective action through the German Courts. Workers' co-determination, in contrast, has no hold in explicit constitutional rights in Germany. However, it has been read into the normative characterization of Germany as a social state (*sozialer Staat*),[14] the so-called social state-clause,[15] that the legislator is not only allowed – but even actually obliged – to create systems of operational and managerial co-determination – notwithstanding how contested a particular piece of legislation may or might be. This obligation was first met with the Works Constitution Act (*Betriebsverfassungsgesetz*), which constituted works councils and conferred rights and power to set collective agreements, and then with legislation on managerial co-determination at the

board-level of corporations (*Drittelbeteiligungsgesetz* and, for corporations with more than 2,000 workers, *Mitbestimmungsgesetz*).

As to the scope of state legislation, it can be noted that the federal level is, albeit not exclusively, fully competent for labour legislation.[16] Labour courts provide for the adjudication of any claim regarding individual or collective labour relations.[17] Eventually, legislative and adjudicative acts, collective bargaining and individual contracts are guided by substantive constitutional principles, the most important being the commitment to human dignity[18] and the already cited social state-clause.

This entirety should be regarded as the labour constitution of Germany. However, the German labour constitution will serve us here as a model only; any other Member State's labour constitution could have served the same function. This is because the labour constitutions of all the Member States, though very different in their particularities, share the same form: fundamental individual and collective rights, a corresponding scope for legislation and adjudication, as well as substantive guidance for all kinds of articulating regulation. It is against this form that I intend to analyse the EU's labour regulation as a 'labour constitution'.

Europe's 'labour constitution' – once and today

The original idea for European labour law was written into the Treaty of Rome. It consisted only of two elements: the free movement of workers, and the right of women to equal pay for equal work. Apart from this, the founding Member States restricted themselves to expressing a belief in an upward harmonization of working conditions, i.e. 'harmonization while the improvement is being maintained'.[19] According to this belief, there was no need for further European labour regulation.

Article 117 goes back to the report by a committee of experts[20] which had been set up by the International Labour Organization. The committee was chaired by the Swedish economist Bertil Ohlin, and the theoretical core of the report formed Ohlin's neo-classic version of the classic 'Pure Theory of Trade',[21] which had been coined by David Ricardo.[22] The theory's basic category is 'comparative advantage', which refers to the international differences of relative prices, i.e. the price of one commodity in terms of another. In Ricardo's seminal example,[23] if the production of cloth in terms of wine in one country – for example, one unit of cloth equals 5/6 of a unit of wine – is cheaper than in another country – for example, the same unit of cloth equals 9/8 unit of wine – then it is advantageous for both countries to specialize in the production of the relatively cheaper commodity and to trade the production surplus with each other. Ohlin had delivered a new foundation for the emergence of 'comparative advantages', namely, the different supply of capital and labour in the countries compared. He argued that different supply led to different factor prices and this again led to different relative prices of the products whose production is not based on the same composition of factors, such as land, labour and capital.[24]

Against this background, it was the key finding of the Ohlin Report that the Common Market did not presuppose a harmonized level of labour standards.[25] On the contrary, harmonization would come as an effect of the market, but this would not, against all fears, represent a 'race to the bottom'. The report's argument was that differences in absolute labour costs reflected differences in productivity. However, this correlation of labour costs and productivity had to be secured through flexible exchange rates. In line with Ohlin's version of the 'Pure Theory of Trade', the report envisaged that the Common Market would permit countries where *labour* was relatively cheap to concentrate on labour intensive industries while countries where *capital* was relatively cheap could concentrate on capital intensive production, leading to an equalization of factor prices ('Factor Price Equalization Theorem'). However, thanks to the expected 'gains from trade' which were to result from an increase of productivity, from specialization and from economies of scale, this equalization would emerge as an upward harmonization.

Now, if – based on the report's finding – the European level was not meant to develop any substantive labour standards, it was also unnecessary to provide for any constitutional roots for labour regulation in the Treaty. The free movement of workers and the principle of non-discrimination for women were not meant to represent the nucleus of a future European labour constitution, but were instead seen as necessities for the well-functioning of the Common Market and were not even intended to be invoked by citizens as their individual rights.[26] Hence, Europe's labour constitution was, at the outset, essentially void. With regard to today's labour constitution of Europe, it is assumed that, despite diverse and important developments, the original model has never been replaced by a coherent alternative.

We have seen that a labour constitution consists of three categories, which are individual and collective constitutional rights, legislative and juridical articulating competence, and guiding substantive principles. With regard to individual rights, the free movement of workers[27] and the principle of non-discrimination[28] are the only individual rights which are explicitly conferred in the Treaty. But it is also true, that 'the Union shall respect fundamental rights, […] as they result from the constitutional traditions common to the Member States, as general principles of Community Law'.[29] Thus, it is conceded that a set of individual rights which correspond to those contained in the German labour constitution, have been shifted to the European level. But, as stressed above, in order to have an impact on the societal sphere, these rights need to be articulated. This is why the competences of the EU in the field of dependent labour do not form a separate issue alongside individual rights. On the contrary, the competences are constitutive for the practical significance of the rights in society.

The competences of the Union are enumerated in Article 137 TEC. However, this constitutional basis for European labour legislation is quite narrow. In addition, unanimity-voting in the Council is still required in many fields. But what is more important is the fact that the Union has no competence for legislation on wages.[30] While it is true that there is a basis for legislation in matters of social

security and social protection, as well as for protection regarding to the termination of the labour contract,[31] legislation in these areas requires unanimity-voting.[32] However, no unanimity-voting is required for acts regarding health and safety measures, or in a few further fields of minor importance. Thus, despite a set of individual rights, the Union is lacking a considerable range of legislative competence with which to articulate these rights for the societal sphere, and, as a consequence of this, it further lacks adjudicative competence.

Turning to collective rights, it is again conceded that the common constitutional traditions of the Member States and the EU Charter of Fundamental Rights (CFR) contain collective rights which refer to workers' participation[33] as well as to collective bargaining and collective action.[34] The problem with workers' participation starts inherently with the content of the right: workers' participation is restricted to information and consultation, which is much weaker than co-determination. This restriction may, on the one hand, reflect the differences between the Member States, in which several systems fail to acknowledge a fundamental right to co-determination. However, on the other hand, this kind of tolerant reflection of restrictive traditions has the consequence of barring further developments for all Member States at the constitutional level. Equally important is the fact that the Union has no competence to confer negotiation power to workers, which is *the* essential ingredient to transform information and consultation rights into co-determination. Article 137 para. 1 lit. f does provide for competence in matters of 'representation and collective defence of the interests of workers and employers, including co-determination', but this is, first, subject to unanimity-voting, and, second, subject to paragraph 5 – where the rights of association and collective action, which remain the primary source for negotiation power even for participation at establishment level, are excluded from Union action. Accordingly, the European measures in this area, the directive on European works councils[35] and the directive on information and consultation of employees[36] have carved out only limited rights to hearing and information, with no real negotiation powers. Hence, the societal power which workers may gain from these instruments, seen as the articulation of their fundamental collective rights, is rather marginal.

With regard to managerial co-determination, though the matter seems to be covered by the wording of the cited co-determination provision in Article 137 TEC, it is simply unthinkable, that the EU level would ever legislate on co-determination to be incorporated into systems of Member States' corporate laws. What remains is legislation on co-determination in the cases of transnational mergers and undertakings created by European law.[37] The innovation in this field is that co-determination is not based on legislation but that it is negotiated. And indeed, workers did receive some negotiation power from a set of 'standard rules' which serve as a default alternative to a negotiated agreement.[38]

The most important issue for societal powers in a context of liberal–individualistic labour relations is collective bargaining with collective action as the decisive source of power. In this respect, Article 28 CFR sounds promising:

'workers and employers, or their respective organizations, have […] the right to negotiate and conclude collective agreements at the appropriate levels'.

However, as stressed before, there is no competence for the EU to articulate these rights at the European level;[39] this is reserved to national law. Moreover, these collective rights are not European rights; they are national rights which are merely acknowledged at the European level. Whereas this makes less difference for individual rights, it is, however, decisive for collective labour rights, where the national source of the rights coincides with their national scope.[40] Thus, collective bargaining at the European level is simply impossible. Autonomous agreements between European social partners, though mentioned in the Treaty,[41] have no European legal status as collective agreements. They are, at most, ordinary contracts *in personam* under the contract law of one of the Member States, to be determined by the private international law of the other Member States – even with different results. Yet, the 'Social Dialogue'[42] is sometimes presented as the institution of collective bargaining at the European level. But this is severely misleading. The 'Social Dialogue' allocates a procedural position to social partners in the European legislation process. The social partners can negotiate the content of a directive if its content does not exceed the Union's limited competences. This is far from the core function of collective bargaining, i.e. 'taking wages (and other labour conditions) out of competition'. In the end, the European labour constitution does not confer European collective rights, and, as a consequence, does not confer corresponding autonomous collective power to workers.

In conclusion, a short remark should be made about the substantive principles in European labour law. As a matter of fact, the existing treaties do contain some principles and objectives which could guide the activity of the legislator, for example, Article 2 TEC. Many adherents of the Constitutional Treaty proudly pointed to the adding of even more principles and objectives of the EU. However, if there is hardly any competence for legislation, if veto-powers for the exercise of given competences are too numerous, if there is no legal framework nor societal power for collective bargaining and finally no effective rights with regard to co-determination, then all constitutional substantive principles are, in this respect, established in vain.

For a final synthesis, it must be declared that European labour law represents – at best – a fragmented labour constitution. It contains some fundamental rights, but the decisive collective rights are acknowledged only in their national format, the articulating competences of the Union are very limited and the core matters are submitted to the unanimity-voting rule or are fully omitted, so that the available principles cannot offer much guidance.

However, one might wish to highlight that, just as far as the labour constitution of Europe remains undeveloped, the Member States' labour constitutions remain untouched. Though this is fully correct, this structure yields further implications which are problematical. First, the fragmentation of Europe's labour constitution must be analysed in its relation to European integration as a whole. The fragmented labour constitution is situated in a context of a customs

union, a single market with a rigid competition regime and a monetary union, of which the latter is complemented by the rules of the Growth and Stability Pact. This context leads to a fundamental change for the functioning of the national labour constitutions. Instead of allocating societal power to employers and workers, its basic function becomes its impact on national competitiveness. The former antagonism between capital and labour which was mediated by a labour constitution is now replaced by common interest. Hence, in an overall picture of the EU, Europe does provide, first and foremost, the framework for the increased competition of national labour constitutions, in which the competitive pressure has been concentrated on labour conditions in an outstanding way. The fragmentation of its labour constitution is, therefore, not a constitutional choice in favour of subsidiarity. It is the other side of the coin of the EU's competitive setting. In this setting, the domestic labour constitutions of the Member States have, to a large extent, lost their former autonomy. And while this loss of autonomy has not been counter-balanced at the European level, the further consequence is, in terms of societal power, that capital is far stronger in every Member State than it was before.

A renaissance: the promise of boons from 'comparative advantages'

Bob Hepple, leading authority in international and comparative labour law, has recently published a book on 'Labour Laws and Global Trade',[43] which presents a challenge to the diagnosis outlined above. In the book's last chapter, entitled 'The Comparative Advantages of Labour Laws', Hepple deals with the problem of integrated global markets and the different standards of labour law in the world. But his account can also be applied to the more deeply integrated single market and less differentiated labour standards in Europe, and it should likewise make no difference that our own account interprets differentiated labour standards as the results of differentiated labour constitutions.

Hepple's provocative thesis can be put as follows:[44] the differences of national labour constitutions constitute 'comparative advantages' for the Member States. This is why the establishment of a single market does not require a complete labour constitution at the European level, as long as discrimination is prohibited. A unified labour constitution would deprive the Member States of their differences and thus deprive them of their 'comparative advantages'. The co-existence of an integrated economic constitution and differentiated labour constitutions triggers neither particular problem as regards the autonomy of the labour constitutions, nor a loss of societal power of the labour side, but instead represents a source for socio-economic well-being for all. In practice, Member States, instead of calling for a full European labour constitution, would be better advised to 'seek' their 'comparative advantages'. This means that each Member State should reflect on what its own 'comparative advantages' actually are and how to preserve and strengthen them.[45]

Hepple's promise and recommendation sounds quite similar to the original

one of the Ohlin Report: the integrated market will do no harm to national labour standards thanks to the functioning of 'comparative advantages'. Hence, action at the European level is neither necessary nor desirable. The difference in the two approaches lies only in the analyses of the foundation of 'comparative advantages', i.e. the foundation of the differences in relative prices which result in the different relative prices of products. Ohlin located their origin in the differences of relative factor-prices. Hepple finds them also in the differences of national labour laws themselves. As a result, the differentiation of national labour constitutions in Europe is said to give foundation to 'comparative advantages', and thus, we must conclude, also gives foundation to the increasing common wealth.

It is not evident how differences with regard to labour law can function as a foundation for 'comparative advantages'. This is where the two contemporary economists, who delivered the basis for Hepple's approach, Peter Hall and David Soskice, step in. The introduction to their book '*Varieties of Capitalism*'[46] suggests a new conceptual candidate which may explain the existence of comparative advantages, namely, the institutions provided by a political economy. Their account contends that each state's political economy provides certain types of production with institutional support. If such support is provided, the production of respective commodities becomes cheaper. Because the political economies of states provide different patterns of institutional support, the result is differences in prices.[47] Hall and Soskice's story to exemplify the institutional foundation of comparative advantage is that states whose political economy is classified as a liberal market economy provide a more flourishing endowment for products which need ongoing radical innovation, as is the case with semiconductors. In contrast, states whose political economies are modelled according to the counterpart, a co-ordinated market economy, are better suited for products which need incremental innovation, as is the case with engines. Thus, we can conclude that, in a liberal market economy-state, the relative price for semiconductors in terms of engines is cheaper than in a co-ordinated market economy-state.[48]

Against this background, we can understand where differences in labour constitutions can play a role in the whole account. A labour constitution is an important institutional part of a state's political economy. Let us assume that an ensemble of higher wages and shorter strike periods is a consequence of a particular labour constitution. Presumably, this characteristic of a national labour system has a different impact on the costs of the production of different commodities. For the production of some commodities, continuous work and mutual trust will be more important than for others. If one compares the relative costs of the same products in another state in which wages are lower but strikes are, in turn, more frequent, the production of the commodities for which peaceful labour relations are more important will carry a comparative advantage in the state with high wages, job security and low strike rates, while the other product will be comparatively advantageous in the state with more strikes but lower wages and less security.

Before having a closer look at Hepple's argument, two things should be noted. First, on the basis of the reported reasoning, Hepple recommends Member States to 'seek' comparative advantages. Such a recommendation represents a severe misunderstanding of the idea of 'comparative advantage' in its use in the '*Pure Theory of Trade*' since Ricardo. The idea of 'comparative advantage' explains why mutual trade is beneficial for countries which have such differences, and it explains the precise division of labour which will result from it. Two countries which have no differences in relative prices and thus no 'comparative advantages' in relation to each other are by no means advised to develop 'comparative advantages'. It just follows that mutual trade will not benefit them, or if it does, that the benefits will not result from 'comparative advantages' but from other grounds.[49]

Second, the Ohlin Report had noted three preconditions for its optimistic promise of the functioning of the market with regard to labour standards: first, a relatively low transnational mobility of capital; second, governments with social aspirations and strong trade unions which were able to claim a just share from the 'gains of trade' for the workers; and, third, the flexibility of exchange rates.[50] Though none of the three assumptions is valid today, Hepple does not even mention them in his account,[51] let alone argue why their absence had no relevance for his quietist promise.

One defence for Hepple would be to claim that he simply does not deal with 'comparative advantage' in the usual sense. A hint of the different use of the concept by Hepple lies in the fact that closer inspection of Hall and Soskice's use of 'comparative advantage' shows that their use is also actually different from the classical one. They argue that several factors, the international mobility of capital being among the most important, had 'dealt a serious blow' to the old idea of 'comparative advantage'.[52] What, then, is their own, allegedly, new conception of 'comparative advantage'? Whatever it is, their concept is developed in contrast to its old semantical counterpart, the 'absolute advantage', which has existed since Ricardo. In Ricardo's case, it was Adam Smith's 'absolute advantage'. But in Hall and Soskice's case, the contrasting point of reference is not the old Smithsonian idea of absolute advantage. Instead, they refer to a completely different idea, developed in the literature, which gives one and the same set of recommendations to all states in order for them to improve their international economic performance.[53] In contrast to this – evidently ignorant – literature, Hall and Soskice discovered that it is not advisable for all states to pursue the same economic policy. Instead, states should focus on the products for which they are able to provide favourable institutional endowment, so that the products can be produced more cheaply in their own country than elsewhere. Thus, the issue is absolute prices. Hall and Soskice's new 'comparative advantage' emerges as the good old Smithsonian 'absolute advantage'. This has one implication in particular. While the theory of 'comparative advantage' in its (neo-) classical version is meant to argue in favour of the mutual benefit of trade among the trading partners, Hall and Soskice's new version helps states to find the best competitive strategy for their own benefit.

However, linking Hall and Soskice's framework again to their idea of the institutional foundations of 'absolute advantages' (from now on, simply 'competitive advantages') the core of their idea can be seen, namely that there are a lot of commodities to be produced in the world and that these commodities are produced in very different ways, so that they in turn rely on the very different institutional support provided by states. Thus, one and the same state – this is the upshot of the argument – cannot provide institutional support for all kinds of commodity production in the world. Hepple has transferred this line of thought to the case of labour law and his own argument may be summarized as follows: each national labour constitution is particularly favourable to the production of certain types of goods. It follows that if all states lowered their labour standards, at least some countries would sacrifice their endowment for the products in which they hold competitive advantages. Let us link this to the example that we reported above. If a co-ordinated market economy-state lifted the burdens on dismissals, the subsequent insecurity would hamper the efforts of workers to participate with their knowledge in the improvement of productivity, so that the conditions to produce commodities in need of incremental innovation would be worsened, with the effect that a decisive competitive advantage might be lost. After reviewing Hepple's argument, we must examine whether it upholds the claim in question: that an integrated market does no harm to national labour standards because of each state's competitive advantages in certain areas. The EU should, in consequence, refrain from establishing substantive European labour standards. Hence, the fragmented labour constitution which the Treaty provides is fully sufficient.

At the outset, a non sequitur in the argument has to be highlighted. The account by which the differentiation of production requires a different institutional endowment in which the whole range cannot inherently be provided by each single state on its own does, indeed, suggest that common substantive labour standards throughout Europe would harm at least some Member States (which ones would depend on the level of the standards chosen). However, from this insight, it does by no means follow that the single market does no harm to the existing differentiated labour standards, that it has not strengthened capital against labour, nor that it has not transformed the function of the labour constitution of a given Member State from a political allocation of societal power between antagonists to a factor of common national competitiveness. Second, it must be pointed out that, even though the demand for the institutional endowment for production is differentiated, this does not dissolve the overall competitive framework. In other words, the plurality of markets (for institutional state-support) does not stop them from being markets. It is very obvious that Member States still fight against delocalization away from their territory, and for relocalization into it, in order to attract direct foreign investment and to retain domestic investments. There are still enough states left to compete with regard to certain kinds of production. The finding of the said differentiation of demand for institutional endowment does not unmask the idea of a prevailing competitive framework as an exaggeration. It only helps to give a more detailed analysis of its functioning.

A last line of defence for Hepple may lie in a refinement of his original sugges-

tion. The argument could start with Hepple's observation that some states would put their competitive advantages in jeopardy if they lowered labour standards as such, and then turn to the conclusion that, at least in some economies, it is the functionality of the institutional endowment which serves, as far as labour standards form an integral part of it, as a red line for the deregulation of labour standards. And the argument concludes by advising states not to cross this line.

In a nutshell, Hepple appeals here to the state's role as the 'ideal personification of the total national capital' (*ideelle Gesamtkapitalist*), as Friedrich Engels once put it so aptly.[54] As the ideal personification of the total national capital, the state has to assure that corporations are forced to submit to measures which represent burdens for each and every one of them, but are in the common capitalist interest in the reproduction of surplus value. This role must be performed by the state because the agents of the individual capital stocks are, due to the competitive structure of the market, unable to introduce these measures voluntarily themselves.[55] Hepple appeals to this role of the state and, moreover, warns some states that excessive lowering of labour standards could actually do harm to their international competitiveness.

Yet, the point is that it has become more and more difficult for the state to perform as the 'ideal personification of the total national capital'. The state, formerly standing somewhat above the individual capital stocks of competitors on the national market, has itself been increasingly shifted into the position of a competitor, one which competes with other states for capital investment. Against this background, the state is scarcely able to force measures on capital, but, instead, has to attract it by providing favourable conditions. The envisaged role of the state as a guarantor for the overall productivity is, in other words, that of a guarantor for the coherence of the institutional endowment, a role which becomes more and more difficult for the state to play. Advice to the intelligence of economic policy-makers, not to cross the red line as regards the labour standards set by the overall institutional endowment, will, in the end, simply die away. This is not because of the intellectual shortcomings of policy-makers, trade union leaders or individual workers, but due to structural reasons. They will not listen, because they cannot follow. Nevertheless, it remains true that this situation does cause a lot of economic harm and will continue to do so in the future. But it seems as if states often have no realistic alternative. In the upshot, this reading of Hepple's position about the fate of national labour standards in an integrated market presupposes a functioning of the state which has become enormously precarious – precisely because of the functioning of the integrated market. This was where our problem started.

A modest alternative: accommodating conflicts of labour constitutions

The functioning of the alternative

It is full harmonization, a unified European labour constitution, which represents the clear-cut political alternative. By drawing an analogy with the famous

imperative of national labour movements to 'take wages out of competition', it could be put forward that, in Europe, it is labour constitutions as a whole which have to be taken out of competition, and that this could be achieved only by means of establishing one single labour constitution and applying it to all labour relations in Europe. Thus, the alternative is a European labour constitution which needs to be understood as a re-building of a state's labour constitution. However, it is also true that the vision of a European labour constitution which produces unified substantive standards is not a promising vision, either. The socio-economic differences simply do not allow all economies to submit to the same standards, not to mention the embeddedness of national labour law in the more comprehensive national regimes, in which a European blueprint would not fit.

Is there, then, a third way between a fully-fledged state-like European labour law on the one hand, and a quietist approach supporting the status quo on the other? It was stated above that the autonomy of national labour constitutions has been considerably reduced due to the single market. The following will therefore start with the assumption that Europe's labour constitution should not simply reflect the competitive framework for labour in Europe as it currently does, but should serve to re-increase the autonomy of national labour constitutions *despite* the persistence of integrated markets. In other words, a European labour constitution should support the autonomy of national labour constitutions against the pressures of the European single market.[56]

If the option of substantive standards regulated at the European level is ruled out, we cannot evade the consequence of acknowledging that competition is the basic form of the relationship between labour constitutions. However, it is also true that competition can be put into action in very different shapes. Competition is not a phenomenon which comes naturally, but a result of social and legal institutionalization, and the act of determining the ways in which competition is institutionalized is a political question, not a question of empirical or theoretical knowledge (although such knowledge will usually help). Against this background, it is assumed that the idea of a European labour constitution which is, on the one hand, not a single unified labour constitution, nor, on the other, a fragmented constitution which merely reflects the competitive framework in order to maintain undistorted markets, appears worth developing further.

Our above stated assumption on the function of European labour law can now be taken as the guiding principle for the regulation of the competition of labour constitutions: A European institutionalization of the competition of labour constitutions should balance the loss of autonomy which the functioning of the market has caused. In other words, a European institutionalization of the competition of labour constitutions should be guided by the idea of upholding and supporting the functioning of the national labour constitutions in respect of their being institutionalizations of the relationship of autonomous powers of societal actors. It is suggested that this form of regulation of labour relations in Europe could be grasped as a meta-constitution, or as a 'constitutional integration' of the competitive interaction of national labour constitutions.

Cornerstones of a constitutional integration of labour constitutions

In order to transcend from principle and form to substance, I would like to outline, in this last part, a few cornerstones of the envisaged constitutional integration of the labour constitutions of Europe. The account draws from existing European labour legislation, from rulings of the European Court of Justice, and from innovative opinions in scholarship. Each cornerstone, i.e. a type of regulation, will be briefly described and presented in its accommodating functioning with regard to the competition of labour constitutions. However, the account will be very brief and sketchy, and, as a consequence, will be open to many corrections and refining criticisms.[57]

The first question to be addressed is the standing of national labour regulation in relation to the fundamental norms of the Single Market. The tension between European primary law, namely the four freedoms and European competition law on the one hand, and national labour regulation on the other, is well known. The deregulatory pressure of the former on the latter, due to the principle of supremacy, has often been deplored. Each and every domestic labour norm has the potential of representing an impediment to the exercise of market freedoms on the part of employers, and collective bargaining can violate European competition law. To avoid any deregulatory pressure, labour law scholars have urged that labour regulation be taken out of the application of market freedoms and that collective bargaining should be taken out of the scope of competition law. But this would appear to be a step too far. Market freedoms do not just represent the interests of foreign corporations, and competition law does not just represent the interests of corporate competitors or an overall interest in efficiency. The conflict of market freedoms and competition law with national labour regulation must also be interpreted as a kind of mediation of the competition of labour constitutions. The capacity of foreign corporations to compete with products and services on domestic markets also represents a result of the functioning of a labour constitution, and it comes into conflict with the domestic labour constitution via the four freedoms and via competition law. Taking labour regulation out of the application of market freedoms or out of competition law would resolve a conflict of labour constitutions unfairly by granting full advantage to only one of them.

This is why the line established by the European Court of Justice deserves approval in the light of our reasoning. It says, in the case of the market freedoms, that labour law might account for an impediment of a market freedom, but that it is valid if it stands the tests of *Keck* and of *Cassis de Dijon*.[58] These tests establish accommodations of the conflicting labour constitutions mediated by the legal conflict between individual market freedoms and national labour regulation. With regard to the *Cassis* test, the Court ruled that even the extension of mandatory national wage scales to foreign workers is upheld.[59] Sure enough, the Court did not apply the conceptual idea of competing labour constitutions, not even for one side of the conflict, the national labour regulation of the host country. It did not put it in terms of the protection of the autonomy of a labour

constitution, but instead chose to approach the case only in terms of social protection of workers. This led to the effect that, according to the Court, the level of protection of a foreign worker has to be compared with his level of protection at home. On the basis of reinterpreting the case in terms of conflicting labour constitutions, this seems questionable. The common good to be invoked would not be the social protection of workers but support for the domestic labour constitution against harmful competitive pressure; but even then a comparison of social standards misses the point. Moreover, for the institutions of a labour constitution which go beyond mere social protection – for example, the German model of co-determination – the Court's conceptual choice is inadequate. Thus, the reference point of justification must not be understood in terms of the protection of workers, but in terms of adequate support for the domestic labour constitution. In conclusion, the Court's jurisprudence on the Fundamental Freedoms aims to provide a restrained form of autonomy for national labour regulation; European law will, to a certain extent, which is defined by the *Keck* test and a refined *Cassis de Dijon* test, allow national labour constitutions to be supported by means of domestic regulation. This is suggested as the first cornerstone.

The autonomy of labour constitutions is under pressure as a result of the European market. As previously suggested, legislators as well as trade unions and – a fortiori – individual workers, are hardly able to oppose this pressure in order to pursue long-term economic interest. It has become quite difficult to enact this kind of regulation, despite the fact that it remains admissible under the cited jurisprudence of the Court. National labour constitutions are therefore in need not only of room for domestic legislation, but also of substantive support provided by the European level. The following three cornerstones are of this kind.

For the second, I draw on Simon Deakin.[60] He is the most prominent scholar who demands a 'floor' of workers' rights which is to be established at the European level. Up until now, existing European labour legislation has, in turn, only provided for minimum standards in an incremental way, for example, in the areas of delocalization, mass lay-offs and insolvency, as well as in the field of working time, temporary and part-time work. In all these cases, the directives state a minimum level of substantive or procedural rights which Member States have to confer to their workers, although they may go further. Deakin has argued for a comprehensive set of such standards, which cover all dimensions of labour relations. In his opinion, such a 'floor of rights' would, on the one hand, represent a strategy for economic growth. Mandatory labour standards, which maintain human labour at a more expensive level than others, force employers to invest in the productivity of labour, and hence to invest in innovation. On the other hand, Deakin also regards a 'floor of rights' as necessary for simple social reasons, namely, to put an end to the competitive lowering of labour standards. To put the functioning of a 'floor of rights' into our vocabulary, supranational minimum standards force the labour constitutions to comply to a bottom line if their own labour system is no longer able to provide a stable one on its own. The bottom line in one state also serves to protect the functioning of labour constitu-

tions in other Member States. The European Directive on Working Time[61] provides a good example. If a Member State's labour constitution does not provide for the restriction of working hours to a rational level, the European level must impose substantive standards. This is not only important for a state in which excessive working hours prevail, as in the UK, but also for other states with different labour constitutions which are not yet aligned to excessive working hours.[62] However, it must be clear that minimum labour standards as such will not put an end to the competitive lowering of labour standards. What minimum labour standards do, first and foremost, is to establish the bottom line for an ongoing race, a line which is, indeed, above the natural limits of human exploitation. As just stated, a bottom line can, over and above this, lower pressure on other standards that are still on a higher level than those set as bottom line. This does not, however, end the 'race to the bottom', it merely slows it down. Nevertheless, this idea of a 'floor of rights' would mitigate the competitive conflict of labour constitutions, and would therefore fit well into the picture of a constitutional integration of labour constitutions.

Third, the shortcomings of the concept of a 'floor of rights' show that there is an urgent need for the European obligations for the Member States to apply relative minimum standards.[63] This tool has hardly been used, yet. But it has been employed in the Rome Convention on the applicable law on contractual obligations. Although it is no proper European legislation, it was concluded by the Member States as kind of a side agreement in 1980. The Rome Convention states in Article 6 that an employee in a transnational labour relationship will always enjoy the legislative labour standards which are guaranteed in the state where his or her place of work is. This is so, even if the contracting parties may have opted to submit the contract to a different legal order with lower standards. The only originally European example of the suggested type of rule is the Directive on Posted Workers.[64] It says that Member States are not only allowed, but are also obliged, to extend their own labour standards applying to the lowest qualified worker to posted workers. This instrument of setting relative standards may have potential for further elaboration. My additional hypothesis is that European social rights[65] – with binding force for Member States, which were not provided for even in the Constitutional Treaty[66] – may have a role to play, as social rights *can*, in this context, function as general principles which need to be contextualized according to the different socio-economic conditions.[67]

Fourth, an area must be acknowledged where the idea of mere accommodation of labour constitutions comes to an end. This is the area of transnational labour relations, as in the case of a European group in which the headquarters of the group takes decisions to be implemented by the employing corporation. It is true that the individual labour contract will, even in this context, still be located in a particular national labour constitution. But the collective labour relations have got a transnational dimension in this context. To adapt to this dimension, transnational norms to generate transnational collective agreements are required, and workers must be enabled to use own autonomous negotiation powers. There have been preliminary and careful attempts in the field of the information and

hearing of workers. But the conferred power is low, and it is far from covering the decisive sphere of labour standards, i.e. wages.

Taking these cornerstones as a whole, the conferral of autonomy for national labour legislation, the adoption of a 'floor of rights', the obligation to create relative standards based on guiding social rights, and the regulation for transnational collective labour relations, can be understood as a model in which conflicts of labour constitutions can be accommodated. But the implementation of such a model requires that a fully-fledged labour constitution will be established at the European level, with both individual and collective rights, the full range of legislative competence, and, then, effective guiding principles. True, the envisaged functioning of the constitutional integration may not be securable at the constitutional level. This might be left for the political process. The aim of the section was to show that, and in what manner, such a functioning is, indeed, conceivable.

Conclusion

The failure of the Constitutional Treaty in France has echoed the long-standing claim for 'Social Europe'. This claim for 'Social Europe' is supported by the sections of the European peoples which form the decisive portion of the potentially pro-integrationist majorities. It does not help us to ignore this fact by reinterpreting the French vote as an expression of domestic political conflict or regressive nationalism. Hence, there is no alternative, even for an unambitious '*Nice plus*' strategy, to enhance the social dimension of the EU. But the trouble has, for a long time, been that hardly anyone has ever been able to present a convincing model for 'Social Europe'. Many praise the 'European Social Model', but far fewer have ideas about what measures could really help to conserve it against the forces of integrated European and global markets.[68] Speaking about the field of labour relations and labour law, models of defending national autonomy, a European 'floor of rights', the adoption of European social rights and the institutionalization of transnational labour relations have been put forward, independently from each other, and from different actors. The idea which has been presented here, which declares support for the autonomy of the functioning of national labour constitutions as a first priority, demonstrates how these models can be understood not as mutually exclusive alternatives, but how they can be bundled as complementary parts of a constitutional integration of national labour constitutions in Europe.

Notes

1 H. Sinzheimer, 'Das Wesen des Arbeitsrechts', in H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie*, vol. 1, Frankfurt aM: Europäische Verlagsanstalt, 1976, p. 110, author's translation.

2 Likewise, R. Richardi, *Arbeitsrecht als Teil freiheitlicher Ordnung: Von der Zwangsordnung im Arbeitsleben zur Arbeitsverfassung der Bundesrepublik Deutschland*, Baden-Baden: Nomos, 2002.

3 C. Möllers, 'Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung', in A. v. Bogdandy (ed.), *Europäisches Verfassungsrecht*, Berlin *et al.*: Springer, 2003, pp. 3ff.
4 H. Ridder, *Zur verfassungsrechtlichen Stellung der Gewerkschaften im Sozialstaat nach dem Grundgesetz der Bundesrepublik Deutschland*, Stuttgart: Gustav Fischer Verlag, 1960, pp. 12ff.
5 To my knowledge, the conceptual idea, though not the term, of 'gesellschaftliche Gesamtverfassung' was coined once by H. Heller, H. Ridder put it to the centre of his constitutional theory, *Die Soziale Ordnung des Grundgesetzes. Leitfaden zu den Grundrechten einer demokratischen Verfassung*, Opladen: Westdeutscher Verlag, 1975, with an explicit reference to Heller on p. 40, note 34.
6 Compare a similar wording of T. Mayer-Maly's, entry 'Arbeitsverfassung', in *Katholisches Soziallexikon*, 2nd edition, Innsbruck: Tryolia and Graz: Styria, 1980, pp. 126ff.; 'a representation of fundamental decisions about the correlation of societal powers' – my translation.
7 Articles 14 and 15 of the German *Grundgesetz* (GG).
8 Article 12, paras. 2 and 3 GG.
9 Article 12, para. 1 GG.
10 Article 2, para. 1 GG.
11 Article 3, GG.
12 Article 11, para. 1 GG.
13 Article 9, para. 3 GG.
14 O. E. Kempen, 'Das grundrechtliche Fundament der Betriebsverfassung', *Arbeit und Recht*, 1986, vol. 33, pp. 129ff.
15 Article 20, para. 1 GG.
16 Article 74, no. 12 GG.
17 Article 95, para. 1 GG.
18 Article 1, para. 1 GG.
19 Article 117, EEC.
20 'International Labour Organisation, Social Aspects of European Economic Co-operation', report by a group of experts (summary), *International Labour Review*, 1974, vol. 74.
21 B. Ohlin, *Interregional and International Trade*, Cambridge, MA: Harvard University Press, 1967 (revised ed.; first ed. published in 1933).
22 D. Ricardo, *Über die Grundsätze der Politischen Ökonomie und der Besteuerung* (English translation: On the Principles of Political Economy and Taxation), Berlin: Akademie-Verlag, 1959, pp. 114–138.
23 Ibid., pp. 121ff.
24 Ohlin, above note 21, pp. 7ff.
25 Above note 20, pp. 103–110.
26 Compare only the original wording of Articles 49 and 119 EEC.
27 Article 39, TEC.
28 Article 141 and 12, TEC.
29 Article 6, para. 2 TEU.
30 Article 137, para. 5 TEC.
31 Ibid., para. 1.
32 Ibid., para. 2, sub-para. 1.
33 Article 27, CFR.
34 Article 28, CFR.
35 See Directive 1994/45/EG of 22 September 1994.
36 See Directive 2002/14/EC of 11 March 2002.
37 *Societas Europea*, and *European Cooperative Society*, see: http://europa.eu/scadplus/leg/en/lvb/l26018.htm for the statutes of the latter.
38 See, for example, Directive 2001/86/EG of 8 October 2001, supplementing the

Statute for a European company with regard to an involvement of employees, Article 7.

39 Article 137, para. 5 TEC.

40 The explanations of the Charter-Convention's Presidium express the limited significance clearly: 'Collective action, including strike action, comes under national laws and practices, including the question of whether it may be carried out in parallel in several Member States', explanation to Article 28: Right of Collective Bargaining and Action; CONVENT 49 as of 11 October 2000.

41 Article 139, sec. 1 TEC.

42 Article 138, f TEC.

43 B. Hepple, *Labour Laws and Global Trade*, Oxford and Portland OR: Hart Publishing, 2005.

44 For the following, see ibid., pp. 251–256 and 266–271.

45 Hepple does call for minimum standards as well, but this call refers to the minimalist core standards of the International Labour constitution (ILO), ibid., p. 273. Moreover, he advocates certain kinds of regional co-operation as has been provided by the Open Method of Co-ordination (OMC), ibid., pp. 271ff. The latter is beyond our interest here, as the OMC is meant to have no legal but only political impact on the Member States' labour constitutions.

46 P. Hall and D. Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford: Oxford University Press, 2001.

47 It remains all but clear from their account whether they talk about relative prices – the relevant concept in the 'Pure Theory of Trades' – or about absolute prices. We will come back to this below.

48 Hall and Soskice claim to establish a new and path-breaking conception of 'comparative advantages', compare the preface in above note 46, pp. vff. This is – in this reading (for a second reading, see below) – exaggerated. The truth is that they have, at most, sophisticated the account of what may cause differences in relative productivity for certain products.

49 M. Heine and H. Herr, *Volkswirtschaftslehre: Paradigmenorientierte Einführung in die Mikro- und Makroökonomie*, Munich and Vienna: R. Oldenbourg Verlag, 2003, 3rd ed., pp. 615ff.

50 Above note 20; for the first precondition p. 104, the second p. 112, the third p. 118 and the dissenting opinion of a group member p. 121.

51 Hepple mentions the problem of the mobility of capital in a very different angle in his book, where he seems, himself, to be critical about the promises of the 'Pure Theory of Trade'. But I cannot see what would make his criticism, on the one hand, and his own application of the theory and the concept of 'comparative advantage', on the other, coherent.

52 Above note 46, p. 36.

53 Compare the references in above note 46, p. 38.

54 F. Engels, 'Herrn Eugen Dührings Umwälzung der Wissenschaft' ('Anti-Dühring'), in K. Marx and F. Engels, *Ausgewählte Werke in sechs Bänden*, vol. 5, Berlin: Dietz Verlag, 1989, p. 305.

55 The thought has been put in an impressive wording by K. Marx: 'What could possibly show better the character of the capitalist mode of production, than the necessity that exists for forcing upon it, by Acts of Parliament, the simplest appliances for maintaining cleanliness and health?', K. Marx, 'Capital', vol. I, in K. Marx and F. Engels, *Collected Works* vol. 35, Moscow: Progress Publishers, 1887, p. 486.

56 Accommodating national autonomies is an essential of C. Joerges' conception of European Law which draws from the legal discipline of conflict of laws (C. Joerges, *Rethinking European Law's Supremacy*, EUI LAW Working Papers 2005/12, 2005).

57 For a further elaboration see my 'Labour Constitution' in A.v. Bogdandy and J. Bast

(eds), *Principles of European Constitutional Law*, 2nd edition, Oxford: Hart Publishing, forthcoming 2008.

58 The corresponding judgments in the area of labour law concerned national restriction on working time. Bans on Sunday trade was first seen as standing the test of *Cassis de Dijon* in Torfaen (ECJ, 23.11.1989 – C 145/88, ECJR 1989, 2852), later, in *Semeraro Casa* (ECJ, 20.6.1996 – C 418/93, ECJR 1996, I-2975), as falling beyond the scope of the free movement of goods in line with *Keck*.

59 ECJ 25.10.2001 – C-49/98 (Final Article), ECJR 2001, I-7831.

60 S. Deakin, 'Labour Law as Market Regulation: The Economic Foundations of European Social Policy', in P. Davies *et al.* (eds), *Liber Amicorum Lord Wedderburn*, Oxford: Clarendon Express, 1996.

61 Directive 2003/88/EG of the European Parliament and of the Council concerning certain aspects of the organization of working time as of 4 November 2003.

62 Needless to say that the Directive's clause allowing individual opt-out (Article 22, para 1) undermines the functioning just praised in the text.

63 This type of European legislation has been envisaged for the social area by F. W. Scharpf, *Regieren in Europa: Effektiv und Demokratisch?*, Frankfurt aM: Campus Verlag, 1999, chapter 5.3.2, pp. 155ff.

64 Directive 1996/71/EG of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services as of 16 December 1996.

65 For a strong pleading, see M. Weiss, 'Fundamental Social Rights for the European Union', in R. Blainpain (ed.), *Labour Law and Industrial Relations in the European Union*, The Hague: Kluwer Law International, 1998.

66 See Article II-111, para. 1 of the Constitutional Treaty for Europe, *Official Journal* C 310, 16 December 2004.

67 A. Supiot, 'Le Devenir des Normes Internationales du Travail', 2003, on file with author.

68 J. Monks, General Secretary of the European Trade Union Confederation (ETUC), writes: 'Even if they [the people, F. R.] have trouble defining what the European Social Model should be, they know very well what it shouldn't be' (comment at: www.EU-observer.com as of 18 May 2006), and it must be assumed that this is not only true for the people, but also for the ETUC and J. Monks himself.

Part III

Identity and collective memories

9 Working through 'bitter experiences' towards a purified European identity?

A critique of the disregard for history in European constitutional theory and practice

Christian Joerges

Introduction: two interdependent theses

My contribution oscillates between two poles or aspirations. The first is to present reflections on the constitutionalization process which comprises both Europe's accomplishments and its performance in the light of a specific theoretical perspective, namely, the deliberative strand of theories of democracy. However, my objective in this respect is not to enrich this theoretical debate. Instead, I will focus on the transformation of theoretical deliberation into *legal* concepts and suggest that conflict of laws would provide the proper legal form for the constitutionalization of Europe.

The second pole is complementary. Its main message is stated in the title; European constitutionalism and the Convention both failed to pay proper regard to the weight of history when embarking on the adventure of writing a European Constitution. Neither the weight nor the differences of European historical experiences and memories have been taken into account. These experiences, especially in the twentieth century, were 'bitter', if not traumatic – albeit in different ways and to different degrees. In the case of Germany, the most appropriate term to capture its specific situation may be found in Bernhard Schlink's term '*Vergangenheitsschuld*'.[1] This notion is a construction with two components, which, through their conflation, exhibit a specific tension. The importance of the first element of the term – *Vergangenheit* or the past – is simply obvious. Ideas about European unity are old. But the integration process that we are experiencing and studying was initiated after, and under the impression of, the Second World War. The remnants of this past have been engraved in the design of Europe, and thus remain 'somehow' present in the EU, even after, or especially because of, its enlargement. To put it even more strongly, we cannot understand what is happening in the EU, nor what we are doing and what we are achieving or failing to achieve unless we bring to mind the meaning of institutional changes, legal commitments, and political processes and aspirations

within historical perspectives. It seems equally obvious, for a German at least, to qualify this past with the second component of Schlink's term, i.e. first and foremost, with German guilt and the 'bitter experiences' related to it.[2] The conflation of the two components in Schlink's term produces a tension which the term '*Gedächtnispolitik*', the politics of memory, captures quite well.

My thesis that important links exist between the two poles of this chapter – European constitutionalism and European historical experiences – is not just a reflection upon Europe's bellicose past and the Holocaust. Historical conflicts both between European nation states and within European societies are present in all important areas affected by the integration. This chapter will briefly address two of them, namely, the debate on Europe's 'social model' and European citizenship. Again, the message will be a critical one; European constitutionalism has not taken into account the weight of historical experiences in Europe's presence and the weight of memory politics in contested political issues.

All of these references to history and the insistence that European constitutionalism should regain a historical consciousness should not be read as a purely negative critique. This critique also has a positive side. It may be best submitted as a bold and daring thesis: Europe should, by working through its past(s), renew and deepen its *acquis historique*; it may, in such processes, not only obtain a better understanding of topical and contested issues of 'the integration project', but also renew the legitimacy and even the dignity of the integration project as such.

How do history and law interact?

Are such expectations simply naïve? The presence of the past is a 'normative fact' in contemporary discussions on the *finalité* of the integration project. One can even argue that the readiness to address the darker sides of the past has grown dramatically. Suffice it here to point to the Habermas/Derrida manifesto published in the *Frankfurter Allgemeine Zeitung* 31 May 2003:

> Contemporary Europe has been shaped by the experiences of the totalitarian regimes of the twentieth century and through the Holocaust – the persecution and annihilation of European Jews, in which the Nazi regime made the societies of the conquered countries complicit as well […] A bellicose past once entangled all European nations in bloody conflicts. They drew a conclusion from that military and spiritual mobilization against one another: the imperative of developing new, supranational forms of co-operation after the Second World War.[3]

These statements will not provoke much opposition. But the constellations to which they refer have not had much impact on my profession. This may seem surprising, it may be uncomfortable and difficult to explain, but it is a fact.[4] There is little explicit reflection by lawyers and legal historians on the shadows

of the past in institutionalized Europe, not even in contemporary legal history.[5] This is not to say that legal historians are not ready to confront the law's 'darker legacy'. They may be accused of having avoided this topic for too long. But this avoidance has been over for some decades now, especially in Germany. It would, of course, be absurd to accuse them of ignoring European history altogether. Quite to the contrary, Thorsten Keiser recently observed that Europe has attracted much attention since Maastricht, and has, with the Convention process, become 'one of the most important reference points of legal historical research'.[6] The primary effort of pertinent studies in the field of private law is, however, to reveal a common cultural heritage which, in the past, is said to have formed the basis of an *ius commune europaeum*, which can now be revitalized in the search for legal unity. The equivalent in public law has been revealed by Felix Hanschmann.[7] Leading exponents of German constitutional thought such as Josef Isensee[8] and Paul Kirchhof[9] invoke a cultural communality of historical experience, which is now to become the bearer of a common polity on the basis of which a united Europe can be, and indeed should be, constituted.

These latter positions contrast drastically with the theoretical assumptions which prevail in general historical research.[10] Not surprisingly, it is much richer and more differentiated. Historians began early[11] and continue to explore the integration process, including its institutionalization, in all its details. The intensity of the historical research into the Second World War, the Third Reich and the Holocaust is simply breathtaking. In addition, historical investigations which interpret the history of the integration process in the light or shadow of European crises and failures are both available and meet with considerable interest.[12] And yet, concerns that are, indeed, very similar to my own personal uneasiness with contemporary legal history are being articulated.[13] Historians have not taken sufficient note of the diversity in Europe's historical memories, complains Konrad H. Jarausch.[14] Not being a historian, I cite once more:

> Europe did possess a vague sense of cultural commonality before 1914, but that did almost disappear during the two world wars. The dominant languages such as Latin, French, and later English, and in a regional sense also German, provided a communication medium for the educated élites. The social origin and intermarriage of the aristocracy or commercial bourgeoisie was another bond. The intensity of economic exchanges created a sense of togetherness. During imperialism, the issue of race also played a role by defining 'European' simply as 'white'.… The rise of nationalism, the fierce hostility of World War I, the destruction of the Central and East European Empires in the suburban Paris treaties of 1919, the breakdown of trade, the repetition of the War in 1939, etc., practically destroyed this sense of cohesion […] After World War II, some residual feeling of cultural affinity grew from below and was promoted by specific sectors of the European population. The common suffering of war and oppression by the Nazis animated members of the resistance movements; the shared project of restoring cultural monuments and reviving high culture called for a degree of

> co-operation; moreover, the eclipse of European power led to a joint defensiveness against popularising cultural influences from America or ideological subversion from the Soviet Union. But, in spite of similar social patterns…, the nation-states were not so damaged that they did not make a come-back and culture remained organized on a national level […] Powerful factors have continued to limit the emergence of a European cultural identity.[15]

How to cope with cultural diversity and divergent historical memories: this seems to be the challenge that Europe is facing. Is it necessary to underline the importance of this point after enlargement? Not only did the accession countries from Central and Eastern Europe have their own national pasts, they also had other reasons for wishing to join the founding nations; last but not least, they were not involved in the writing of institutionalized Europe's '*acquis historique*'.[16]

Historians will respond to these challenges. We can even assume that, sooner or later, legal historians will listen and talk to their neighbouring discipline. At present, however, it is impossible to anticipate such developments. But it is all the more important to reflect, at the very least, on the methodological difficulties of an integration of Europe's pasts into our understanding of institutionalized Europe and European law. None other than Reinhard Koselleck dealt with this relationship between 'History, Law and Justice' some 20 years ago when addressing the German Legal Historians, albeit at a very general level.[17] Historians, Koselleck argues, have traditionally acted quite openly like judges in their accounts of history. Although they have become conscious of this role and sought to define their accounts more cautiously and subtly, they cannot avoid talking, explicitly or implicitly, about the justice or injustice of situations, changes or catastrophes.[18] There is a link between history, legal history, and law. However, there is also a fundamental difference in the approaches of historians and legal historians. Inherent in the category of law is the telos of repeated application, which requires respect for formalism (Koselleck: 'the maximum of formalism') because the law has to ensure that its principles, procedures and rules transcend the individual case. In their analyses of the preparation and adoption of legislative acts, the approaches of lawyers and historians will be very similar. However, when it comes to the study of the development of the enactment, the legal historian has to respect the law's *proprium*.[19]

This is all quite abstract, but it is nevertheless helpful, because it makes us aware of what is bound to happen once political processes end with a juridical act. It is not just that lawyers, as they did with the Draft Constitutional Treaty (DCT)[20] in so many books, start to apply their methods of interpretation to the text that they have received. They will also project their understanding of the meaning of the political sphere into their interpretations, and will bring their visions of the social functions of law, and of its normative aspirations to bear. The case of the European Economic Community (EEC) is particularly illustrative here. What, 'legally speaking', was new and promising in the ECC Treaty?

What kind of commitments had the signatories accepted? What kind of post-national legitimacy could the new entity claim? How could the rule of law in the European Community be strengthened? In his account of the European Community's *raison d'être*, Joseph Weiler has famously and convincingly underlined three rationales; Europe was about ensuring peace, promoting prosperity, and overcoming discrimination on grounds of nationality.[21] These are all lessons that Europeans had learned from their pasts. The importance of both their 'juridification' in the Treaty and their subsequent implementation cannot be overestimated. And yet, they are by no means sufficiently substantiated to document some comprehensive 'unity' or to exclude fundamental disagreements about the ends of the Community, about its legitimacy and its *finalité*. A comprehensive legal history informing us about the different national ways to write European law is still to be written. It is in Germany alone that we can identify at least three schools of thought, each of which promotes its own distinct vision in democratic positivism, functionalism and ordo-liberalism.[22] This diversity would certainly become much richer with the inclusion of more legal traditions. And such an exercise could inform us about both the law's and the Union's capacity to live with pluralism and diversity.

Unitas in pluralitate

If legal scholarship has invested so little, what can we expect from Intergovernmental Conferences and even from the Convention on the Future of Europe? I am not aware of any analysis of the use of history and memory politics in the Convention process.[23] Just one text-element refers explicitly to the past, namely, the preamble.[24] This was in the original version of the Convention, a quite euphemistic document. But, at the very end of the whole process, in June 2004, the Intergovernmental Conference, following a Polish initiative, changed the preamble quite considerably. The first two, somewhat ostentatious, passages were dropped, and the reference to 're-united Europe' was replaced by a 'Europe, re-united after bitter experiences'.

Constitutionalization

One could have imagined a more substantiated reference. The 'bitter experiences' are simply copied from the preamble of the Polish constitution.[25] Poland, indeed, had particularly bitter experiences, and this notion will have very clear connotations. But what does it mean in the community of 27 Member States? More importantly, perhaps, and certainly more bitterly, the formula can be read to comprise the suffering of European nations. It may even comprise German suffering. But why is there no mention of 'the persecution and extermination of the European Jews, in which the Nazi regime also involved the societies of the countries they had conquered'?[26] There is neither an official interpretation available, nor can one detect traces of discussions, let alone controversies, of Europe's 'bitter experiences'. This seems to be shaming enough. The intergovernmental silence

may even be telling in a specifically political way. The revised preamble seems to document self-pity, instead of shame and guilt. It continues to do what Tony Judt analyses so intriguingly and movingly in the 'Epilogue' of his *'Postwar'* as a pan-European style of *Vergangenheitsverdrängung* (repression of the past).[27] It does what the Germans have done for decades after the Second World War, namely, to remain silent about their former citizens.[28] It does what the Western Europeans have done, namely, to remember their liberation from the occupier but to forget about their own involvement; and it does not liberate Eastern Europeans from the perverse interpretation of exterminative racism as a machination of capitalism. What a self-deception! We must not infer from the absence of the darkest side of our past in the official constitutional agenda that we have escaped from its shadows.

The real challenge, we concluded in our introductory observations, is the challenge of European diversity. How to accomplish 'unity in diversity' (*unitas in pluralitate*), the motto of the Union according to Article IV-1 of the DCT? As jurists, we have to ask how the Union's motto might be transformed into law? The answer submitted in the next section is this: through an understanding of European law as a new species of conflict of laws. This suggestion, it is submitted, is not only an appropriate response to the diversity of European pasts, it is also, as we will argue, the one most compatible with the state of the European Union (EU).

'Deliberative' supranationalism

A decade ago, Jürgen Neyer and I submitted a response which we coined 'deliberative' (as opposed to traditional or doctrinal) supranationalism – and we continue to defend and elaborate this concept.[29] In a nutshell, we did not suggest that deliberation in transparent or opaque transnational bodies would constitute democratic transnational or European governance. Instead, we started 'from below', with the simple observation that no Member State of the EU can take decisions without causing 'extra-territorial' effects on its neighbours.[30] Provocatively put, perhaps, but brought to its logical conclusion, this, in effect, means that nationally organized constitutional states are becoming increasingly incapable of acting democratically. They cannot include all those who will be affected by their decisions in the electoral processes, and, vice versa, citizens cannot influence the behaviour of the political actors who are taking decisions on their behalf. This is why the law of constitutional democracies has to be complemented by a transnational law compensating democracy failure of nation states. 'Deliberative' supranationalism, we argued, needs to identify principles and rules that serve precisely this end. It is a concept well-anchored in real existing European law in doctrines such as the following: the Member States of the Union may not enforce their interests and/or their laws unboundedly; they are bound to respect European freedoms; they may not discriminate; they may only pursue 'legitimate' regulatory policies approved by the Community; they must co-ordinate in relation to the regulatory concerns that they may follow, and they

must design their national regulatory provisions in the most Community-friendly way.

Conflict of laws as constitutional form

The primary function of these types of norms is co-ordinative. Deliberative supranationalism promotes a 'proceduralization' of the category of law in the sense that Jürgen Habermas and others have defined this legal paradigm.[31] To put it slightly differently, deliberative supranationalism pleads for a proceduralized understanding of European law, as a 'law of law production'.[32] In order to illuminate its specific status, European law may be characterized as a new species of conflict of laws.[33] Conflict of laws seeks to identify the appropriate legal responses in multi-jurisdictional constellations. It is an old discipline which, even and in particular in its so-called modern (post-1848) development, shares all the weaknesses of methodological nationalism. Its methodology, however, is rich and adaptable to 'vertical' conflicts between different levels of governance, as well as to the 'diagonal' conflicts which result from the assigning of different competences to different levels of government in constellations which require the co-ordination or subordination of such partial competences.[34] It is, furthermore, an approach to the resolution of complex conflict constellations which is by no means appropriate only within international settings, but is likewise appropriate within national legal systems. It is an approach which reflects the continuous need for law production, and seeks to ensure the law's legitimacy through proceduralization. It is precisely this need which is constitutive for the EU. To rephrase our initial thesis, the constitutionalization of Europe should not seek to replace national constitutional law. Instead, it should be prepared to work continuously on Europe's '*unitas in pluralitate*'. This process can be characterized as a constitutional conflict of laws paradigm.

It cannot be the objective of this chapter to elaborate this version of supranationalism much further. Suffice it to restate that deliberative supranationalism continues to do what conflict of laws has done during its long history, namely to identify the rules and principles which frame multi-jurisdictional constellations. In the EU, it does this with much more strength and with orientations which form the fundamental achievements of the *acquis communautaire*: the Member States have, in principle, to recognize their laws mutually; however, they remain autonomous where domains and orientations which they regard as essential are concerned. The guarantee of this type of autonomy can be understood as an institutionalization of tolerance in the trans-legal sense of this notion.[35] All this is not to say that the arguments, critiques and scepticism towards this vision of supranationalism do not deserve to be considered. What I understand to be the strength of the argument, namely, its perception of democracy failure of constitutional states, also points to a practical weakness of the EU which the theory of deliberative supranationalism cannot cure.

Two illustrations

Does all this have anything to do with Europe's *praxis*? Are all these matters merely for a preamble, and not for the actual contents of constitutional law? How compatible or dysfunctional are they when brought to bear in the mundane world of European affairs? My thesis is, of course, that Europe's pasts are present *in our daily business* and not just in debates about memorials for the European Jewry and/or the Roma and the Sinti, about surrender and/or liberation days, about resistance and/or collaboration, about genocide trials and the remuneration of forced labour, or about the true nationality of Albert Einstein. In order to substantiate my assertion, I could now go into a huge spectrum of topics – only to get lost there. This would be carrying coals to Newcastle, but, at the same time, it is too abstract simply to insist that there are varieties of capitalism in Europe, that Scandinavian welfarism has always been distinct, that the history of antitrust in post-war Germany differs from that of Italy, that the French *planification* and *services publiques* are not identical with Germany's *Ordoliberalismus* and its *Daseinsvorsorge*. My argument is much more specific; it concerns the 'bitter experiences' to which European societies have responded individually, in concert, or collectively, and my hope is that it would be beneficial for Europe to work through its pasts. Two of the topics addressed explicitly and implicitly in this volume seem particularly appropriate for exemplary discussions, namely, 'Social Europe' and 'European Identity and European Citizenship'. I therefore can be very brief. Other topics would be equally important. One is enlargement. But this seems too huge to be dealt with en passent.[36]

Social Europe and the disregard for history in the convention process

I will not try to summarize the vast topical debates on 'Social Europe' here. Instead, I will address a neglected dimension of this debate, namely, the ambivalent legacy of 'the social' – the efforts to find a stable response to the social conflicts in capitalist societies – as an issue of *constitutional* importance.

Rechtsstaat versus Sozialstaat

The patterns of debate on social justice, democracy and the rule of law are enormously stable. It all starts – in the German memory – with Max Weber's warning that the intrusion of values of social justice into the legal system (the turn to substantive rationality) will threaten the law's formal rationality and the rule of law as such.[37] Or should we understand 'social justice' as an inherent promise of true democracy? Hermann Heller was probably the first to deliver a systematic constitutional theory in which a social model and the rule of law were synthesized, and the *soziale Rechtsstaat* presented as the best, or the only, conceivable democratic response to the tensions between the classes in capitalist societies.[38] Heller's defence of social democracy resonates famously in the commitments of Germany's Basic Law,[39] but was never uncontroversial. Two types

of arguments are particularly important. In the neo-liberal and monetarist view, the quest for a 'social' democracy is economically irrational and risks destroying our freedoms. This second aspect was drastically articulated by von Hayek's characterization of welfarism as a 'road to serfdom'.[40] The authoritarian and populist right never cared about the law's rationality. De-formalization was inevitable, but should – and this was the fascist and national-socialist conclusion in the 1920s and 1930s – be compensated by strong political leadership representing *il movimento* or *das Volk* directly. This is no longer the vocabulary of modern populism. What remains a common credo of populist movements is their anti-modernism, their instrumentalization of anxieties, their appeal to collective cultural or national – but always exclusionary – identities. How far away is our darker past?[41]

Social Europe in the Draft Constitutional Treaty

Hermann Heller's legacy was strong in post-war Germany. And Germany, in its search for a synthesis of a social model and the rule of law, did not choose some *Sonderweg*. The responsibility for ensuring welfare, balancing social inequalities and creating infrastructure for economic development has become a common feature of the European nation states. It is in this abstract sense that we can identify 'a European social model' as one of the four dimensions of 'a multifunction state that combines the Territorial State, the state that assures the Rule of Law, the Democratic State, and the Intervention State'.[42] Given the strength of this tradition, it was predictable that the Convention, even though this was not originally foreseen, would have addressed this precarious dimension of the integration project. The ambition of the Convention to design a document of constitutional dignity left no choice. A refusal to enlarge the agenda would have damaged the political credibility of the whole endeavour. Working Group XI on Social Europe had a belated start, but worked all the more intensively.

This had an impact. Social Europe became a visible dimension of the DCT.[43] It mainly rests on three pillars: the commitment to a 'competitive social market economy';[44] the recognition of 'social rights'[45] to be implemented by the European Court of Justice; and the introduction of 'soft law' techniques for the coordination of social policies.[46] It is, however, once again both remarkable and deplorable that all of these elements were introduced by political fiat and without much reflection on historical experience. Joschka Fischer and Dominique de Villepin, to whom we owe the assignment of constitutional dignity to the concept of the 'social market economy', knew they were giving a political signal. But apparently not much more. Nobody seems to have explained that the '*soziale Marktwirtschaft*' was Germany's post-war historical compromise, supported by the Christian Democrats, the trade unions and both Christian Churches.[47] No one seems to have recalled the ambivalent past of this project. Nobody seemed to know or to care about the reasons which the German Constitutional Court had given for its rejection of the idea of a constitutionalization of the market economy in its seminal *Investitionshilfe* judgment, handed down in

1954.[48] The standard response in the debates on the social dimension of the Convention to the openness and indeterminacy of the formula in the Constitutional Treaty was that all modern constitutions need to resort to programmatic commitments. Germany is then cited again as an exemplary case. The future gestalt of the *soziale Rechtsstaat* was, indeed, by no means clear at the time of the adoption of the Basic Law. However, as indicated, it was quite clear how the '*soziale Marktwirtschaft*' would try to give a specific content to the social commitments of the Basic Law, and it was apparent that this 'Third Way' met with broad political and societal support. The *Bundesverfassungsgericht* found also broad support for the view that the concrete design of Germany's social model should be left to the legislature and was not prescribed by the Basic Law.

Would such awareness have made a difference? It might, at least, have led some of the actors to proceed with more caution and to be more careful with their promises. The same holds true for the two other pillars of 'Social Europe'. What should make us trust in the capability of the ECJ to accomplish social progress through the powers that it has in the interpretation of the new social rights? Based on what kind of evidence could the Convention's Working Group XI 'consider that the Open Method of Co-ordination has proved to be a useful instrument in policy areas where no stronger co-ordination instrument exists' without taking note of the experience which we have had with the de-formalization of social commitments?

Social Europe and the French referendum

It was no longer possible to be more cautious in the presentations of 'Social Europe' after the campaigns in France had got off the ground. It seemed that Pandora's box had been opened.[49]

There is hardly any doubt that the perceived dismantling of the French welfare state through the integration process, the portrayal of Europe as neo-liberal de-regulation machinery, and the anxieties that such portrayals of Europeanization and globalization provoked amongst the French had a substantial impact on their '*non*'. Political commentators and academic observers hold this view; solid opinion polls confirm their point.[50] Hauke Brunkhorst is probably right in pointing out that the heated French debate failed to acknowledge the bright side of granting spheres of autonomy to European citizens and equated the freedoms all too superficially with 'Anglo-Saxon neo-liberalism'.[51] Among the mixed motivations which guided the French, the disappointing insight that Europe could no longer be understood as just a *grande France* may have been as important as Joachim Schild assumes.[52] What I seek to underline – and what the comments cited confirm, at least implicitly – is the presence of France's past which manifests itself in the patterns of the debate. It seems to me unsurprising that the kind of European future that the DCT had so vaguely outlined, and its proponents had so confidently proclaimed, could not cope with this past.

Identity and citizenship

What does it mean to be a citizen in the EU? Other contributors to this volume[53] and other CIDEL publications[54] have explored this issue so thoroughly that I can be very brief. But I would like add a legal aspect rephrasing my suggestion: that a constitutional conflict of laws paradigm can help us to avoid the pitfalls which analogies to nation state concepts entail.

It is impossible to avoid Habermas and the notion of constitutional patriotism when one enters this arena. As Jan-Werner Müller has explained,[55] it was not Jürgen Habermas but Dolf Sternberger,[56] who constructed this category. Habermas adopted *Verrfassungspatriotismus*, transforming it into a cornerstone of his political theory in such a way that he could later, in 1991,[57] introduce the idea of constitutional patriotism into the European constitutional discourse. Does Habermas' constitutional patriotism abstract too rigidly from the social, political and cultural embeddedness of 'really existing' human beings, as has been argued so often? This objection is not valid. It is the great achievement of Sternberger and Habermas' constitutional patriotism that this is not a substantive concept of identity.[58] But it is, nevertheless, a concept which is embedded in a specific culture and *Lebenswelt*, designed to mirror Germany's transformation into a constitutional democracy.[59] Is it too 'thick' to become a European concept, or, if deprived of its German connotation, too 'thin' to represent Europe's *unitas*?[60]

Habermas has only recently given a re-statement. Constitutional patriotism, he insists, does not assume that citizens will identify with abstract constitutional principles. *Verfassungspatriotismus* is a conscious affirmation of political principles as citizens experience them in the context of their national histories.[61] He deepens this point in his discussion on the meaning of culture and of the, in his view, misconceived idea of guaranteeing cultures through collective rights: culture is of an intrinsic importance for our lifestyle; the human mind (*Geist*) is culturally constituted[62] – and culture is perpetuated only through the acceptance of its addresses and their convictions that it be worthwhile maintaining this tradition.[63]

A European concept of citizenship which seeks to achieve a deepened integration through some form of intentional 'identity politics' would then be fundamentally misconceived. European citizens are not expected – by Habermas – to forget their histories and cultural traditions. They cannot escape from them, anyway, they should develop them further, and they should learn to live with this variety. Back in 1988, Habermas opined: 'By and large, national public spheres are still culturally isolated from one another […] In the future, however, a common *political* culture could differentiate itself from the various *national* cultures.'[64] This differentiation between a 'European-wide political culture' and many other cultural spheres which remain national resembles an exercise in conflict of laws methodology, inspired by systems theory and its notion of functional differentiation. It is a conceptually all-too-artificial and, sociologically-speaking, unrealistic suggestion.[65] A conflict of laws approach would be much simpler; let the differences persist, but subject these national communities to rules and principles which ensure mutual respect and co-existence. Do not create

some elitist public space, but ensure that the national political cultures can observe and criticize each other.[66]

Notwithstanding its inclusion in the Maastricht Treaty, the concept of European citizenship has remained a playing field mainly of political scientists and legal theorists. Lawyers trying to come to terms with Europeanization processes in the fields they examine have difficulties in transforming it into legal concepts with a potential of structuring their inquiries. But it is at this level of concreteness where 'European citizenship' can deploy a great potential. It is a concept through which the inherited schism between the European 'market citizen'[67] who enjoys private autonomy in the great European economic space and the un-Europeanized political citizen who exercises his political autonomy under the umbrella of a constitutional state, can be gradually overcome. This potential has materialized in many fields. The most interesting example that I know of is from the not so mundane world of European company law, which I will not explore here.[68]

There are many more examples. They all could serve to illustrate in much detail how legal systems are re-constituting legal systems in Europeanization processes. This is by no means a linear and necessarily beneficial process. However, what is so important to underline, in my opinion, is that it is false to conceptualize European law as a ready-made or steadily growing *corpus juridicus* which will gradually replace national legal systems. What we have to develop is an analytical understanding of these processes. What we have to learn is how to organize and stabilize the balance of private and public autonomy in such a way that the European law of law production (*Recht-Fertigungs-Recht*) deserves recognition. But let me refrain from substantiating these visions here any further. What should have become plausible, however, is their potential to link law to history.

Concluding remarks

The past – good or bad – is with us. Does it matter whether or not we make ourselves aware of it? We should try, especially in the cases of an unpleasant past, to learn! We may then even have a 'duty to remember'.[69] These answers seem so evident, even emotionally appealing. But appearances deceive. Until now, and, indeed, for the foreseeable future, Europeans will have to live with different, in many respects conflicting, historical memories – and there is no authority entrusted with deciding about such conflicts. It is all the more important to be aware that 'the glance in the mirror'[70] tends to have unsettling effects both in one's own lifeworld and in the political sphere.

There is hardly much room to choose. It may well be, as Armin von Bogdandy observes in his evaluation of the preamble,[71] that negative connotations are unlikely to further identity-building. We can therefore argue against 'identity politics' altogether. We should not assume, however, that we can control the biases that insert themselves into narrative structures.[72] We can observe that this infiltration becomes consciously politicized, that it is simply impossible not to instrumentalize the past in general, and 'bitter experiences' in particular.

And it is all underway, Jan-Werner Müller observes in his chapter.[73] The 'politics of regret', exchanges of opinions on the recognition of guilt, the apologies by political leaders, the debates about memorials in schoolbooks, the painful self-interrogations in so many quarters about collaboration and involvement in the Holocaust. Is there a chance that these often painful processes and contestations will create a new sensitivity, that Europeans will learn something about themselves, from and for their neighbours, which will be beneficial for their Union? Could one even hope that the European project derives a new legitimacy out of these confrontations with the 'bitter experiences' in Europe's pasts? Müller is sceptical and cautious. Mutual observation tends to provoke cross-border blame and to promote shame as governmental politics.[74]

Back to the Constitutional Treaty: Can Europeans really hope to 'forge a common destiny' while remaining 'proud of their own national identities and history' – as the preamble suggests – if they fail to confront their pasts? 'Working through the pasts' is a European burden and 'from the very beginning, the integration of Europe represents the remedy to centuries of imperialism, war and other kinds of inter-state conflict, and is shown as the only possible alternative to Europe's self-destruction and decay'.[75] This insight we may share. However, it will not suffice as an orientation when trying to come to terms with our pasts. Somewhat paradoxically, it is the Holocaust which Europeans seem to recognize as a point of negative communality. To cite *'Postwar'* again:

> The new Europe, bound together by the signs and symbols of its terrible past, is a remarkable accomplishment; but it remains forever mortgaged to that past. If Europeans are to maintain this vital link – if Europe's past is to continue to furnish Europe's present with admonitory meaning and moral purpose – then it will have to be *taught* afresh with each passing generation. The 'European Union' may be a response to history, but it can never be a substitute.[76]

Notes

1 B. Schlink, *Vergangenheitsschuld und Gegenwärtiges Recht*, Frankfurt aM: Suhrkamp, 2002; the essays in B. Schlink's collection deal mainly, but not exclusively, with the assessment of wrongdoing in the past in criminal law proceedings. But see, for the present context in particular, 'Die Gegenwart der Vergangenheit', pp. 145–156.

2 I am neither referring to personal guilt, nor the moral 'duty to remember', but to something factual which social psychology and trauma research will be able to decipher. Suffice it to cite two questions here:

> Aber liegt nicht seit jener moralischen Katastrophe, in abgeschwächter Weise, auf unserer aller Überleben der Fluch des bloßen Davongekommenseins? Und begründet nicht die Zufälligkeit des unverdienten Entrinnens eine intersubjektive Haftung – eine Haftung für entstellte Lebenszusammenhänge, die das Glück oder auch die bloße Existenz der einen einzig um den Preis des vernichteten Glücks, des vorenthaltenen Lebens und des Leidens der anderen einräumen?,

J. Habermas, *Eine Art Schadensabwicklung*, Frankfurt aM: Suhrkamp, 1987, p. 164 [Habermas, at times, and especially in his recent interventions, writes very personally. His dimensions get too easily lost in translations. Suffice it therefore to indicate that he is reflecting upon how the trauma of the Holocaust affects the self-consciousness of the later generations].

3 Cited from the translation in J. Habermas and J. Derrida, 'February 15, or What binds Europeans Together: a Plea for a Common Foreign Policy, beginning in the Core of Europe', *Constellations*, 2003, vol. 10, no. 3, 291–297, p. 296.

4 See for an instructive recent overview, T. Keiser, 'Europeanization as a Challenge to Legal History', *German Law Journal*, 2005, vol. 6, no. 2, 473–481.

5 Such a statement requires qualifications. There are of course important contributions to a historical interpretation of Europe in the legal literature on European integration. Suffice it here to mention J. H. H. Weiler, 'The Community System: The Dual Character of Supranationalism', *Yearbook of European Law*, New York: Oxford University Press, 1981, J. H. H. Weiler, *The Constitution of Europe*, Cambridge, UK: Cambridge University Press, 1999; M. Kaufmann, *Europäische Integration und Demokratieprinzip*, Baden-Baden: Nomos, 1997; A. von Bogdandy, 'A Bird's Eye View on the Science of European Law', *European Law Journal*, 2000, vol. 6, no. 3, 208–238; A. Somek, 'Constitutional *Erinnerungsarbeit:* Ambivalence and Translation', *German Law Journal*, 2005, vol. 6, no. 2, 357–370, with references to his much more comprehensive work; U. Haltern, *Europarecht und das Politische*, Tübingen: Mohr Siebeck, 2005; see also his 'Europäische Verfassung und Europäische Identität', in R. Elm (ed.), *Europäische Identität: Paradigmen und Methodenfragen*, Baden-Baden: Nomos, 2002, 239–290, pp. 252–261. See also much earlier H. Schneider, *Rückblick für die Zukunft: Konzeptionelle Weichenstellungen für die Europäische Integration*, Bonn: Europa Union, 1986, which summarizes the models (*Leitbilder*) which have transformed perceptions of the European situation into political and institutional concepts. Many elements for a legal history of European integration are hence available!

6 Keiser, above note 4.

7 F. Hanschmann, '"A Community of History": A Problematic Concept and its Usage', *German Law Journal*, 2005, vol. 6, no. 3, 1129–1141; '"Geschichtsgemeinschaft": Ein Problematischer Begriff und seine Verwendung im staats- und Europarecht', *Rechtsgeschichte*, 2004, vol. 5, 150–162.

8 J. Isensee, 'Abschied der Demokratie vom Demos', in D. Schwab, D. Giesen, J. Lstl and H.-W. Strätz (eds), *Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft (Festschrift für Paul Mikat)*, Berlin: Duncker & Humblot, 1989, 705–740.

9 P. Kirchhof, 'Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland', in J. Isensee (ed.), *Europa als politische Idee und als rechtliche Form*, Berlin: Duncker & Humblot, 1993, 63–101.

10 See the references in Hanschmann, 'A Community of History', above note 7, especially notes 47 and following; see also, B. Stråth, 'Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community', *German Law Journal*, 2005, vol. 6, no. 2, 255–271.

11 See, for example, W. Lipgens, *A History of European Integration*, Oxford: Clarendon Press, 1982.

12 See, for example, M. Mazower, *Dark Continent: Europe's Twentieth Century*, London: Penguin, 1998.

13 K. H. Jarausch, 'Zeitgeschichte Zwischen Nation und Europa: Eine transnationale Herausforderung', typescript, Potsdam, 2004 (on file with author).

14 Ibid.,

Die Überwölbung eines Ensembles von disparaten Nationalgeschichten bleibt

> ebenso unbefriedigend wie die teleologischen Anstrengung, das aufklärerische und liberal-demokratische Erbe Europas herauszustellen, oder das Bemühen, die gegenwärtigen Integrationsversuche in die Vergangenheit vor 1945 zurückzuprojizieren. Gerade weil Erkenntnissinteressen, Wertbezüge und nationale Perspektiven drastisch variieren, ist die Pluralität der interpretatorischen Ansätze zur europäischen Geschichte gänzlich unvermeidlich.

See, also, B. Stråth, above note 10.

15 K. H. Jarausch, 'A European Cultural Identity: Reality or Hope?', typescript, Potsdam, 2004 (on file with author).

16 See, on this latter point, F. Larat, 'Present-ing the Past: Political Narratives on European History and the Justification of EU Integration', *German Law Journal*, 2005, vol. 6, no. 2, 273–290.

17 R. Koselleck, 'Geschichte, Recht und Gerechtigkeit', in D. Simon (ed.), *Akten des 26: Deutschen Rechtshistorikertages*, Frankfurt aM: Klostermann, 1987, 139–149, cited from the reprint in, *Zeitgeschichten. Studien zur Historik*, Frankfurt aM: Suhrkamp, 2000, 336–358.

18 Ibid., p. 349.

19 Ibid., p. 352.

20 *Draft Treaty Establishing a Constitution for Europe*, see OJ C 310/2004, 1 of 16 December 2004, online, available at: http://european-convention.eu.int/. For a very detailed and instructive analysis, see A. von Bogdandy, 'Europäische Verfassung und Europäische Identität', *Juristenzeitung*, 2004, vol. 59, 53–61, especially pp. 55ff.

21 Weiler, *The Constitution of Europe*, above note 5, subtly commented by Z. Bankowsi, 'The Journey of the European Ideal', in A. Mortan and J. Francis (eds), *A Europe of Neighbours? Religious Social Thought and the Reshaping of a Pluralist Europe*, Edinburgh: Centre for Theology and Public Issues, 1999.

22 See C. Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy', *European Law Review*, 2005, vol. 30, no. 4, 461–489. Even within national communities the perceptions of what is noteworthy differ considerably. Ordoliberalism, in my view the intellectually most interesting and practically most influential German contribution to European law, is not part of the mindset of the mainstream German European law scholarship.

23 So much has been done – the review essay by Martin Große Hüttman, 'Das Experiment einer Europäischen Verfassung', *Integration*, 2005, vol. 28, no. 3, 262–267, presents six German language volumes – that I may easily have overlooked pertinent efforts.

24 See above note 20. For a brief synopsis of the preambles to the different versions of the European Treaties, see Larat, above note 16.

25 Which reads: 'Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland…'

26 Above note 3.

27 T. Judt, *Postwar: A History of Europe since 1945*, New York: Penguin, 2005, pp. 803–831.

28 On the price to pay for such silencing ('*Beschweigen*') see G. Schwan, *Politics and Guilt: The Destructive Power of Silence*, Lincoln, NB and London: University of Nebraska Press, 2001.

29 C. Joerges and J. Neyer 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', *European Law Journal*, vol. 3, no. 3, 274–300. See also C. Joerges, 'Deliberative Political Processes Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making', *Journal of Common Market Studies*, 2006, vol. 44, no. 4, 779–802; J. Neyer, 'The Deliberative Turn in Integration Theory', *Journal of European Public Policy*, 2006, vol. 13, no. 6, 779–791.

30 This argument was first submitted in C. Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', *European Law Journal*, 1996, vol. 2, 105–135, and then restated in 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective', *European Law Journal*, 1997, vol. 3, no. 4, 378–406.
31 See, as a brief summary, J. Habermas, 'Paradigms of Law', in M. Rosenfeld and A. Arato (eds), *Habermas on Law and Democracy: Critical Exchanges*, Berkeley, CA: Berkeley University Press, 1998.
32 F. I. Michelman, *Brennan and Democracy*, Princeton, NJ: Princeton University Press, 1999, p. 34.
33 For a recent re-statement on which the following remarks draw, see C. Joerges, above note 29; 'Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws', in B. Kohler-Koch and B. Rittberger (eds), *Debating the Democratic Legitimacy of the European Union*, Lenham, MD: Rowman & Littlefield, 2007.
34 See, similarly, C. Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation: A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing', *European Review of Private Law*, 2000, vol. 8, no. 1, 155–172.
35 See J. H. H. Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg', in K. Nicolaïdis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford: Oxford University Press, 2001, pp. 67–68; R. Forst, 'Toleration, Justice and Reason', in C. McKinnon and D. Castiglione (eds), *The Culture of Toleration in Diverse Societies: Reasonable Tolerance*, Manchester: Manchester University Press, 2003; J. Habermas, *Zwischen Naturalismus und Religion*, Frankfurt aM: Suhrkamp, 2005.
36 Particularly thought-provoking: T. Judt, 'The Past is Another Country: Myth and Memory in Post-war Europe', in J. W. Müller (ed.), *Memory and Power in Post-war Europe: Studies in the Presence of the Past*, Cambridge, UK: Cambridge University Press, 2002; in legal literature, see J. Pøibáò, 'European Union Constitution-Making, Political Identity and Central European Reflections', *European Law Journal*, 1995, vol. 11, no. 2, 135–153; A. Sajó, 'Legal Consequences of Past Collective Wrongdoing after Communism', *German Law Journal*, 2005, vol. 6, no. 2, 425–437, all of them with rich references.
37 M. Weber, *Economy and Society*, Berkeley: University of California Press, 1978, pp. 873–874; on socialism, see his 'Socialism', *Political Writings*, Cambridge, UK: Cambridge University Press, 1994.
38 See W. Schluchter, *Entscheidung für den sozialen Rechtsstaat: Herrmann Heller und die staatstheoretische Diskussion in der Weimarer Republik*, 2nd edition, Baden-Baden: Nomos, 1983; D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herrmann Heller in Weimar*, Oxford: Clarendon Press, 1997. Important texts by Heller have been made accessible by A. J. Jacobsen and B. Schlink (eds), *Weimar: A Jurisprudence of Crisis*, Berkeley: University of California Press, 2000.
39 *Grundgesetz für die Bundesrepublik Deutschland*, Article 20, para. 1: 'Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.'
40 F. A. von Hayek, *The Road to Serfdom*, Chicago: University of Chicago, 1944.
41 The issue that has resurfaced in Götz Aly's intensively discussed *Hitler's Volksstaat*: *Raub, Rassemkrieg und nationaler Sozialismut*, Frankfurt aM: S. Fischer, 2005.
42 S. Leibfried and M. Zürn, 'Reconfiguring the national constellation', in S. Leibfried and M. Zürn (eds), *Transformations of the State*, Cambridge, UK: Cambridge University Press, 2005, p. 8.
43 Above note 20.
44 Ibid., Article I-3 (3).
45 Ibid., Title IV.
46 Ibid., especially, Article I-14 (4); the assignment of a *competence* 'to promote and

co-ordinate the economic and employment policies of the Member States' has been repealed. Article I-11(3) as amended on 22 June 2004.

47 C. Joerges and F. Rödl, *The 'Social Market Economy' as Europe's Social Model?,* EUI Working Paper Law no. 2004/8, 2004, published in L. Magnusson and B. Stråth (eds), *A European Social Citizenship? Preconditions for Future Policies in Historical Light*, Brussels: Lang, 2005.

48 *Bundesverfassungsgericht* in 5 *BVerfGE* 7, 1954. See, on the contemporary discussion in Germany, G. Brüggemeier, *Entwicklung des Rechts im organisierten Kapitalismus*, vol. 2, Frankfurt aM: Syndikat, 1979, pp. 269ff.

49 See D. della Porta and M. Caiani, 'Quale Europa? Europeizzazione, Identità e Conflitti', Bologna: Molino, 2005; J. Schild, 'Ein Sieg der Angst – das gescheiterte französische Verfassungsreferendum', *Integration*, 2005, vol. 28, no. 3, 187–200.

50 For a detailed discussion, see D. della Porta and M. Caiani, above note 49.

51 H. Brunkhorst, Chapter 11 in this volume.

52 Schild, above note 49, p. 199.

53 See Chapter 10 in this volume by J. W. Müller and in addition his recent *Constitutional Patriotism*, Princeton: Princeton University Press, 2007.

54 J. E. Fossum, 'The European Union – In Search of an Identity', *European Journal of Political Theory*, 2003, vol. 2, no. 3, 319–340; 'Still a Union of Deep Diversity? The Convention and the Constitution for Europe', in E. O. Eriksen, J. E. Fossum and A. J. Menéndez (eds), *Developing a Constitution for Europe*, London: Routledge, 2004.

55 Above note 53.

56 D. Sternberger,'Verfassungspatriotismus'. Rede bei der 25-Jahr-Feier der 'Akademie für Politische Bildung' in Tutzing am 29.6. 1982, in M.-L. Recker (ed.), *Politische Reden 1945–1990*, Frankfurt aM: Deutscher Klassiker Verlag, 1999, pp. 702ff.

57 J. Habermas, *Staatsbürgerschaft und nationale Identität*, St. Gallen: Erkner, 1991. The short monograph was reprinted in *Faktizität und Geltung*, Frankfurt aM: Suhrkamp, 1992, and in English translation in *Between Facts and Norms*, Cambridge, MA: MIT Press, 1997.

58 Ibid. See, also, J. Habermas, *Die Zukunft der menschlichen Natur: Auf dem Weg zu einer liberalen Eugenik?*, Frankfurt aM: Suhrkamp, 2004, p. 124.

59 On the 'militancy' and its credentials in this process, see in G. Frankenberg, *Autorität und Integration: Zur Grammatik von Recht und Verfassung*, Frankfurt aM: Suhrkamp, 2003, the chapter 'Der Lernende Souverän' illustrates perfectly how problematical it would be to try to transmit social learning into another society – and how useful inter-societal observation and critique can be.

60 See M. Kumm, 'Thick Constitutional Patriotism and Political Liberalism: On the Role and Structure of European Legal History', *German Law Journal*, 2005, vol. 6, no. 2, 319–354; M. Mahlmann, 'Constitutional Identity and the Politics of Homogeneity', *German Law Journal*, 2005, vol. 6, no. 2, 307–317; F. C. Mayer and J. Palmowski, 'European Identities and the EU – The Ties that Bind the Peoples of Europe', *Journal of Common Market Studies*, 2004, vol. 42, no. 3, 573–598, which contains historical dimensions and a more cautious view than their title suggests.

61 J. Habermas, *Zwischen Naturalismus und Religion*, Frankfurt aM: Suhrkamp, 2005, p. 111: 'Entgegen einem verbreiteten Missverständnis heißt "Verfassungspatriotismus", dass sich Bürger die Prinzipien ihrer Verfassung nicht allein in ihrem abstrakten Gehalt, sondern konkret aus dem Kontext ihrer jeweils eigenen nationalen Geschichte zu Eigen machen.'

62 Ibid., p. 306.

63 Ibid., p. 313.

64 Habermas, 'Citizenship and National Identity', Appendix II to *Between Facts and Norms*, above note 57, p. 507.

65 See B. Peters, 'Public Discourse, Identity, and the Problem of Democratic

Legitimacy', in E. O. Eriksen (ed.), *Making the European Polity: Reflexive Integration in the EU*, London: Routledge, 2005.

66 See K. Eder's intensive work on the Europeanization of public spheres, in particular, K. Eder, 'Zur Transformation Nationalstaatlicher Öffentlichkeit in Europa: Von der Sprachgemeinschaft zur Issuespezifischen Kommunikationsgemeinschaft', *Berliner Journal für Soziologie*, 2000, 167–184; K. Eder and C. Kantner, 'Transnationale Resonanzstrukturen in Europa: Ein Kritik der Rede vom Öffentlichkeitsdefizit in Europa', in M. Bach (ed.), *Die Europäisierung nationaler Gesellschaften*, Wiesbaden: Westdeutscher Verlag, 2000. See, also, H. J. Trenz, 'Einführung: Auf der Suche nach einer Europäischen Öffentlichkeit', in A. Klein, R. Koopmans, H. J. Trenz, L. Klein, C. Lahusen and D. Rucht (eds), *Bürgerschaft, Öffentlichkeit und Demokratie in Europa*, Opladen: Leske & Budrich, 2003.

67 H. P. Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen: Mohr, 1972.

68 But see C. Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline', *Duke Journal of Comparative and International Law*, 2005, vol. 24, 149–196, pp. 173ff., online, available at: www.iue.it/PUB/law04–12.pdf. Fields like anti-discrimination and labour law may appear more exciting. Mechanisms of 'Europeanization from below' are instructively documented in the latter field by S. Sciarra (ed.), *Labour Law in the Courts: National Judges and the European Court of Justice*, Oxford: Hart Publishing, 2001.

69 P. de Greiff, 'The Duty to Remember: The Dead Weight of the Past, or the Weight of the Dead of the Past?', typescript, Princeton, 2001 (on file with author).

70 M. Stolleis, 'Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945', in C. Joerges and N. S. Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Oxford, Hart Publishing, 2003.

71 von Bogandy, above note 20, p. 57.

72 H. White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe*, Baltimore and London: Johns Hopkins University Press, 1973.

73 Above note 53.

74 See also J. Q. Whitmann, 'What is Wrong with Inflicting Shame Sanctions?', *Yale Law Journal*, 1998, vol. 197, 1055–1092, pp. 1088–1091.

75 Above note 16.

76 Above note 27, p. 831.

10 A 'thick' constitutional patriotism for the EU?

On morality, memory and militancy

Jan-Werner Müller

> Men are not tied to one another by papers and seals. They are led to associate by resemblances, by conformities, by sympathies. It is with nations as with individuals.
>
> *Edmund Burke*

> Il faut constater que l'Europe ne fait plus rêver. On n'aime pas l'Europe telle qu'elle est…
>
> *Jean-Claude Juncker*

With the apparent failure of the European Constitution (at least on the first try), the search for a pan-European civic 'identification mechanism' is as likely to be intensified as it is to be abandoned.[1] Given that most political theorists are reluctant to formulate a liberal pan-European nationalism, a 'thicker' version of constitutional patriotism might seem an attractive (and relatively modest) normative proposal.[2] 'Thick' would denote a constitutional patriotism that is 'enriched' by forms of particularity; such forms of particularity would make European patriotism distinctive, that is, different from outright cosmopolitanism or universalism.

In this chapter, I argue that, in its original German incarnation, constitutional patriotism – rather than being 'abstract' and 'bloodless' (as a particularly inappropriate metaphor tends to suggest) – already had two important 'supplements of particularity', which have made it a morally effective (and affective) force.[3] In particular, it contained what one might call, for shorthand, 'memory' and 'militancy'. Memory here refers primarily to a critical memory of the Holocaust and the Nazi past. Militancy, on the other hand, was shown towards the enemies of democracy, mainly through judicial means, such as banning parties and restricting free speech. In other words, a militant democracy is explicitly not neutral about its own principles and values – and puts in place strong checks on those who are hostile to these principles.

I want to argue that memory and militancy were not accidental forms of particularity associated with constitutional patriotism; rather, there is an inherent normative connection to the universalist liberal–democratic kernel of

constitutional patriotism. Put crudely, and in the vocabulary of 'identity talk', memory and militancy – thus defined – reinforce 'identity' through negative contrasts: on the one hand, with the past that is being repudiated; on the other, with anti-democratic political actors in the present (and/or potentially in the future). Positive political principles do imply these negative contrasts – but this is not to say that all forms of constitutional patriotism would have to come with a strong emphasis on memory and militancy. Positive political principles might equally be affirmed through positive forms of particularity (such as historical examples to be emulated). In other words, and contrary to one of the most widespread clichés of our time, not every 'identity' needs primarily to be 'constructed' through an 'other'. And, of course, the shape and style of a version of constitutional patriotism will always be influenced by the vagaries of history, the particular visions of politicians, the legacies of pre-existing political cultures – in other words, there is only so much that can be *theoretically* pre-determined in any one case.

Memory and militancy have repeatedly been advanced as elements that might 'thicken' a *supranational* constitutional patriotism – without thereby making constitutional patriotism into a variant of liberal nationalism. In the second part of this chapter, I examine whether memory and militancy might work as 'supplements of particularity' at the European level. I shall argue that a 'thick' constitutional patriotism, enriched by memory and militancy, *could* indeed be made coherent at the European level. What is much less clear is whether European political elites *should* embark on a political project of emphasizing memory and militancy. Both memory and militancy, as I shall seek to demonstrate in the third part of this contribution, carry significant dangers of illiberalism. This is not the same as saying that they simply amount to a civic nation-building project and the quasi-nationalist management of popular loyalties, and therefore erase the distinctiveness of constitutional patriotism's normative vision, as liberal nationalists might be tempted to charge. Constitutional patriotism is not simply 'statist nationalism'; it *is* morally different from liberal nationalism; and rendering it more particular through memory and militancy does not make a difference to this basic moral difference.[4] However, given the dangers of illiberalism, I cautiously conclude in favour of a 'thinner', liberal conception that seeks to complement and, to some extent, relativize, existing attachments at the level of the nation state and below.

I shall not discuss the psychological background assumptions that are being suggested by the metaphors of 'thickness' and 'richness' in this chapter. However, I wish to emphasize that I do not regard these as unproblematic, and that I do not find that particularity automatically motivates, in the way that almost all theorists on both sides of the nationalism-patriotism debate tend to suggest. However, these questions are clearly of profound complexity and simply cannot be treated at the same time as the European context; so all that interests me here is the theoretical possibility (and normative desirability) of 'thick European constitutional patriotism'.

In the same vein, I leave aside for the moment the question of whether there

already is, or, in principle, can be, a 'European public sphere'. Both a 'European nation' and a European constitutional patriotism would depend on such a public sphere, and would partly have to create them. My concern here is with the normative content of 'thick constitutional patriotism', not with providing a manual for actual polity-building.

A very brief history of constitutional patriotism

Neither constitutionalism, nor patriotism was invented by Germans.[5] Yet, constitutional patriotism, as a theory distinct from both liberal nationalism and republican patriotism, was elaborated most clearly in post-war West Germany. Two background factors contributed to this; one was a long-standing debate about the connections among democracy, cosmopolitanism, and contesting a problematical past, a debate which I will not go into in detail on this occasion; the other factor was the sheer importance of the constitution in West German political culture.

While the Weimar Constitution had been seen as a great intellectual and political achievement initially, and then de facto failed disastrously, it was more or less the other way around after 1945. Legal theorists regarded the constitution as a problematical construct in 1949 – a list of articles seemingly imposed from outside, deliberated over with hardly any publicity, and unable to withstand serious threats to democracy. Yet, as time went on, the Constitution proved not just its resilience; more importantly, it proved its enormous *relevance* in ordering political life.[6] To put it crudely, relevance, in turn, inspired reverence – the Constitutional Court eventually developed into the most respected public institution of West Germany, alongside the *Bundesbank*.

It was against this background that the political scientist Dolf Sternberger explicitly introduced the concept of constitutional patriotism on the occasion of the thirtieth birthday of the Federal Republic.[7] Sternberger was arguably the *doyen* of democratic political theory in West Germany after the Second World War. As early as 1959, he had thought about a 'patriotic sentiment in the constitutional state', and, in the early 1960s, had developed the notion of *Staatsfreundschaft* (friendship towards the state). He framed such friendship as a 'passionate rationality' which would make citizens identify with the democratic state and, not least, defend it against its enemies.[8]

To give his conception of constitutional patriotism theoretical coherence, Sternberger drew on Aristotelianism and Hannah Arendt's republicanism. To lend it historical credibility, he excavated a tradition of patriotism stretching back to Aristotle, which, he claimed, had not been linked to the nation. Sternberger argued that, at least until the end of the eighteenth century, all forms of patriotism had been 'constitutional patriotism' understood as the love of the laws and common liberties.[9] In other words, constitutional patriotism was on some level to be a return to pre-national patriotism.

Sternberger, scarred by the experience of Weimar, also explicitly called upon the 'friends of the Constitution' to defend the polity. He thereby linked constitutional patriotism to the concept of a *wehrhafte* or *streitbare Demokratie* – that is,

a 'militant democracy' capable of defending itself against its internal and external enemies.[10] This concept had been introduced by the exiled German political scientist Karl Loewenstein in 1937.[11] At that time, one European country after the other had been taken over by authoritarian movements using democratic means to disable democracy. Loewenstein argued that democracies were incapable of defending themselves against fascist movements if they continued to subscribe to 'democratic fundamentalism', 'legalistic blindness' and an 'exaggerated formalism of the rule of law'.[12] Part of the new challenge was that, according to Loewenstein, fascism had no proper intellectual content, relying on a kind of 'emotionalism' with which democracies could not compete. Consequently, democracies had to find, above all, political and legislative answers – as opposed to 'emotional ones' – in order to confront to anti-democratic forces; here, Loewenstein thought of measures such as banning parties and militias. Democracies, according to this vision of democratic self-defence, should also restrict the rights to assembly and free speech, and, not least, the activities of those suspected of supporting fascist movements – who could be 'guilty by association'.[13] As Loewenstein put it, 'fire should be fought with fire'. And that fire could only be lit by a new, 'disciplined' or even 'authoritarian' democracy.[14]

This idea of a *wehrhafte* or *streitbare Demokratie* then became highly influential in the Federal Republic. It was used to justify the banning of the Nazi Socialist Reich Party and the Communist Party in the 1950s, and in the 1970s, the draconian measures against those guilty of (suspected) association with terrorists.[15] The Constitutional Court's decisions and the rhetoric used by successive West German governments made it clear that democracy was to be as militant about the left as about the right (whether it actually was is another matter that I shall not deal with here). In other words, militancy was framed as a form of 'anti-totalitarianism', directed as much against the Communist threat from the East as against any revivals of the brown menace from the past. The legal basis for bans and for restricting rights – for anti-democratic measures supposed to serve democracy – was the so-called 'free democratic basic order'. The Court had coined the phrase and elaborated it in its judgments in the 1950s. This 'order' consisted of the very values which, according to the Court, permeated the entire legal system. Thus emerged what has been called democratic 'anti-extremism', which, by definition, assumed the symmetry of threats from right and left.[16]

It was then only in the mid-1980s that Jürgen Habermas appropriated the concept of constitutional patriotism. Like Sternberger, Habermas conceived of *Verfassungspatriotismus* as a conscious affirmation of political principles. But unlike Sternberger, Habermas did not think that an unproblematical return to a pre-national (and pre-modern) republican patriotism was possible or even normatively desirable. Put very schematically, the disenchantment of the modern world and its complex division into different spheres of value would necessarily block such a return to a quasi-Aristotelian polity, integrated and 'held together' primarily though civic duty and the individual's overriding devotion to political principles. Individual and collective identities are no longer formed – or should

no longer be formed – by internalizing religious or, for that matter, nationalist imperatives. In other words, an unproblematical reference to quasi-sacred objects – including the *patria* – is no longer available. Instead, in a disenchanted world, individuals develop what Habermas, following the psychological models of Lawrence Kohlberg, called 'post-conventional identities'. They learn to adopt as impartial a point of view as possible and to step back not only from their own desires, but also from the conventional social expectations with which society and its institutions confront them. To put it again rather schematically, identity becomes 'de-centred', as individuals relativize what they want and what others expect from them in the light of moral concerns.

A similar process can be observed at the level of society.[17] The exercise of coercion over citizens can no longer be justified by reference to sacred or quasi-sacred sources. One way or another, actual popular sovereignty becomes the sole source of legitimacy. Religious legitimacy tends to be abandoned alongside traditionalism and other transcendent sources of authority. Thus emerges what Habermas has termed 'post-traditional society'. This concept does not imply that religion, tradition and other forms of conventional morality are simply superseded. Instead, they are, at least partially, re-interpreted in the light of the universalist claims that have also been at least partially realized as basic rights and constitutional norms. Citizens are asked to reflect critically upon particular traditions and group identities in the name of shared universal principles. This also means that they reflectively have to endorse or reject the national traditions with which they find themselves confronted.

Unconditional or even unreflective identification is then supposed to be replaced by dynamic and complex processes of identity formation – or, expressed differently, by open-ended political, legal and, not least, moral learning processes. And what unfolds at the level of the individual through social interaction needs a delicate web of communicative processes at the collective level. It is in a public sphere as porous as possible that collective identities are renegotiated and revised over time. Open-ended communication is thus a crucial precondition for what Habermas has termed the 'rationalization of collective identities' – a rather off-putting term perhaps, especially for conservatives, but one that captures the critical distancing from unquestioned inherited beliefs well.

The privileged site for the formation of this kind of identity – and the emergence of proper constitutional patriotism – is thus the public sphere. And its purpose, one might say, is the normative *purification* of public argument, as opposed to the *protection* of the polity, which had been the main purpose of Sternberger's version of *Verfassungspatriotismus*. The primary question, here, is about the democratic quality of political culture – not the defence of a democracy perpetually under threat from anti-democrats or those prone to neglect the public good.

Even shortly after the initial formulation (or, rather, reformulation) of constitutional patriotism by Habermas, criticisms were levelled that were to reappear in the arguments of Anglo-American liberal nationalists many years later. Most frequently, there was a question about the *specificity* of patriotic attachment.

After all, 'something prior to constitutional principles determines who falls under their authority'.[18] Or, to put the question differently, why should those supporting universalist moral norms not give their loyalty to polities which attain them in a fuller sense of a more coherent fashion? Constitutional patriotism, at first sight at least, seems to beg this question.

From the very beginning, however, Habermas himself presented an answer to this problem. He stressed that the particular – in fact, unique – experience of National Socialism *had* to be the implicit reference point for German constitutional patriotism. It was only after the ultimate evil of Nazism that Germany, at least its Western part, had finally and fully embraced the Enlightenment and firmly anchored itself in the West. He affirmed that:

> [O]ur patriotism cannot hide the fact that in Germany democracy has taken root in the motives and the hearts of citizens, at least of the younger generation, after Auschwitz – and in a way only through the shock of this moral catastrophe.[19]

And he added that 'the overcoming of fascism forms the particular historical perspective from which a post-national identity centred around the universalist principles of the rule of law and democracy understands itself.'[20] After all, 'conventional morality', in the sense of obeying law and order, following 'common sense' or acting according to national traditions had all spectacularly failed to prevent the moral catastrophe of the Third Reich. Consequently, post-fascist identity *in particular* had to be post-traditional (and post-national).

So, in conclusion, at least in the German context, the universalist moral norms at the core of constitutional patriotism have always relied on supplements of particularity to become effective (and affective) as moral motivation, and to be translated into political action. Sometimes militancy and memory have even come together directly, as in the law against the Auschwitz lie, which made it a criminal offence to deny the Holocaust. Denial was not just seen here as offensive to the victims and their descendants – it was also seen as damaging the quality of democracy more broadly.[21]

It is my contention that memory and militancy, as conceived here, were not arbitrarily related to the universalist values at the heart of constitutional patriotism. They are located in a different conceptual space, so to speak, but the imperatives of purification and protection consistently follow from the idea of constitutional patriotism. Those who subscribe to universalist liberal democratic values will see their past in a different light; and they will want to draw a legal and political line, as far as the possibility of endangering these values is concerned. Clearly, to what extent actual citizens feel different about their pasts, and to what extent democratic militancy is elaborated before any particular threat emerges are open empirical questions and will depend on much that is contingent. Existing national traditions will have a profound influence on the shape and style of a constitutional patriotism.

Constitutional patriotism, then, as Ciaran Cronin has pointed out, is not as

much post-national as it is post-*nationalist*.[22] Nationality is not simply suppressed, although it is, to use a somewhat ugly phrase, 'de-centred'. It was Benedict Anderson who once pointed out that 'if one wished to see modern world history as an endless soap opera, in every country, the one character centrally cast in each interminable episode would be one's own nation'. Constitutional patriotism does not make the nation-character die; it merely relegates him (or her) to a supporting role.

Thus, a 'thicker' constitutional patriotism does not simply turn into a particularly liberal variant of liberal nationalism. Superficially, there are, of course, similarities: liberal nationalists might also ask co-nationals to adopt a critical attitude towards a problematical past; in fact, it is hard to see how they would not counsel an attitude which is, at least to some extent, somewhat similar to what Habermas advocated for the Germans after 1945. They will also call upon co-nationals to defend a 'liberal way of life', if necessary, although they might, perhaps, even turn out to be more tolerant than some constitutional patriots.

Yet, the essential moral difference remains in place: in the eyes of real liberal nationalists, nationality carries an unquestioned (and, it seems, unquestionable) ethical significance. It is, after all, what people *feel* themselves to be. Constitutional patriotism, on the other hand, concedes only a pragmatic (and, in all likelihood, temporary) significance to nationality. It agrees with liberal nationalism that particularity – in the form of particular political communities in which some human beings are privileged over others – is not, per se, illegitimate. It also agrees with liberal nationalism that such communities are the only way to attain certain 'relationship goods'. But nationality, for constitutional patriotism, does not generate these goods; and, in particular, it is not an extension of (and does not constitute an analogy with) the family.

Mystic chords of European memory?

> Democracy is a matter of having a good memory.
>
> *Kurt Schumacher*

Now, what about these kinds of supplements of particularity (which, I argued above, do have a moral connection with constitutional patriotism) in Europe? Are such supplements even imaginable at the European level?

Let me first take *memory*. The last 15 years or so have seen the rise of what has been called a 'politics of regret'. Simply put, this is a politics in which national leaders increasingly assume collective responsibility for past misdeeds and engage in public acts of atonement.[23] Whether this public repudiation of the past constitutes a new form of political legitimacy as such is still very much open to question – that it is spreading as a type of political claim-making is not.

Yet, a shared, Europe-wide constitutional patriotism might be more demanding than a series of seemingly national instantiations of the politics of regret. In particular, it seems that it would have to include 'new pasts' for each member.

This could mean either that Europeans acknowledge the collective memories of other countries, or that 'transnational memories' might have to be the basis of a European sense of belonging. On the surface of it, the first option seems somewhat awkward, perhaps even absurd. A national collective *can* take responsibility for its past, and even argue about its past in continuous public communication. Yet, it is far from clear that nations could – let alone should – argue about *other* nations' pasts. Should the Germans judge France's 'Vichy syndrome', that is, the supposed repression of French collaboration with the Nazis after 1945? Should the French debate the British treatment of the Irish? Are the Spanish in a position to feel sorry for Portuguese colonialism? There is a sense in which one can acknowledge (and emulate) the success of other countries in coming to terms with their past – but one cannot do it for them.

Yet, some European countries have already been moving strongly in the direction of dealing with other nations' pasts. For instance, the French National Assembly and the French Senate and other national bodies of representation have passed resolutions condemning the Armenian genocide, often against the explicit wishes of the foreign ministries of their own countries. The point of such resolutions was officially – and, in particular, internationally – to acknowledge the character of the events from 90 years ago as 'genocide'. Defenders of such resolutions have argued that the fact of genocide did not depend on an acknowledgement by the national collective of the perpetrators. For instance, the fact that *French* politicians had named what had to be named was irrelevant. Shameful truths, one might say, are not national property.

It is against this background that Jean-Marc Ferry has suggested a self-critical 'opening' of European national memories to each other.[24] The point is not somehow to 'dilute' national memories; instead, such a mutual opening would 'de-centre' national memories, and could contribute to the creation of an 'enlarged mentality', as far as thinking about Europe's pasts is concerned.

Second, it is not prima facie impossible to 'merge' historical memories to some extent or to draw on 'transnational memories' – and to forge a common political culture in the process of arguing about these pasts. At first sight, this prospect might seem to be on an equal footing with the well-known nationalist manipulation of memories, or even evoke Orwellian images of the manipulation of individual consciousness for the sake of political conformity. Moreover, it seems to come up against the argument that only ethical communities, such as families and nations, have a duty to remember in the first place – while moral relations (and humanity at large) are not concerned with memory.[25]

Here, a basic distinction has to be put in place between collective or national memory on the one hand, and individual mass memory on the other.[26] The former refers to 'frames' of remembrance, while it is only the latter that designates the memories of participants in actual historical events. And it is collective (or cultural) memory, as a kind of *narrative* that nations or other groups tell about themselves, that is subject to moral claims and counter-claims.

In other words, then, at issue are public, collective memories and public claims about these memories – *not* private, unarticulated, or even involuntary

memories. 'Memory claims' of the former sort are *always* political, in the sense that they demand collective recognition and are aimed at creating legitimacy. They are consciously shaped and re-shaped both by the 'producers' and the 'consumers' of memory; and they are not a matter of 'trauma' and 'repression', as false analogies with individual psychology often suggest. They can, therefore, be subject to shared public reason, historical scrutiny and moral argument in a way that individual memories are not.[27]

Now, there is no prima facie reason why such public, collective memories should be restricted to 'thick' ethical communities. It is a mere definitional stipulation that only ethical communities have such memories and thus have a 'duty to remember'. Communities of memory are, for the most part, shaped politically; the fact that the nation state is the dominant political form of modernity explains (but does not automatically justify) the fact that nations have come to be the prime communities of memory. The 'thickness' of the national community is not least the result of the thickness of the legal relations that co-nationals entertain with each other. In other words, communities of memory are politically configured (to avoid the term 'constructed') – which is not to suggest that they can be changed or reconfigured at (political) will.[28] But it does mean that communities of memory are not simply the result of pre-existing solidarities or even histories.

Even on an empirical level, one finds a variety of transnational and subnational memories, in addition to seemingly dominant national memories. An example of a recent 'transnational memory' might be the collective European failing (and shame) over Bosnia in the early to mid-1990s. An 'overlapping moral consensus' seems to have emerged that Europe betrayed its own liberal and internationalist ideals in its reluctance to intervene on behalf of European Muslims. Clearly, it is difficult to draw a line between European and international memories here. But given how fervently European politicians claimed, at the beginning of the Yugoslav wars, that this was 'Europe's hour', the responsibility for successive failures would have to be attributed to the European Union (EU) at least as much as to the United Nations or to the 'international community' as such.

More importantly, perhaps, there have recently been some intimations of a 'Europeanization' of the Holocaust – although, on closer inspection, it becomes clear that – for obvious reasons – British, French and German views of the Holocaust also remain deeply divided. Nevertheless, a pattern seems to be emerging that individual European nations acknowledge their role in the Holocaust, while at the same time affirming its 'universal significance'. In France, Italy and even in Switzerland, Denmark and Sweden, as well as Holland, the last decade of the twentieth century saw extensive debates about collaboration, slave labour and 'Nazi gold'. In fact, one might say that, after the collapse of Communism, memories of the Second World War were 'unfrozen' on both sides of the former Iron Curtain. This is not to say that some pristine, pre-representational memory, free of any political instrumentalization, could suddenly be recovered. But it is to say that both personal and collective memories

were liberated from constraints imposed by the need for state legitimation and the 'friend-enemy' thinking associated with the Cold War.[29]

This process of a genuine re-engagement with the past was not simply prompted by the string of half-century anniversaries stretching from 1989 to 1995, let alone the general desire for 'closure' or settling historical records at the end of the last century. For the most part, there has been a genuine opening towards national and transnational wrongs – committed both during and after the Nazi occupation of Europe. In particular, the policies of retribution after the Second World War, as well as the extensive expulsion policies, have increasingly become subject to historical scrutiny. Detailed studies have demonstrated how punishment contributed to myths of national expiation and rebirth.[30]

The upshot has been that many myths of resistance and purity of the post-war period seem to have dissolved – which, of course, is not to claim that guilt or responsibility are all of a sudden distributed equally across the continent. Immediately after the Second World War, nations quickly needed to assert themselves and to find – and legitimize – their role in the global confrontation between the East and the West. Arguably, European integration has helped Western European countries to gain some distance from their own pasts, as these pasts ceased to serve the particular post-war function as moral foundations of individual nations. Integration lessened the need for national self-assertion, for homogeneous narratives of national continuity – and thereby the need to present a morally pristine past.

Now, however, *la hantise du passé* is clearly no longer a German peculiarity. It might be too much to claim that the Nazi experience as a whole has now been 'Europeanized'. But it is not unreasonable to claim that a sufficiently common language now exists about guilt, moral-political entanglements and fateful exclusions. In short, national memories have become more heterogeneous and discontinuous, but free-floating particles of these memories, in turn, might possibly coalesce into a thin, transnational European memory.

A similar process of 'unfreezing' and fragmentation has taken place in Central and Central Eastern Europe. The painful Polish self-interrogation over the massacre at Jedwabne, the debates surrounding Budapest's 'House of Terror', and the German–Czech disputes over the Beneš Decrees – these are only a few examples of intense recent historical controversies, in which, often enough, Nazism, Communism and collaboration were all at stake simultaneously. In each case, history and national identity have been linked more or less directly – and, in each case, a European dimension was eventually added to the discussions. In fact, for some Central and Central Eastern European countries waiting to join the EU, establishing Holocaust memorial days seems to have almost become a 'test case' of their liberal democratic morality.

Arguably, European integration has helped these processes of critical self-reflection. The prospect of inclusion has made Central and Eastern European politicians and intellectuals *more* willing to 'de-centre' and question national identities. Eventually, the security of 'belonging to Europe' – even if sometimes on rather unfavourable terms – has also made self-questioning more secure. This

fact also weakens the frequent claim that the accession countries do not have traditions of constitutional patriotism, or that, since they have only just regained sovereignty in the name of nationality, they would resent supranational integration (even if they might consent to it as a sheer economic necessity). But again, constitutional patriotism only asks for a post-nationalist, critical kind of political attachment, not a complete abandoning of national cultures.

In the EU itself, on the other hand, reference to the Holocaust has been linked explicitly with an affirmation of tolerance, non-discrimination and respect for diversity in the present. For all their inclusiveness, these measures have clearly been part of an adversary structure, except that it is a diachronic, and not a synchronic, political or national one. Put more simply, present political communities reaffirm themselves against an image of absolute moral evil in the past, thereby inextricably linking memory and morality.

The choice of the Holocaust as a horizon of absolute political evil is, of course, not accidental, and says much about European political realities since 1989. After the end of the Communist 'evil empire', the Third Reich appeared as a new (or old) standard of political evil. Moreover, in the presence of 'rogue states' and genocide – apparently, the worst political spectres of the post-Cold War period – the Third Reich seemed as the most 'useful past'.

Memories of the Holocaust have served to legitimate both multicultural integration and humanitarian intervention. And, at least until 11 September 2001, it seemed that integration and intervention were the two major political projects of Europe (and the West more generally) after the end of the Cold War. They are also connected, although often in complex ways. The wars of Yugoslav succession also mean the presence of refugees across the continent in a way not seen since the Second World War and its aftermath. Military intervention was partly designed to manage (and limit) the problems of integration at home, while the goals of intervention often included the vision of an integrated multi-ethnic society. For both purposes, the Holocaust proved a useful past.

So, in sum, a 'European memory' in the service of a European constitutional patriotism is certainly conceivable, and it is arguably no less feasible than 'national memories' that can be shaped by the speeches of politicians, and the style and content of commemorations, etc. How such 'official' collective memories eventually frame private and individual memories – both for those who lived the past in question and for those who did not – is a complex question and almost impossible to verify empirically; but the fact that they *do* frame memories is no longer in dispute.

And yet, a conscious 'memorialization' of politics is not as unambiguously desirable from a normative point of view, as it might seem at first sight. For one thing, such a 'memorialization' tends to open the Pandora's Box of problems associated with historical analogies. James Bryce's judgement that 'the chief practical use of history is to deliver us from plausible historical analogies' will not deter politicians, intellectuals and citizens from rummaging through the past. Yet, such analogical reasoning is likely to have poor results, for reasons deeply rooted in cognitive psychology.[31] Mainly, analogies simply create 'instant

legitimacy'. If nothing else, they serve to reduce complexity and short-circuit critical reflection. In summary, there is a real danger that analogy comes to substitute argument and analysis.

Furthermore, invoking the past frequently furnishes the participants of political debates with a moral certainty which otherwise can hardly be obtained in pluralist democratic societies. Drawing on memories for the justification of foreign and military policies, as frequently happened in the Kosovo War of 1999, can simply be designed to lend these policies a self-evident character and moral legitimacy. They might or might not have had this kind of legitimacy, had there been a proper debate about their meaning for the present. In short, appealing to the past can function as a way of avoiding political argument. Perversely, perhaps, they can also end up demoralizing political argument. After all, reference to the Holocaust might set the standard for military intervention, for instance, far too high.

Moreover, as critics have long pointed out, the Holocaust is perhaps the last form of acceptable, albeit negative, 'Eurocentrism'. Its uniqueness in the annals of genocide, at least in the eyes of some, is derived precisely from the fact that it occurred in Europe and, in particular, in 'highly cultured Germany', as the phrase goes. Since we are still far from what sociologists have called a 'globalization' (or even 'glocalization') of the Holocaust, a European 'Holocaust identity' could result in its own, novel forms of 'mnemonic exclusion'.[32] Immigrants and minorities, especially, might be alienated from constitutional patriotism if this historical dimension were to be over-emphasized.

Militancy: 'un-European activities'?

> [W]hen the constitution itself is secure, there is no reason to deny freedom to the intolerant.
>
> *John Rawls*

What about militancy, then? Almost all EU Member States have traditions and provisions of militant democracy, or what Peter Niesen has called 'negative republicanism', that is, mechanisms for defending democracy that both refer back to and repudiate particular national pasts.[33] Moreover, the European Court of Human Rights has affirmed the idea of militant democracy in reviewing national legal decisions,[34] thus setting a precedent for the EU. Could there, then, not be an 'overlapping consensus' through which European states can find cohesion by defining internal limits to political speech and behaviour? And is militant democracy not the obvious way of making memory politically relevant for the present?

In a sense, the members of the EU have already had one experience with supranational militancy. In fact, not only militancy, but also political morality and memory played a role in the decision to sanction Haider's Austria in the spring of 2000. Suddenly, there seemed to be a determined political will shared by a number of European leaders to show that Europe finds its real limits not

with any geographical borders, but with a certain kind of politics. Individual democracies enacted bilateral sanctions against Austria, while encouraging their civil societies to 'shame' the Austrians. These sanctions were of a particularly (and peculiar) moral character – official representatives of European democracies would deny their Austrian counterparts recognition in diplomatic encounters by refusing handshakes, by leaving the room and through other similar gestures.

Memory also played an important role in European democracies acting in concert against Austria. It was not an accident that European leaders took steps against Austria almost immediately after the Stockholm 'Holocaust Forum' in January 2000, where they solemnly pledged 'collective responsibility'.[35] The moralization and memorialization of European politics went hand in hand, as memory was invoked as a motivational resource for moral action and for renewed identification with universal norms.

Why not then build on this example and flesh out an idea of a proper EU militant democracy? One needs to distinguish two potential scenarios here: one is an EU Member State actually becoming un-democratic in an obvious way – a case which would require the expulsion of the state from the Union, and for which, in a sense, no pan-European idea of militant democracy is required. The other scenario is the rise of anti-democratic parties and movements *within* Member States. Here, the principle of subsidiarity would suggest that the Member States are themselves in the best position to judge how they wish to confront such parties and movements, and how important a place political toleration ought to have in their political cultures. Given how difficult it is to predict the results which measures commonly associated with militant democracy might have, European countries could certainly learn from each other, and perhaps, over time, improve the legal-technical 'tool kit' of militant democracy. Brussels might help this process, but it must not enter into anything that might resemble taking decisions on what constitutes 'un-European activities'.

The matter is different again, if one shifts from state-initiated measures of militant democracy to civil society. After all, to return to the Austrian example, anti-Haider protests were also expressed through demonstrations by ordinary citizens in various European countries (and in Austria itself), as well as through individual measures, for example, boycotting Austria for holidays. Such symbolic gestures were largely attempts at political shaming, of drawing attention to and expressing disgust at acts seen as politically shameful.

Prima facie, there is much to be said in favour of such shaming through ordinary citizens – as opposed to politicians or judges exclusively handling the machinery of militant democracy. Politicians, after all, would often be suspected of hypocrisy, that is of pushing their own popularity or the national interest of their country behind the veil of moral concern. Judges, on the other hand, might react too slowly; or they might be hindered from taking the appropriate measures quickly because of procedural constraints. To put it differently, politicians might be too political, while judges might not be political enough in the event of

real anti-democratic challenges. These potential problems are not specific to the European level; but, arguably, they would be exacerbated once one shifted beyond the framework of a particular nation state.

Yet, there is a general normative worry about shaming through civil society – a worry that is arguably much amplified at the level above the nation state. As James Q. Whitman has pointed out, political shaming, especially when encouraged, if not organized by governments, is easily complicit with a kind of unreflective and emotional crowd politics that might damage the quality of democratic life.[36] This suspicion applies even more at the supranational level. Shaming across borders is easily 'nationalized'; it might encourage a politics of national indignation and defensiveness – as was very much the case with Austria in 2000.

It seems, then, that there is no obvious place for an affirmation of militant democracy at EU level. Clearly, the EU excludes what is non-democratic, but below the level of clear-cut deviance from democratic principles, it is not obvious what the Union could do, and whether an elaboration of a European militant democracy would yield a strengthening of a European constitutional patriotism. Militancy, significantly more than memory, might indeed become decidedly illiberal, if artificially forced upon Member States as part of 'constructing a European identity'.

The EU's 'constitutional morality' – a modest proposal

Should one, perhaps, then refocus attention on what is actually at the core of constitutional patriotism (in contrast to any supplements of particularity), namely, a 'constitutional identity' centred on universalist liberal democratic values, refracted and interpreted through particular historical experiences and political cultures? Clearly, there will be significant overlap between EU Member States and the EU itself, as far as such 'constitutional identities' are concerned. And yet, it is arguably here that a positive form of particularity can find another foothold in order to become a force of motivation or even of loyalty. It is a thought that I only want to sketch for now, partly because discussions about the EU's Constitution – whether it be a newly written one, or the actually existing one – remain so much in flux, and partly because there is still comparatively little agreement among scholars as to the actual inner workings of the Union and normative principles that might be extracted from these workings.

The EU is distinguished by at least three peculiar characteristics: first, its constitutionalization has been an essentially open-ended process of deliberation and political struggle. It therefore might fit a notion of a constitution as an ongoing project actually much more closely than constitutions at the level of the nation state. Clearly, there is nothing inherently good about change for its own sake or the character of a political association as a project; as Glyn Morgan has pointed out, the 'qualities of flux and flexibility' which proponents of a post-modern (and, in particular, 'post-sovereign') EU highlight, do not have obvious political value as such.[37] All will depend on the specific character of the projects (or

enterprises) themselves. But it does distinguish the EU as a particular kind of polity, a polity not based on pre-existing civic solidarities, but on mutually agreed projects and enterprises.[38]

Second, this process is open not just with regard to its ultimate outcome; it is also open with regard to its constituents. What has been called the EU's normative 'power to attract' new members translates into a further institutional peculiarity: the European constituent power is itself subject to enlargement. The EU is not based on one constituent power, or *one* demos. Instead, it is based on an expanding *group* of demoi. It is not about creating a basic identity which supports a constitution, but about a dynamic and complex process of 'sharing identities', while at the same time tolerating and preserving difference.[39] European peoples will continuously have to negotiate, and will have to decide how much they wish to share in common, and how much they wish to keep apart.

Given this persistent plurality of peoples within the EU, the Union requires a large degree of what Joseph Weiler has called 'constitutional tolerance'.[40] It also requires – and ideally enables – a great deal of mutual learning against the background of persistent plurality. Again, this characteristic might not be an exclusive EU-property – but it certainly requires a different kind of constitutionally patriotic disposition than other kinds of polities. It is not so much about the 'purification' of a public sphere or the 'protection' of democracy as such (although both elements are, at least somewhat, present in the EU), as it is about taming raw power and sovereignty, and establishing a politics of compromise and mutual recognition that is unprecedented at the supranational level. Again, it is important not to idealize a process for the understanding of which we still lack adequate conceptual tools – but it is not entirely fanciful, in this context, to speak of a 'silent cosmopolitan revolution' that has transformed nation states, as opposed to superseding them with a 'supra-nation state'.[41]

Finally, a conscious endorsement of the particular principles and practices that have evolved in the EU does not exclude a simultaneous constitutionally patriotic attachment within Member States. In fact, much of what makes the EU both distinctive and successful can only be sustained because the existing Member States remain liberal-democratic, stable and conscious of a will to integration which is, at least partly, informed by memory. The EU is able to remain so open to change – so open-ended – partly because the Member States themselves are unable to do so. To put it differently, an expanding, self-transforming EU depends on already transformed and 'tamed' nation states.[42] This is the EU's peculiar political dynamic, which does not supplant nation states, but rather continuously transforms them.

Thus, a European constitutional patriotism and constitutional patriotism in and for the existing Member States might – at least partly – inform and enrich each other. Mutual learning for the sake of addressing common political challenges and mutual identification over shared projects – rather than 'common identity' – might qualify as practices that would allow for a kind of back-and-forth between the European and the national levels. In this sense, the very 'multi-level' political architecture of today's Europe might also enable multiple

levels of identification, depending on the particular problem or project in question. At the same time, this conception does not exclude, or automatically distrust, the very possibility of the emergence of a 'European collective identity' in a way that a political hermeneutic informed by post-modern suspicions – often based on unarticulated normative premises – would suggest.

Now, it would be evicting politics from political theory, if one did not take into account the possibility of conflict between different levels, and the need to choose amongst them. Such a thought would indeed give credence to the charge that post-modern visions of a perpetually evolving, infinitely varied, and yet harmonious entity called the 'European Union' are profoundly apolitical.[43] However, the fact that these kinds of conflicts tend to be contained in a political culture in which only a certain kind of political claim-making is publicly acceptable, reinforces the point that the EU has, in fact, produced a range of practices and principles that distinguish a particular EU constitutional political culture.

It is, I submit, these demanding political principles – and the no less demanding political dispositions needed to sustain them in the long run – that make for the *differentia specifica* of the EU's constitutional identity. It is what renders the EU *sui generis* – which, once again, is not a good thing in itself, unless one wants to be a victim of what Paul Valéry once called 'the moderns' *néomanie*'. But it is these characteristics which have – at least partly – contributed to making the EU the most successful innovation in political forms since the nation state.

How these principles could be made clearer in the eyes of the public, more obvious, more *lisible* – is again a question that goes beyond the scope of this chapter. But it is a task that is arguably more promising than the mere concentration on the 'thickening' of the negative contrasts of memory and militancy, even if memory, in particular, might also be used extensively in order to explain and to justify these principles.

Conclusion

A 'thicker' constitutional patriotism could indeed then be made coherent in and for Europe. Memory and militancy might, at first sight, seem artificial and removed from the daily political concerns of citizens (not to mention their non-political concerns). Yet, past experience suggests that the treatment of public collective memory by political elites, and the formulation as well as the actual application of the legal means for dealing with the enemies of democracy, do have profound long-term effects on the framing of political cultures.

I have suggested, however, that there are good reasons to put an emphasis on the principles and practices that the EU has developed as part of a distinct constitutional identity, rather than the potential supplements of particularity. This is not a question of either/or; a European constitutional patriotism would – over time – change the perspectives on Europe's past; it would certainly mandate a vigorous response – even of the EU's specific principles and practices – were there to be a serious challenge to liberal democracy, either in an individual Euro-

pean country or even somehow within Europe as a whole. The distinctions between memory and militancy on the one hand, and morality on the other, are, after all, analytical.

Whether European political elites can render the principles and practices of the EU more *lisible* is an open question. But normatively, as I hope to have shown, such a project is more desirable than a 'thickening' of a European constitutional patriotism for the sake of whipping up pro-EU passions. And once again: thinness does not automatically imply weakness.

Notes

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Part IV

Post-national democracy in Europe

11 Taking democracy seriously

Europe after the failure of its constitution

Hauke Brunkhorst

Introduction: Europe's constitutional problem

The European constitution was rejected in France and the Netherlands in 2005; as a result, the ratification process was stopped. Does the fact that Europe's citizens decided against the proposed constitution imply that Europe remains without a constitution of any kind? Certainly not. For a long time, Europe has had a constitution which has consisted of the European Treaties (Rome, Maastricht, Amsterdam and Nice). Historically, it is not unusual for international treaties to turn into constitutions; just think of the American Constitution of 1787–1788 or the Constitution of the *German Reich* of 1871. The inter-state treaties of the American Confederation of 1781 and of the *German Bund* of 1816 were also confederal constitutions in character.[1]

Whereas the constitutional treaties of the United States and of the German *Grundgesetz* are of the very same democratic–revolutionary kind, the constitutions of the *German Reich* and the European Union (EU) have to be categorized differently. Although, in both cases, their constituent states are all democracies, they do not *constitute* a new democratic polity, completing an already existing political order or even replacing an old one with a new one. Instead, they *restrict* the constituent states' already existing partial delegation of sovereignty to the supranational level, thereby resembling British history with its constitutional reining in of an absolute monarchy from the late seventeenth century onwards.[2] Yet, there is such a marked overlap between both types of constitution that, as in the case of the United Kingdom, a slow transition from a power-restraining to a power-constituting constitution is possible through numerous radical reforms, finally leaving the constitutionalized monarchy to vanish into the society press. This also might have been the fate of the *German Reich* as its constitution was of the very same type as the British one, given that the *Reich* had not sought and lost the First World War.

From the standpoint of constitutional theory, there is hardly any doubt that the European Treaties from Rome to Nice represent the EU's constitution. First, they are superior, reflexive law employed to generate legal norms – Rudolf Wiethölter's *Recht-Fertigungs-Recht*. Second, they maintain a normative supremacy of European law over national law, including national constitutional

law.[3] In the light of European norms, even the German Constitutional Court has considerably softened its previous claims that it should remain the final authority in the interpretation of German fundamental rights, whereas the European Court of Justice (ECJ) maintains its claim to hold *Kompetenz-Kompetenz* when it comes to European law.[4] However, the relationship between the ECJ and national constitutional courts is characterized more by co-operation than by subordination, and is, indeed, characterized by some observers as a European 'constitutional court combine' ('*Verfassungsgerichtsverbund*').[5] Third, the European Treaties establish independent European organs (the Commission, the Council of Ministers, the Court and the Parliament), which create community law and are only committed to the Union itself. Fourth, since the somewhat revolutionary Treaties of Maastricht and Amsterdam, and despite the multiplicity of treaties, only a single, unitary European community exists, which is not a state, but a supranational organization and an autonomous legal personality within international law.[6] Fifth, by generating new rights, the Treaties establish a unitary European citizenry which is clearly distinguished from the already existing national citizenries. Sixth, both the legal community and legal rulings even apply the term 'constitution' with regard to the European Treaties.[7]

However, if the ECJ calls the European Treaties the *charte constitutionelle* of the Union,[8] it might accidentally have given away the true character of the European constitutional system, which would hardly have been changed, if at all, by the failed constitution. The term *charte constitutionelle* was first used in 1814 in order both to describe the counter-revolutionary French constitution after the fall of Napoleon and to replace the republic with the restoration, albeit constitutional, of hereditary monarchy. At that time, the *charte constitutionelle* was a modern constitution – far removed from re-establishing the pre-revolutionary *ancién regime*[9] – but like its successor, the constitution of 1830, which was also termed *charte constitutionelle*, it was not a constitution *by* and *through* the people. At best, it was a paternalistic constitution *for* the people. It was a constitution by the grace of the king and, essentially, it was a constitution for the self-organization of the ruling class.

The European Treaties from Rome to Nice stand in stark contrast to the *charte constitutionelle* of 1814, as they constitute an association of democratic, legal polities and not a high-handed, hereditary monarchy. Nevertheless, in one aspect, the current European situation resembles the situations of 1814 and 1830. The term 'constitution' in the draft Treaty does not lend new, or even revolutionary, meaning to the already existing Treaties. The old Treaties and the new draft are a constitution meant for the organs of both the Member States and the Union, for judges and lawyers, for professional politicians, for boards of directors, for union leaders, for television presenters and bureaucrats, for Sabine Christiansen, Olaf Henkel and Jacques Chirac. To put it bluntly, the European Treaties are a constitution for a political class, which has allied itself with economic power and the mass media in order to become a new, highly flexible, transnational class, only referring to the citizens 'as the people out there'. They

are a part of a cosmopolitan project, but unfortunately their cosmopolitism is a 'cosmopolitism of the few'.[10]

The European Treaties are certainly not an egalitarian constitution for the citizenry of Europe. In constitutional praxis, provided that it is played out beyond the ruling class, there is no constitution. The European constitution might be the constitution of a 'confederation of states' ('*Staatenverbunds*'[11]), perhaps of a 'combine of constitutional courts' ('*Verfassungsgerichtsverbunds*'[12]), but it is hardly and, if so, only insufficiently, the constitution of a covenant of citizens ('*Bürgerbund*', Rousseau). This also applies to the awkwardness, complexity, legal finesse and length of the old Treaties as well as to the draft constitution. One cannot grant extensive rights to citizens and then leave them to play *pouvoir constituant* in the sand pit. The criticism of the draft constitution as being impenetrable and bulky should not simply be dismissed as populism. It is actually appropriate to the issue, as a constitution is (or, at least, is also) a 'layman's document, not lawyer's contract' (Franklin D. Roosevelt). Thus, it has to come to the fore, as in the *Grundgesetz* and in the constitutions of *all* the Member States, that the people hold decision-making powers and that they are undoubtedly the sovereign of their polity.

However, in one aspect, the Treaties are already a constitution for all citizens. They represent an egalitarian constitution for all citizens as individual European citizens who are able to utilize their right to legal action and to claim their European rights.[13] This is a way which is open to everyone, whenever he or she wants or feels the need to utilize their rights, albeit only as an individual. The voluntarism of individualized claims is a constitutive contribution to an egalitarian–democratic legitimation of law,[14] but it should not be equated with a common law-making will. This is the central issue which came to the fore in the European constitutional system in late spring time last year.

In order to analyse this problem in greater detail, I distinguish three levels of constitutional integration: first, unintended functional integration, which mirrors a certain level of social evolution; second, rule of law integration or, according to the German constitutionalism of the nineteenth century, constitutional integration, which represents a planned evolution of a regime in existence; and third, revolutionary integration via a democratic constitution which has the effect of constituting political rule.

Functional constitution: the Hobbesian stage of constitutionalism

In the early phase of European legal development, which was still heavily impinged upon by the technocratic ideas of the late 1950s and early 1960s, it was common to define the European Treaties as a functional constitution.[15] In a more sophisticated understanding of functional integration, which is detached from a crude teleological scheme of means and ends, the European Treaties have had the function of a constitution since the Treaty of Rome.[16] The Treaties maintain both the borders between the legal and the political system and the borders

between the legal and the economic system. Niklas Luhmann terms this as 'structural coupling'.[17] The structural coupling of law and politics means that each law can be altered by political power, although law, at the same time, limits the application of political power. The structural coupling of law and the economy now hinges upon the constitutionally guaranteed freedom of contract. Following this pattern, other fundamental rights allow for the structural coupling of science and law, religion and law, and other systems.[18] The enormous explosive energy of the productive forces of communication, unleashed by functional diversification and specialization, is channelled and controlled by these structural couplings. Through the marked shift of the centre of structural coupling from politics to the economy in the EU, a constitutionally privileged position of the market and market logics has emerged. This structural imbalance cannot be corrected by soft interventions alone (for example, through social democratically motivated and parliamentarily supported Commission policies, through a deliberative comitology system, etc.). Hence, what is needed is a fundamental strengthening of the political power within the EU, i.e. the transition to a complete political union.[19]

The reduction of the concept of *constitution* as a revolutionary achievement to the function of structural coupling does no justice to the normative claims of a modern constitutional conception. In this perception, Hobbes with his notion of a contract had quite the same in mind as Luhmann. An effective constitutional regime enables the relatively peaceful progress of jurisprudence, political power, economic capital, scientific advance, and general education, etc. However, in contrast to Hobbes, who still adhered to purpose-rational concepts, a functional analysis indicates that the same function can be fulfilled by very different types of constitutions. The only condition to be fulfilled by a functional constitution is the condition that political action can change any legal norm, and that all political actions have to be in accordance with (constitutional) law. But political action to change law does not presuppose a democratic polity; it can include autocratic or authoritarian politics as well. The function of the structural coupling of law and politics can be fulfilled by authoritarian as well as by democratic regimes, and hence the legal rules that enable and cover political action can include human rights or not. Therefore, authoritarian and democratic regimes are functionally equivalent when it comes to structural coupling. Hence, the peaceful expansion of power, capital and knowledge via structural coupling does not necessarily lead to increased individual and democratic freedom.

Rule of law constitutionalism: the Lockean stage of constitutionalism

The rule of law binds the power of state organs and other political organizations through legal norms. Hence, ordinary laws gain the status of subjective rights, which protect citizens against extra-legal state interventions. '*Zwingendes Recht*', the German Jurist Christoph Möllers writes, '*befreit von informeller Macht*' ('Binding Law does emancipate us from the arbitrary informal use of

power').[20] The continuum of rule of law constitutions encompasses the Hobbesian minimum ('what is not forbidden by law is allowed'), the binding of all state power to the fundamental rights (as in Article 1.3 German *Grundgesetz*), and the expansion of the protection of fundamental rights to private relationships (as in the *Drittwirkungslehre* of the German Constitutional Court). Rule of law transcends the mere function of structural coupling; it is a normative ideal, which paradigmatically corresponds to the political theory of John Locke. The rule of law normatively limits political power without hindering the growth of functionally specialized or publicly mobilizable power.

The major achievement of the EU is a new form of freedom of movement in Europe, which does, however, have some historical predecessors in the laws of federal constitutions (such as those of the early Swiss Confederation, of the United States, of the *German Reich*, as well as the previous ones of the *Deutsche Bund* and of the American Confederation of 1781) concerning the status of their nationals ('*Indigenat*').[21] But the *individual right to move* has much more relevance, and becomes a manifest constitutional problem of legitimization only when it comes to a global society of nation states *and* global organizations which is what our political world now is. The situation within a *globally organized system of nation states* is very different from the former *world of regional nation states* which were restricted to some regions of the globe, and this was the case during the nineteenth century and the first half of the twentieth century when the system of nation states did not reach further than first Europe, then America, and later Japan. In a global society, state borders, which were formerly a condition of the possibility of freedom, have now turned into an arbitrary restriction of freedom.[22] The freedom to cross every national border and to enjoy the same rights as national citizens – apart from a few political rights – outshines all economic fundamental rights. To cite a spectacular case, a ruling of the ECJ holds that Irish women are allowed to have a legal abortion in the UK, although abortions are illegal under Irish criminal law. The citizens of the EU, all short- and long-term inhabitants within EU territory, and even the citizens of neighbouring countries today enjoy more rights than ever before.

Yet, the resulting joy is, to some extent, reduced as the rule of law within the territory of the EU is not, in every aspect, better than it would be without the Union, despite the latter's complex plethora of rights, legal claims and means. Numerous special regulations, exceptions and 'flexible-formula' compromises within EU law jeopardize legal security and open the door to abuse by powerful state and private actors.[23]

Together with the emergence of new European citizens' rights and a strongly rights-based rule of law legal community, we can observe – at the same time – a *deformalization* of law, and an increase in *informal power* which has a strong impact on European and national legislation. The unified power of prime ministers, which is concentrated within the legally and democratically nearly uncontrolled and mainly informal meetings of the European Council, *bypasses* formal treaty-making by means of informal political influence, and this means: *bypassing democratic legitimization* by the growing informal power of an emerging transnational (and, in particular, European) ruling class.

The growing informal power of the executive bodies of the transnational ruling class lends their protocols (such as the *Bologna Protocol*) and their consultancy an *authority beyond the constitution (Treaties) of the Union and beyond the constitutions of the Member States*. In this respect, the informal power of transnational bodies such as the European Council, the G8, or the Basel Bank Commission looks like a copy of the old Roman Senate's *senatus consultum*, which had no legally-binding force (and therefore could never be questioned legally) but nearly all the (extra- or pre-legal) power needed to implement all its protocols and consultings. The now more and more fragmented, and more and more closely co-ordinated executive organs of states belong to the great winners of globalization and Europeanization.[24] The independent power of the executive branch in foreign affairs was always at a rather high level, and often went beyond the control of both parliaments and constitutional courts. But globalization and Europeanization have led (in a highly pluralized and fragmented process) to something akin to an *original accumulation of the informal power* of the now united executive branches of the states.

There are other examples of a reduction of the rule of law or *Rechtsstaatlichkeit*. Sometimes, the space of *freedom*, *security* and *law* which the preamble of the Treaty of Maastricht promises, seems to be reduced to *security* alone. To newspaper readers, the new possibility of extraditing EU citizens without judicial hearing to another Member State where they are accused of a crime is well known. From a rule of law perspective, this is a scandal that is rendered even greater by the European Commission's assurance that, in general, legal conditions are alike in all Member States. But, in court, it is not the general level of human rights or of the rule of law (which is undoubtedly high in all Member States) that is decisive: what is decisive is the particular individual case and here it can make a huge difference whether Spanish, Irish or Swedish law is applied: starting from the admissibility of evidence, to the attribution of sanctions and the administering of the penal system, which can all violate the fundamental rights of the individual affected.[25] Cases like this reveal that the EU should not only count the gains when it comes to the rule of law, even though the gains still by far outweigh the losses.[26]

Furthermore, the Union provides its citizens with legal protection from the outside, which, in many cases, exceeds the protection granted by individual states. Thus, the Union filters the direct impact of international law via its institutions. As Hilf and Reuss state, the EU holds the function of a 'hinge' in transferring global economic, trade and consumer norms into its Member States.[27] This function protects EU citizens from the implementation of WTO norms which could violate national or European rights. However, there are also prominent counter-examples of stark interventions into the political rights of Member States, and of regional and local authorities, such as the case of the global deregulation of water service (*Wasserrechte*), through which the German local authorities lost a major part of their autonomy.[28] This does not change the fact that the growth rates within the arena of private autonomy are markedly higher than any reverse tendencies, and it would be a mistake (as in the French 'No'

campaign) to equate private autonomy with neo-liberal competition and market de-regulation. Private autonomy cannot be reduced to possessive individualism, as private autonomy consists of the mutual granting of rights by citizens, and thus those rights *can* only be turned into positive law and be secured without loss via the application of public autonomy.[29]

The fact that EU citizens hold direct rights from the Union, such as personal freedom of movement, the ban on discrimination, the right to vote, to be treated as a national to petition, and to diplomatic protection,[30] thus has far-reaching implications for the legitimacy of the Union. The ECJ had already realized this in 1963 and, hence, developed the doctrine of *direct effect* and *supremacy*,[31] which was quickly followed and applied by all courts in Europe from the late 1960s onwards. The doctrine prescribed that a citizen *as* a European citizen can claim his or her rights in courts all over Europe. Thus, national courts are, at the same time, European courts which are bound as much to European law as they are to their respective national laws, be they German, French, Danish, etc.[32]

The ECJ had deducted the direct effect doctrine from the right to legal action, held by the Commission and the Member States (ex Article 169 EEC). It re-interpreted the prescriptions of ex Article 177 EEC in an almost subversive, civil societal manner by enabling and prescribing the pre-eminent application of European law by national courts. As the establishing of a common market affected Community citizens directly, the TEC had to be more than a treaty that constituted mutual obligations between states. Instead, it constituted a new legal order, by both imposing obligations on and also granting rights to affected individuals. The Court further argued that this could be deducted from the preamble, which referred to states and peoples, and, in particular, from the establishment of organs which held delegated authority, which affected both Member States and citizens. Thus, the citizens had to have the right to claim community law in national courts.[33]

The legal claims of the EU citizens, which result from the doctrine of *direct effect*, constitute a source of legitimacy for European law independent of international treaties, originating from European citizenry itself. Since the famous ruling of the ECJ in 1963, the EU has been legitimated not only by the treaties made by statesmen, and ratified by national parliaments, but also directly by the implementation of the Union's fundamental rights. Today, 'the legal subjects of the Union are not only the Member States but also' – legally at least – 'its citizens' [my translation H. B].[34] The 'citizenship of the Union shall complement […] national citizenship' (Article 17.1 TEC) and grants the community a 'double legitimation' as an independent 'legal personality' within international law (Article 281 TEC).[35] It follows that the existence of subjective rights between the Union and its citizens forbids the break up of the Union 'even against the will of the Member States'.[36] As all European citizens, as citizens of the Union, enjoy rights in all Member States, only the united citizenries of the Union, as *the people* of the EU, could allow such a dissolution, and would have to be involved or at least be consulted.

The need for the double legitimation of European law is essentially an

implication of the *indiginat*, already common in the 'classical' confederal constitutions of the US, Switzerland and Germany, through which the constituent states grant their citizens mutually equal rights of residence as citizens of the confederation, community or union.[37] At first, purely interstate in nature and only democratically legitimated by the constituent states and their parliaments, the *indigenat* has serious consequences. It is the 'germ cell of European citizen rights'.[38] It sets in motion a 'logic of development'[39] that transcends both a merely functional market or economic citizenship, and a democratic legitimation limited to the nation state by the 'masters of the Treaties'.[40] As the freedom of personal movement aims to grant equal rights to all citizens within all the constituent states, encompassing the whole spectrum of civil rights, it is fundamentally different from mere economic freedom or the free movement of goods. It therefore indicates the legitimatory need to complement the European *Staatenverbund*[41] and its *Verfassungsgerichtsverbund*[42] with a (Rousseauian or Kantian) covenant of citizens.

The very moment that states make an international treaty that grants their respective citizens reciprocal rights of *indiginat* and *free movement of persons* (ex Articles 6a and 18.1 TEC), the contracting states lose their intergovernmental rulership over the *new federal citizenship* which they have constituted through their treaty. Kings as absolute monarchs can grant rights and take them back if they are pleased to do so. Not so democratic states. In a democratic regime only the citizens themselves can mutually grant rights to one another.[43] This is precisely what distinguishes civic *rights* from mere (feudal) *privileges* which do not presuppose a reciprocal acknowledgement through free and equal citizens. Therefore, by the very act of signing the Treaties, the Member States representatives are no longer the only 'masters of the Treaties'.[44] They have *constituted a new and independent civic subject of legitimization*.

Thus, from the beginning, European civil rights have been rights of European citizenry – both of equal origin.[45] You cannot have rights without a citizenry. European law therefore needs to be legitimated by both the mutual commitments of Member States and the reciprocal rights of its citizenry. This clearly distinguishes the Union's subject of legitimation from that of the constituent states: the members of the European Parliament represent 'the peoples of the States brought together in the Community' (Article 189 TEC) in 'their entirety' and 'not as representatives of isolated national peoples'.[46]

But what does *legitimation* actually mean? That which is clearly co-original legitimation at the level of subjective *rights* becomes highly unbalanced at the level of the legal build up of the *organizational* structure (*Organisationsrecht*) of the Treaties. In democratic associations, legitimation of law has one, and only one, meaning: it means democratic legitimation. This democratic legitimation of law hinges not only on the input-side of law-making via public discussion, 'elections and votes' (Article 20.2.2 German *Grundgesetz*), but also on the democratic legitimation which encompasses the whole process of norm-creation which takes place at all the levels where law-making materializes and implements itself or is enacted. The democratic legitimation of law stretches, for

example, from public debates and lobbies in the *Bundestag*, from late night phone calls and political arrangements with every type of person involved',[47] from sit-ins on motorways to press reporting, from party conferences and campaigns to parliamentary legislation. However, it does not end here, but continues at all levels of the legal edifice (Kelsens '*Stufenbau des Rechts*'): in governmental orders, administrative decrees, in police law, court rulings, in concrete orders and in the local practices of the police and the penal system.[48] Legal claims and the right to legal action, *judicial remedies* and *direct effect*, which are enabled and protected by informal discussions as well as by demonstrations and the freedom of association, are important elements of democratic legitimation and, in particular, of the output-side of legislation in a democratically organized layered legal structure. Here, at last, the people as single individual human beings enter the public arena by demanding decisions ('*im Namen des Volkes*') about the transfer of law into concrete norms. By making use of their private autonomy, the individual citizen can take legal action and thereby force judges to open a court case, which may finally generate a new norm or confirm an old one.[49]

With Christoph Möllers, we can call this 'individual legitimation'.[50] However, we need to bear in mind that the arbitrarily enforceable, individual legitimation – which nevertheless demands public justification in court – has legitimizing power only via the application of juridical remedies, as it remains a central element in the whole process of public and democratic will formation, albeit without any independent function of legitimation. Hence, the direct effect of European law not only extends the private autonomy of Union citizens, it is also, in itself, an element of public legitimation that goes beyond a mere rule of law regime. However, the claim to democratic self-rule, founded in the existence of subjective rights, cannot be achieved via mere individual autonomy in court. Thus, Joseph Weiler is absolutely right when he states:

> [B]ut you could create rights and afford judicial remedies to slaves. The ability to go to court to enjoy a right bestowed on you by the pleasure of others does not emancipate you, does not make you a citizen. Long before women and Jews were made citizens they enjoyed direct effect.[51]

Indeed, in the Roman Empire, a (high-ranking) slave could lodge an appeal on behalf of his master as if he were a free citizen: '*si liber esset ex iure Quiritium* [as though he was free according to Quiritian law].'[52] This illustrates the counterfactual emancipatory power of norms, but in real life, it may be good for some privileged slaves but changes nothing in the societal structure of slavery and thus reveals the Janus-like face of law.

Rights to individual autonomy limit political power and concretize legislation, but they do not constitute a rule-breaking 'rule by the ruled'.[53] They function only as momentum for such justification if they have been democratically transformed into concrete norms in court. Otherwise, subjective freedom that is to be secured by the mutual rights of personal movement, lacks concretization

through democratic procedure, which works to define the scope of subjective freedom and to render this freedom reliable, resistant to arbitrariness and 'court proof'.[54] Without public autonomy, *judicial remedies* secure rights, which are withheld from the citizens and left to democratically unbound courts for decision. Without democracy, no rule of law regime can guarantee the equal freedom of each addressee of law. Without democracy, rule of law is just an instrument to stabilize the power of the ruling class. It is an instrument that *can* be used by the oppressed against their oppressors, but that does not change the brutal fact that it regularly works in the interest of the oppressors.[55]

Democratic constitution: the Rousseau-Kantian stage of constitutionalism

Within the EU, there are not only rights to individual autonomy, which are, at the same time, the pre-condition for, and momentum of, democratic legitimation, but also *instruments of direct democratic legitimation*: European elections, a European Parliament, etc. Yet, even with the completion of 'individual legitimation' by the right to vote for the European Parliament and by the impressive broadening of democratic, but still insufficient, parliamentary rights, individual legitimation does not turn into a sufficient justification for rule – it does not turn into a democratic legitimation of European law. Like the German Parliament in the Bismarck era, the present European Parliament is, structurally speaking, no ruling parliament but a subservient parliament.[56]

However, like the parliament of the German Empire (the *Reichstag*) shortly before the First World War, the European Parliament has become a *strong Parliament*. As Phillip Dann has shown, the European Parliament functions in a way similar to the US Congress, and its political power within the EU comes close to the power of the Congress within the American constitutional system. Like the Congress the European Parliament is not (as in the Westminster paradigm case) a *debating* but a *controlling parliament* within a semi-parliamentary system.[57] However, the European Parliament is different from the US Congress in the sense that it is not a *democratic parliament*. European parliamentarism is *strong parliamentarism without democracy*.

Different from the US system of semi-parliamentarism is *first* the fact that Europe instead of a directly elected president has a Council of Prime Ministers who are democratically legitimated, not as this Council but only indirectly as agents of their respective Member States. And yet, the European Council has nearly as much power as, and even much more *uncontrolled*, *informal* and *sub-legal* power than the American President,[58] and – as we have already seen – the Member States' legislative and judicial organs, as well as the other organs of the EU, are completely insufficiently equipped to control the mostly informal Power of the European Council. In this respect, the position of the European Parliament (*and* the Member States parliaments) vis-à-vis the European Council resembles the position of the nineteenth century German Empire's *Reichstag* vis-à-vis the *Kaiser* and the *Bundesrat* which was a chamber of princes and monarchs. The

growth of informal power within the EU makes the *legalization of the centres of informal power* one of the most important steps on the road towards a more democratic Union.

But there is a *second* difference between the European parliament and the US Congress, which is as important as the first one. The strong and controlling European Parliament is based on democratically completely insufficient European elections which are of little or no democratic value. They are *pseudo-elections*, and European parliamentary democracy is *pseudo-democracy*. This simply is so because (in contrast to the US Congress) the voters have no choice at all between *clear and visible political alternatives*. The current elections for the European Parliament do not offer alternatives for either personal (leaders) or programmatic choice.

There are other striking lacks of democracy. The European Central Bank, like the Council of Ministers, has the entire legislative breadth of the EU at its disposal (Article 110.1 and 2 TEC) and is able to sanction violations of its legislative directives (Article 110.3 TEC). Whereas the German legislator can intervene in the fiscal policy of the national central bank at any time by law, at European level, there is no possibility of control through the Parliament *or* the Council of Ministers. From the perspective of democratic theory, the empowerment of the Central Bank or of any other executive organ remains unproblematic only if all decisions taken by these organs are bound back to the general political process via a legislative decision for their establishment.[59] However, this is not the case in the EU. As the empowerment cannot be traced back to the simple legislator (Parliament, Council of Ministers) but to the constitutional legislators of the Treaties, the fundamental condition of democratically legitimate delegation, its reversibility, is annihilated. The executive organ becomes a *special* legislator, which destroys the democratic general public and, in particular, the competence of national parliaments to take up every possible subject, and to make binding decisions on every possible subject.[60]

Furthermore, the present structure of the Council of Ministers leads to ever deeper cuts into the flesh of national, still halfway democratically legitimate law. This can be illustrated best by an example. As the former German minister of the Interior, Otto Schily, wanted to cast his civil-rights-adverse security policy into law and adopt biometrical passports without finding sufficient support in both German government and parliament, he had to meet with his European fellow ministers in Brussels and urge them to decide on a European directive that binds the *Bundestag* and the *Bundesregierung* and demands implementation. Today, it is the passport, tomorrow, after the next large terror attack, it will be 'auxiliary torture' as an EU directive. Schily's bold stroke effectively annulled both the sovereignty of the parliament and the authority of both the chancellor and his government towards the parliament. Institutionally, via the fragmentation of ministries, this has become a common practice in almost all policy areas in Europe, and resembles the situation in some African states. However, this is no European phenomenon; it is a global trend,[61] which is merely most effectively organized within the EU, and reinforced by the internal

fragmentation of the Council of Ministers which has no instruments to coordinate and connect the different branches of ministers.

At its core, this process is about interests and power. The winner of the game is the political class; the loser is the European citizenry. The path of the political class via supranational (and international) law stabilizes the single rule of the government – in contrast with democracy – over parliament, of ministries over their domain, of government-friendly bureaucracies over regions, of the political class and its networks of industrial associations and politicizing media stars over the people. Even the new constitution, had it been accepted, would not have dramatically changed anything in this set-up.

It is not in economical terms, but in terms of democratic political power that the peoples of Europe *and* the legally united European citizenry were the losers of the European integration process. But now they, *the people out there*, have struck back. The *latent constitutional crisis* of Europe that consists in a contradiction between the *democratic rights* of the European citizens and the *undemocratic organization of will formation* within the European branches of power, now becomes manifest in a process of *popular politicization of European elitist politics*, which begins in the middle of the 1990s with a silent shift in voters behaviour (1), and becomes public dramatically during the referenda over the new European constitution in 2005 (2).

(1) The elections to the European Parliament are, as we have seen, pseudo-elections, and the European political class has cheated the voters because there were never real and visible alternatives for them to decide about. But after about 15 years of European elections, the people began to cheat the European establishment. During the first 15 years of elections since the elections of 1979, the citizens voted on national issues which had nothing or little to do with European parliamentary politics. For the united political ruling class of Europe, this was very convenient – because the elections changed nothing, but gave them the clear conscience of being sufficiently democratically legitimated.

But, since the middle of the 1990s, things have changed silently but dramatically. They, *the people out there*, have 'Europeanized' the elections.[62] They now vote basically on European issues, and they take the only alternative that the political ruling class of Europe and the vast majority of the parliament has left to them, the alternative of *pro* and *con* Europe. The effect is that now, for the first time, a real *opposition* is emerging within the parliament, and this opposition is not good news for the European unification project. The anti-European parties, which strongly rely on right wing *ressentiments*, have gained significantly from election to election since the middle of the 1990s.

However, there might also be some good news. First, if the trend of significantly increasing anti-European votes holds, then the pro-European majority of the parliament has to strengthen and fight through its conflicts with the Commission and the Council of Ministers as it still does, and it could even become a power that opposes the European Council and questions its informal power. If the majority parties do not do this, they will lose further voters to the anti-European parliamentary opposition, and this could happen very quickly – in

particular, because the European constitutional crisis has, at least, become manifest during the French and Dutch referenda of 2005. Second, the consequence then could be that the half *external* parliamentary split between *pro-* and *anti-*European parties could change into a more *internal* opposition between a (British) *neo-liberal economic* Europe and a (Germany–France–Spain–Italy) *social democratic and political* Europe.

(2) The current constitutional crisis of the EU has for the first time become publicly manifest in the no-votes of French and Dutch voters. They have seized the opportunity the minimal democracy of the Union gives them. The negative votes of the French and Dutch people, acting for the first time as part of the European *pouvoir constituant*, have made the latent European constitutional crisis – concealed so far by the economic success-story of the Union – visible.[63] For the first time in the history of the elitist European project, the imbalance between intergovernmental legitimation and legitimation through the European citizenry has become an issue for the European public. The no-voters might have underestimated the real democratic progress which would have been possible with a new constitution. Even the effective propagandist equation of the immense broadening of private autonomy within the Union to a neo-liberal political programme – a strong motive to vote 'no' – was not even half the truth. There are, as we have seen, more civic rights to defend in Europe than just the freedom of competition, and it is precisely these rights that can, and should, be taken seriously by the citizens.[64]

But the no-voters were absolutely right when they declared the state of public autonomy in the Union to be insufficient and when they revealed its pathetic draft constitution as a mere mirror of this situation.[65] Although the criticism of the impenetrable and bulky character of the document produced was populist, it was appropriate to the matter as a constitution is (at least in part) a 'layman's document and not a lawyer's contract' (Franklin D. Roosevelt). It has to state, without any legal finesse, that the people have to decide important matters and that they are the sovereign of their polity. A polity only holds public authority when its constitution not only contains a grandiose Charter of Fundamental Rights, but also comprises a system of egalitarian norms of a democratic procedure of check and balances, which enable democratic politics, which, in turn, does not exclude anyone a priori or without a specific general reason. Democratic politics means that citizens hold communicative powers, that they are able to generate a common will via public deliberation, accessible not only to experts, and that they can regularly decide about political alternatives. The philosophical and political founding fathers of such a constitutional understanding are not Hobbes and Locke, but Rousseau and Kant, Jefferson and Sièyes.[66]

The more supranationally a post-national constitutional regime is organized, the higher its need for direct democratic legitimation becomes. First, the fragmentation of the Council of Ministers has to be overcome, and this means not only that the ministers of different branches (such as finance, internal affairs, agriculture, etc.) have to meet regularly, but also that they need to hold common meetings in order to co-ordinate their politics. Second, the European Council has

to be formally equipped with the informal competences that it anyway already has. Third, for a half parliamentary regime such as the EU, there is need for some direct democratic legitimization, be it via a system of (veto-) referenda and/or a directly elected president. Fourth, the still strong European Parliament has to be democratized, and this can work only if European alternatives for the voters, alternatives in both programmes and in leaders, are presented. The electorate must have clear options as to who are to be the leaders of the majority and who shall form the parliamentary opposition. There are important political alternatives in Europe today, alternatives between social disembedment and social reembedment of the capitalist market economy, or between a global politics of weakening and reinforcing global constitutionalism, or between strengthening and weakening the rule of law in Europe during the so called 'war on terror'. If these alternatives are not democratically decided and legitimized by European debates and campaigns, and by direct elections and votes of the European citizens, then democracy not only of the Union but also of the Member States will vanish.

After the rejection of the draft constitution by the *pouvoir constitutant*, the EU is confronted with the alternative between constitutionalism and constitution: either regress into a *constitutional* de-regulatory regime with a growing executive power of the European political class, or the *constitutive* re-founding of the Union as a democratic polity with an overall competence, subsidiarily layered and grounded in the will of the citizenry and oriented towards a democratic separation of powers.

Notes

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1 C. Schönberger, 'Die Europäische Union als Bund – Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas', Freiburg: unpublished manuscript 2003; see, also, C. Schmitt, *Verfassungslehre*, Berlin: Duncker & Humblot, 1989, pp. 363ff.

2 C. Möllers, 'Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung: Begriffe der Verfassung in Europa', in A. v. Bogdandy (ed.), *Europäisches Verfassungsrecht*, Berlin: Springer, 2003, pp. 1ff. A second type Möllers coins *evolutionary*. However, and as we will see, this does not correspond with the sociological meaning of evolution as a spontaneous, involuntary development.

3 H. P. Ipsen, 'Die Bundesrepublik Deutschland in den Europäischen Gemeinschaften', in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Heidelberg: Müller, 1987, § 181, margin no. 32; D. Grimm, *Die Verfassung und die Politik: Einsprüche in Störfällen*, Munich: Beck, 2001, pp. 229–230; A. Augustin, *Das Volk der Europäischen Union*, Berlin: Duncker & Humblot, 2000, p. 253; F. Scharpf, 'Regieren im europäischen Mehrebenensystem – Ansätze zu einer Theorie', *Leviathan*, 2002, vol. 30, no. 1, 65–92, p. 76; C. Joerges, 'Rechtswissenschaftliche Integrationstheorien', in: B. Kohler-Koch and W. Woyke (eds), *Die Europäische Union: Lexikon der Politik, Vol. 5*, Munich: Beck, 1996, p. 230; M. Kaufmann, 'Permanente Verfassungsge-

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6 A. v. Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform*, Baden-Baden: Nomos 1999, pp. 10, 32–33, pp. 38ff. The supranational character of the European communities has earlier been pointed out by H. Steiger, *Staatlichkeit und Überstaatlichkeit*, Berlin: Duncker & Humblot, 1966.

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19 For the distinction between power and influence in this context, see G. Marks, L. Hooghe and K. Blank, 'European Integration from the 1980s: State-Centric v. Multilevel Governance', *Journal of Common Market Studies*, 1996, vol. 34, no. 3, pp. 341–378.

20 C. Möllers, *Legitime Gewaltenteilung. Nationalstaat – Europäische Integration – Globalisierung*, quoted from the not yet published manuscript (Göttingen, 2006), p. 300.

21 C. Schönberger, *Föderale Angehörigkeit*, Freiburg: Habilitationsschrift, 2005.

22 C. Möllers, *Legitime Gewaltenteilung*, Tübingen: Mohr, 2005, pp. 197ff.

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24 K. D. Wolf, *Die neue Staatsräson*, Baden-Baden: Nomos, 1999.

25 For a similar case concerning the planned European public prosecutor, see K. Lüdersen, in: *Frankfurter Allgemeine Zeitung*, 29 December 2003; also K. Lüdersen, 'Europäisierung des Strafrechts und Gubernative Rechtsetzung', in *Goldthammer's Archiv für Strafrecht*, 2003, pp. 71–84. Meanwhile, the German constitutional court has come to a decision.
26 For the rights of EU citizens, see A. Augustin, above note 3, pp. 30ff., pp. 43ff., p. 61, pp. 63ff., pp. 67ff., pp. 82ff., pp. 87ff.; see, also, Grimm, above note 3, p. 229; C. Tietje, 'Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen der Europäisierung und Internationalisierung', *Deutsches Verwaltungsblatt*, 2003, vol. 17, 1081–1146; C. Joerges, 'Zur Legitimität des europäischen Privatrechts: Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU', in C. Joerges and G. Teubner (eds), *Rechtsverfassungsrecht – Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, Baden-Baden: Nomos, 2003; EUI Working Paper Law no. 2004/04, pp. 10ff.
27 M. Hilf and M. Reuß, 'Verfassungsfragen lebensmittelrechtlicher Normierung', *Zeitschrift für das gesamte Lebensmittelrecht*, 1997, pp. 293ff., p. 296, p. 300.
28 For an illustration, see G. Lübbe-Wolf, 'Globalisierung und Demokratie: Überlegungen am Beispiel der Wasserwirtschaft', *Recht und Politik*, 2004, no. 3 pp. 293ff., p. 296, and p. 300.
29 This is the central argument of J. Habermas, *Faktizität und Geltung*, Frankfurt aM: Suhrkamp, 1992.
30 For the significance of the freedom of movement and the right to vote for a federal political order, see above note 21, pp. 160–161, pp. 288–289, p. 313, pp. 315ff., pp. 324ff., pp. 399ff., pp. 514ff.
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32 For social evolution and the implementation of *direct effect*, see K. Alter, 'The European Court's Political Power', *West European Politics*, vol. 19, no. 3, 458–487; see, also, K. Alter, 'Who are the "Masters of the Treaty"?', *International Organization*, 1998, vol. 52, 121–147.
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34 M. Heintzen, 'Die "Herrschaft" über die europäischen Gemeinschaftsverträge', *Archiv des öffentlichen Rechts*, 1994, vol. 119, 564–589, p. 570.
35 C. D. Classen, 'Europäische Integration und demokratische Legitimation', *Archiv des öffentlichen Rechts*, 1994, vol. 119, 238–260, pp. 259–260, author's translation.
36 C. Möllers, *Staat als Argument*, Munich: Beck, 2000, p. 404.
37 Above note 21, pp. 307ff.
38 Ibid., p. 401.
39 S. O'Leary, *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, The Hague: Kluwer Law International, 1996, p. 21.
40 Kirchhof, above note 3
41 Ibid.
42 di Fabio, above note 5.
43 See, in detail, above note 29, pp. 116–117, pp. 155ff.
44 Kirchhof, above note 3.
45 For the equal origin of private and public/political autonomy, above note 29, pp. 161–162.
46 Above note 21, p. 517, pp. 519ff.
47 A. v. Bogdandy, 'Entmachtung der Parlamente?', in *Frankfurter Allgemeine Zeitung*, 3. May 2005, p. 8.
48 For the layered structure of the edifice of law, see H. Heller, 'Der Begriff des Gesetzes in der Reichsverfassung' (1927), in *Gesammelte Schriften*, Leiden: Sijthoff, 1971, pp. 225ff. (author's translation); seminal also A. Merkl, *Allgemeines Verwaltungsrecht*, Wien, Berlin: Julius Springer, 1927.

49 This does not resemble the *output*-legitimacy political scientists have in mind when they analyse the economic and social effects of a regime. What is meant here is the citizens' opportunity to intervene in the concretization of norms even at the very end of the legislative process. For the term *output*-legitimacy and its significance for political science, see F. Scharpf, *Regieren in Europa – Effektiv und demokratisch?*, Frankfurt aM: Campus, 1999.
50 Möllers, above note 14.
51 J. H. H. Weiler, 'To be a European citizen – Eros and Civilisation', *Journal of European Public Policy*, 1997, vol. 4, no. 4, 495–519, p. 503.
52 Cit. in A. Bürge, *Römisches Privatrecht*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1999, p. 174.
53 C. Möllers, 'Der parlamentarische Bundesstaat – Das vergessene Spannungsverhältnis von Parlament, Demokratie und Bundesstaat', in *Föderalismus – Auflösung oder Zukunft der Staatlichkeit?*, Munich: Boorberg, 1997, p. 97.
54 Möllers, *Gewaltengliederung*, p. 230, p. 232; for the democratic deficit of transnational civil rights, p. 235, p. 411. See, for the WTO, A. v. Bogdandy, 'Verfassungsrechtliche Dimensionen der Welthandelsorganisation', *Kritische Justiz*, 2001, vol. 34, 264–281, p. 271, p. 273.
55 In their *Dialectic of Enlightenment*, Horkheimer and Adorno have analysed this double feature of the instruments of the rulers in general:

> Domination, in becoming reified as law and organization,… has had to limit itself. The instruments of power – language, weapons, and finally machines – which are intended to hold everyone in their grasp, must in turn be grasped by everyone. In this way, the moment of rationality in domination also asserts itself as something different from it. The thing-like quality of the means … its 'objective validity' for everyone itself implies a criticism of domination.…
>
> (M. Horkheimer and T. W. Adorno, *Dialectic of Enlightenment*, Stanford: Stanford University Press, 2002, p. 29.)

56 C. Schönberger, *Das Parlament im Anstaltsstaat*, Frankfurt: Klostermann, 1997.
57 P. Dann, *Looking through the Federal Lens: The Semi-parliamentary Democracy of the EU*, New York University, Jean-Monnet Working Paper 5/02, 2002.
58 A. Moravcsik, *The Choice for Europe*, Ithaca: Cornell University Press, 1998.
59 Möllers, *Gewaltengliederung*, pp. 114–115.
60 Ibid., p. 230.
61 For the global fragmentation of the state, see J. W. Meyer, *Weltkultur*, Frankfurt aM: Suhrkamp, 2005, pp. 176ff.
62 P. Manow, *National Vote Intention and European Voting Behavior, 1979–2004 – Second Order Effects, Election Timing, Government Approval and the Europeanization of European Elections*, MPIfG Discussion Paper 05/11, 2005, pp. 7ff., pp. 17ff.
63 H. Brunkhorst, 'Verfassung ohne Staat? Das Schicksal der Demokratie in der europäischen Rechtsgenossenschaft', *Leviathan*, 2002, vol. 30, no. 4, pp. 530–543; H. Brunkhorst, 'A Polity Without a State? European Constitutionalism between Evolution and Revolution', in E. O. Eriksen, J. E. Fossum and A. J. Menendez (eds), *Developing a Constitution for Europe?*, London: Routledge, 2004.
64 See R. Dworkin, *Taking Rights Seriously*, Cambridge, MA: Harvard University Press, 1977.
65 For the 'co-originality' of private and public autonomy, see Habermas, above note 29.
66 See I. Maus, *Zur Aufklärung der Demokratietheorie*, Frankfurt aM: Suhrkamp, 1992; F. Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie: Elemente einer Verfassungstheorie VI*, Berlin: Duncker & Humblot, 1997; H. Brunkhorst, *Solidarität: Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, Frankfurt aM: Suhrkamp, 2002; but see, also, earlier H. Arendt, *Über die Revolution*, Munich: Hanser, 1974, p. 191, p. 193.

12 A done deal?

The EU's legitimacy conundrum revisited

Erik Oddvar Eriksen and John Erik Fossum

Introduction

It is widely recognized that the European Union (EU) suffers from a democratic deficit, due to its weakly developed and inadequate democratic structures, a cumbersome and executive-driven policy process and an 'incomplete' constitutional arrangement. The integration project is widely critiqued, but the critics do not agree on the proper diagnosis. Some are concerned with costs and efficiency, others with technocracy and lack of popular participation and others yet with the absence of a sense of community and a common identity. Some critics will denounce the EU for its lack of ambition, whereas others will denounce it for its overly strong ambition. These disagreements stem from different perceptions of what the EU is, what it should be, and how its democratic legitimacy can and should be assessed in normative terms. Through the CIDEL project, we sought to disentangle this confusion by specifying and assessing in a systematic manner, different strategies for how the EU's legitimacy deficit could be handled.[1] We asked: what is the EU and whose interests does it serve? Is the EU first and foremost:

- A tool for enhancing profit and economic growth? The ensuing entity would be a mere *problem-solving arrangement*
- A collective project to define and promote a European identity? The ensuing entity would be best labelled a *value-based community*
- A political effort aimed at forging a citizen's Europe? The ensuing entity would be best understood as a *rights-based post-national union.*

The findings from this project documented that the integration process has moved cooperation beyond intergovernmentalism and pragmatic problem-solving. The EU started out from humble beginnings, but with a noble aim: to entrench peace in Europe. The approach was modest and seemingly counter-intuitive: rather than locking in the former warring states in a supranational arrangement equipped with full-fledged state functions that would have abolished the sovereign statehoods (of nation states), the original European Economic Community fostered integration in such areas as trade and investment,

under a common customs union. This permitted the fledgling Union to serve as a problem-solving device, that is, as an instrument to help solve those problems that the Member States could no longer solve on their own. But the Union has never been only a vehicle for the Member States. The findings from the CIDEL project[2] underscored the tenet that the EU has developed into a supranational order; an order that not only subjects the Member States as its constituent parts to collectively binding decisions, but also establishes direct links to the citizens. European cooperation has turned political and constitutional. In other words, European cooperation is not only a matter of solving practical issues of low politico-normative salience; the integration process has become a process with deep implications for individuals', groups' and peoples' values and rights.

But the CIDEL project also contains broader lessons pertaining to *how* we might best address the issue of the EU's legitimacy deficit. These lessons pertain to the question of research approach: how we may best assess the legitimacy of a contested and constantly developing entity such as the EU. The question of what is the most suitable research approach cannot be considered in isolation from the Union's development and the insights we may glean from the multifaceted debates on the EU. Of particular importance in that connection is that the CIDEL project ran during the period in which there was a real constitutional debate over the EU. The European Council's Laeken Declaration (December 2001) raised the constitutional issue. This had profound effects on the political and academic debates, which picked up on and framed the question of the EU's legitimacy deficit in constitutional–democratic terms. One important lesson is that the constitutional frame requires attention to the connection between *legitimation strategy* and *polity framework*. CIDEL's analytical framework, with three legitimation strategies, had been foremost tailored to the examination of the EU's legitimacy within a range of policy areas.

The CIDEL research effort corroborated the notion that democracy (understood as a procedure) is the only remaining credible legitimation principle under conditions of pluralism and complexity. Substantive values, functional results or rights do not themselves legitimate authority; they do so only to the degree that they relate to democratic institutions and can be justified procedurally. But the project's short duration in a situation of rapid changes entailed that precisely what polity configuration could be associated with a given legitimation strategy remained underdeveloped.

The main purpose of this chapter is to suggest a way to move the research agenda beyond CIDEL. We start by discussing the CIDEL legitimation strategies. Thereafter, we revisit the debate on democracy in Europe. The main lesson we can discern from this multifaceted debate is what we will label as Europe's present democratic conundrum: Europe will suffer democratic losses if it does away with the multilevel structure. But the present structure is also deficient; unless it is reformed, the EU will not be able to resolve its democratic problems. The upshot is that we have to consider how best to democratize the multilevel constellation that makes up the EU. Such a solution entails *reconstituting* democratic orders (rather than simply abolishing the EU or uploading

nation state democracy to the EU-level). In the last part of the chapter, we briefly outline three models for how to *reconstitute democracy in Europe*; each of which reflects the entity's compound character.

The puzzle of integration

In the EU, we increasingly find problem-solving, goal attainment and conflict resolution in arrangements *beyond* the nation state: in policy networks and in transnational, as well as in supranational, institutions, such as the European Parliament, the European Court of Justice and the Commission. The continued albeit uneven integration in Europe has enabled the Union to expand through several rounds of enlargement, has produced a legal framework of constitutional stature, and has led to a – however fragile – common foreign and security policy. These developments cannot be accounted for solely as outcomes of threat-based bargaining between the largest Member States, or as 'natural' processes of spill-over from 'low' to 'high' politics.

The European integration process represents *a puzzle* for established theories, as the Member States have surrendered part of their sovereignty without being 'forced' to do so, to an entity whose democratic vocation could make it a competitor in allegiance terms. This process has taken place within a system bereft of any major physical means of coercion, and without a distinct identity at its disposal for ensuring compliance. Many of the presumed preconditions for integration and polity-building have *not* been in place. The Member States have effectively barred the EU from the measures generally seen to be required to produce a common culture or a common cultural identity. Integration has been conducted on a more or less voluntary basis. But it cannot be understood *solely* as the result of strategic bargaining because how can it be, that unequally situated governments, each in pursuit of its own self-interest, would bargain rationally with one another, and arrive at a system with some form of a democratic imprint? By the same token, it is difficult to see the *democratic* integration process as driven solely by the interests and resources of the decision makers who are compelled to make choices under conditions of uncertainty and risk. Neither can the functionalist approach explain why democracy should result from integration, as it does not spell out which feedback mechanisms produce democratization.

The puzzle is that integration has proceeded, whereas the Communities have manifestly lacked the means for forging integration that the rulers had when the European nation states were forged. In the CIDEL project we sought to address this puzzle by establishing a third logic of integration: integration through deliberation. This third logic represents a supplement to the mentioned mainstream theoretical perspectives on EU integration. Under specific conditions integration can occur through deliberation.[3]

Deliberation, which denotes a reason-giving practice – of giving and 'taking' arguments under critical scrutiny – is promoted through such mechanisms as public debate, institutionalized meeting places, peer and judicial review, and

complaint procedures. The EU has developed a whole host of such arrangements. It shares competencies with the Member States, and depends on the national administrations for the implementation of its decisions. The structure contains many veto points, there is a relative lack of forceful compliance mechanisms, representation and problem-solving take place through committees and networks; all these factors underscore a deliberative mode of decision-making. Under conditions of unanimity the members cannot simply apply arguments that convince a majority of the participants, but have to pick arguments convincing to all.[4] The infrequent use of majority vote – most Council decisions are unanimous – makes the EU into a kind of 'consensus' democracy.[5] Small countries are systematically overrepresented in the Council's voting formula, and unanimity is required on a whole range of issues.

But whereas deliberation is necessary for integration to come about, there is nothing automatic about this: talk can be cheap. Deliberation translates into integration only under conditions of trust and law, when:

1 there is a certain level of confidence and mutual respect, a modicum of non egoistic commitment – so that people dare to let themselves be bound by 'the better argument'; and,
2 the legal structure is developed to such a degree that agreements can be made into binding laws and non-compliance can be sanctioned.[6]

Some institutional mechanisms are more conducive to further integration than others. The EU is a mixture of supranational, transnational and intergovernmental-type institutions, which vary greatly with regard to integrative ability. The process of integration is often steeped inbetween competing and contending institutional structures. This has obvious implications for the type of entity that is being forged in Europe as well as for the relevance of the different legitimation strategies.

Legitimation through what?

Political orders may seek justification through various means, including utility, values and rights. But can these components stand alone, and do they – even when taken together – exhaust the range of possible legitimacy bases for the Union?

Beyond utility and rights

One widely held view of the EU is that of a special type of international organization whose particular purpose it is to solve the problems facing the nation states, notably those associated with an increasingly globalized economy. In this view, the EU's legitimacy depends on its ability to solve problems effectively and efficiently and its capacity to deliver the goods that people demand. Hence, the reference to 'output-oriented legitimation', which highlights positive results

for the 'stakeholders'.[7] In *intergovernmental* organizations it is the results that count and state survival is the sine qua non of the international order. Thus, the veto-power of all participants can create legitimacy in and of itself, as parties will not consent to decisions that are contrary to their interests. Only decisions that no one will find unprofitable – *pareto-optimal* solutions – i.e. that will make no party worse off, will be produced.

Functional results, or efficiency, do not in themselves justify policies or polities. Outcomes are themselves in need of legitimation; only to the degree that they can be related to some common goods, or some commonly accepted values, do they have justifying force in a political context. 'Output legitimacy' hinges on agreement on what the outcomes are for. Which values do they protect? What interests do they count in favour of? etc. Consequential or utility-based justifications for political orders are limited both in the sense that they can lend legitimacy also to a brutal dictatorship – as long as it produces the goods, it is legitimate – and in the sense that these justifications require further qualifications. They are not stable or sufficient in and of themselves – they cannot stand alone. In this sense, the legitimacy of the Union is not *a done deal*.

The end of the so-called permissive consensus which occurred with the contestation over the Maastricht Treaty, testifies to the fact that underlying the integration process there had been a tacit value-consensus on economic growth and efficient production of consumer goods. The instruments for achieving prosperity within the EU were: abolition of trade barriers, enhanced cooperation and a free market. The conflict over the Maastricht Treaty made it clear that prosperity could no longer be seen as an uncontested value. The European integration process spurred contention over the values and identities of Europeans, as concerns with democracy, sovereignty, identity and rights took centre stage in the public debate.

The historical context drove home a theoretical lesson: the problem-solving strategy as such, does not speak to *trust-generating values*; it simply presupposes such values. But it is precisely the presence of such (taken-for-granted) trust-generating and sustaining values that ultimately render problem-solving credible as a legitimation strategy.

Both critics and supporters of European integration have picked up on this, and underlined that a community-supportive and sustaining sense of European identity is a core requirement for the Union to achieve the status of a full-blown polity, able to make collectively binding decisions, to allocate and reallocate resources. It is widely held that a legally integrated state-based order is premised on the existence of a sense of common destiny, an 'imagined common fate' induced by common vulnerabilities, so as to turn people into compatriots willing to take on collective obligations to provide for each other's well-being. This is seen to be the solidaristic basis of the nation state, as well as of the welfare state.[8] To comply with this and to be authoritative and legitimate, the EU needs a symbolic collective 'we'. A European identity is required to sustain an ability to make collective decisions over time.[9]

A value-based community will engender civil compliance and build charac-

ter. In this perspective, legitimacy stems from primordial sources of belonging, which constitute the identity of the group, and provide the *cultural substrate* of collective decision-making and redistribution. The clear presence of this value-based legitimation strategy would serve as vital evidence for the proposition that the EU is something more and different from a mere problem-solving entity; and it would also be a more committing type of entity than would be a rights-based union. A rights-based Union could, over time, become a value-based community in that the establishment of rights could spur identity-forming processes and a community ethos, but it need not be so, because rights in and of themselves do not automatically generate obligations or produce identitarian commitments conducive to solidarity. Even children and slaves enjoy rights. Only citizen-empowering political rights can be said to have this function. These are the *rights of rights*, as they turn individuals into self- and co-legislating citizens with the competence to give each other rights. Co-legislating citizens are structurally placed in a position to judge the reasonableness of rights and to take on the duties involved. By implication, rights should not be thought of as possessions or as innate protections of private interests, but rather as what compatriots mutually grant each other when they are to govern their co-existence by law: 'Rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another'.[10] In this perspective, rights are inter-subjective; they entail recognition of reciprocity and they depend on *successful socialization and individuation processes* in order to work adequately. Persons who are capable of respecting the rights of others and of using their own rights in a responsible way are required for rights to function as protectors of interests. Those rights that can be understood in this way point to democracy as a mode of legitimation, as this constitutes the medium through which people, via law and politics can retroactively and reflexively act upon themselves.

Short of democracy the EU thus cannot qualify as a rights-based union proper. Moreover, democracy provides no criteria for drawing borders, as the people cannot decide on who the people is; this also means that democracy does not offer any explicit set of reasons for stopping the enlargement process. Many therefore hold up *nationhood* as a plausible solution to the circular question of how to constitute a polity democratically; that is, without predetermining the core issue: The democratic procedure cannot be used to settle the demos or the membership conditions, and democracy cannot operate without these.[11] Many therefore conclude that for democracy to be effective, it has to depend on primordial values or some form of *homogeneity*, that is, some form of substantial equality that makes it possible for citizens to see themselves as equals.[12] According to this kind of reasoning democracy requires a 'thick' collective identity and community on par with a nation, which enables the citizens to see each other as brothers and sisters. Democracy amounts to a community of faith that autonomously governs itself. We return to this.

But will values and identity do as legitimation categories in a complex and pluralist setting such as that of the EU? Clearly 'the multicultural reality of Europe makes it impossible for European identity to be based on particularistic

conceptions of peoplehood'.[13] Further, it is notoriously difficult to establish what form of common identity, and what sense of commonality, that the notion of value-community requires. When we consider the EU from the vantage-point of value-community, the continued salience of nationalism (and other forms of diversity) among the EU's Member States makes it more appropriate to consider the EU as *a Union of deep diversity*[14] than as a coherent and unified value-community.

A Union of deep diversity

Deep diversity refers to a situation, wherein a 'plurality of ways of belonging [are] acknowledged and accepted'[15] within the same polity. Acceptance entails that special political–legal, and even constitutional, measures have been devised to preserve and promote the system's diversity. Deep diversity, as developed by Taylor is premised on the notion that rights and constitutional arrangements are inadequate as a means of fostering a sense of community and belonging. Law and rights are always steeped within a particular cultural setting that provides people with deep-seated cues as to who they are and what is good and valuable. A political system, whose hallmark is deep diversity, can be federal but cannot be based on *one* nation state. Deep diversity does not presuppose a unified people, and the constitutional arrangement, therefore, does not need an explicit popular endorsement on a par with that of a full-fledged constitution. In contrast to a rights-based union, deep diversity does not presuppose that the entity is based on a full-fledged constitution but rather on a *contract*, which amounts to *a treaty*. This is a trait of deep diversity that resonates with the EU's present constitutional structure.

Many analysts, prominent among whom is Joseph Weiler, have repeatedly stressed the importance of diversity for understanding the distinctive structure that the EU has wrought. Weiler argues that the EU has developed a unique federal arrangement, whose normative foundation is the principle of *constitutional tolerance*. This is based on two components that sit well with the notion of deep diversity. The first is the consolidation of democracy within and among Member States. The second is the explicit rejection of the 'One Nation'-ideal and the recognition that

> [T]he Union … is to remain a union among distinct peoples, distinct political identities, distinct political communities … The call to bond with those very others in an ever closer union demands internalization – individual and societal – of a very high degree of tolerance.[16]

Weiler notes that 'in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to be bound by precepts articulated, not by 'my people', but by a community composed of distinct political communities: a people, if you wish, of 'others'.[17]

The probable core tenet of deep diversity is that the polity is accepting of different collective conceptions of its cultural or national or linguistic or ethnic make-up; different visions of what the polity is, and different visions of what it ought to be. In the EU the existence of different collective goals is not only an acknowledged and accepted fact, but also something that is accommodated through various means, including differentiated patterns of citizenship incorporation, through which collectives try to maintain their sense of difference. Deep diversity presumes that a group's sense of belonging to the overarching entity passes through its belonging to another smaller and more integrated community, which again is consistent with how most of Europe's citizens consider their relation to the EU.

A Union of deep diversity would harbour a unique constitutional construction: it would not be based on the notion of final, ultimate authority, or on a single, founding norm but rather on a system whereby the lower-level units (such as Member States) would be understood as constitutional chaperons. This again resonates with the EU, where the overarching entity is equipped with a constitutional authority, but the acceptance of its authority is, at least in principle, 'an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities.[18] The supranational level is intended to fulfil a specified set of tasks that the lower-level entities confer on it. Further, there are provisions to ensure that the authority conferred, and the resources granted, are properly put to those tasks.

Given this significant attention to value diversity within the EU, the question of legitimacy remains a theoretical quandary: can values and particularistic identities at all do as legitimating categories for large-scale political orders?

A norm-rational order

The point of departure to address this issue is that the very existence of pluralism and value diversity calls for agreement on mechanisms of conflict resolution that speak to a higher-order system of legitimation in which clashes of interests and value conflicts can be handled with due regard to impartiality and fairness. The notion of constitutional patriotism has been presented and discussed as one such means, but one that is also sensitive to the context within which such clashes occur.[19]

Values or principles?

Identity is an existential concept about *who we are* as well as a relational concept pertaining to *what distinguishes us from others*.[20] It is based on the simultaneous inclusion of the in-group, those sharing the same identity and sense of community, and the exclusion of those deemed not to belong by virtue of being different or of not belonging to the community.

The EU is not only distinctive as a polity that takes special heed of diversity; this is complemented with a very comprehensive inclusion of new members. The issue of enlarging the membership of the group is, by definition, an issue with profound identitarian implications. Every instance at which an enlargement of membership takes place is therefore a test-case of European identity. The EU has successfully completed six rounds of enlargement. It has expanded from its original six members to a total of 27 in 2007. There is, however, a distinct difference between how the EU addressed the former Communist countries of Eastern Europe in the accession negotiations, as compared to how Turkey, a very early applicant, has been addressed. The former were held to be 'one of us', while Turkey has never been addressed in the same manner; here the questions have only concerned compliance with the criteria of democracy and human rights. But even though there is a lack of a sense of 'kinship' towards Turkey, the EU has committed itself to let it accede to the Union.[21]

While it is clear that the EU is *more than* an intergovernmental-type entity it is not clear that what this *more* entails in polity terms could easily be programmed in either a value-based or rights-based form. The discussion above has demonstrated that the EU falls well short of value-based community, in the way communitarians understand this.

Also in conceptual terms values cannot be the main mechanism of allegiance as they are by their very 'nature' particularistic and relative. In practice, they are often contested and when entrenched there will be value conflicts. In order to deal adequately with value collisions, higher order principles are needed. These are needed in order to facilitate choice, adjudication and balance between conflicting embedded values. Contrary to the communitarian view, it is allegiance to an impartial legal order based on universal norms that depicts the modern, democratic–constitutional mode of political integration. In contrast to a culturalist mode of integration, in which an order is identified in value terms, that is as an expression of a community's common values or conceptions of the good, *political integration* takes place among and beyond particular identities and group loyalties, due to adherence to principles and procedures of a universal character.[22]

We may therefore distinguish between values – as cultural manifestations of identity – and principles pertaining to human rights, democracy and rule of law – as political manifestations of identity. In line with this the modern legal order would be understood as a *norm-rational* order in which freedom, democracy, equality, and rights have obtained a *deontological* status. They constitute principles with which it is our duty to comply, even if it should be at the expense of the majority's values and collective utility. They demand *absolute validity*. This is why rights can function as *trumps* in law-making as well as in ordinary collective decision-making. Constitutional rights through judicial review check and overrule majority decisions because they are given superior validity. Habermas explains the fact that one basis for integration ranks above another by introducing a *conceptual distinction between values and moral norms*, where the latter refers to higher-order principles, which, thus claim universal validity. By

contrast, values are understood as collective conceptions of the good life that vary according to different cultural and social contexts, and which, therefore, are both relative and particular in character.[23] Values compete with one another, and refer to more or less particular forms of life. They create identification in concrete communities. They say something about what is important and what counts as good for us as members of a particular group, and hence about which action-rule should be chosen in order to reach a goal. Whether actions are governed by values or norms is reflected in our degree of commitment. When we act in accordance with moral norms, the action gives the impression of being obligatory or compulsory. By contrast, when we act in accordance with some value, it is only a matter of which action is more recommendable. This is a distinction between axiology and deontology.

> Norms and values therefore differ, first, in their references to obligatory rule-following versus teleological action; second, in the binary versus graduated coding of their validity claims; third, in their absolute versus relative bindingness; and fourth, in the coherence criteria that systems of norms and systems of values must respectively satisfy.[24]

According to this reasoning there is an alternative to nationalism and homogeneity as a basis for political integration. Democracy and peoplehood can be detached. The call for democracy as the legitimating principle of the EU testifies to the decoupling of ethnos and demos, of nationality and citizenship.

Constitutional patriotism

In modern societies, citizenship has taken a cognitive turn, which reflects the onus on basic equal rights: If compatriots are to regulate their common affairs by law, they must concede equal rights to each other. Modern states are, according to Kant, based on entitlements entrenched in constitutions as individual rights which turn human beings into a unified body of citizens capable of making the very laws that they are to obey. Increasingly, nationality and citizenship have been disconnected in modern, Western societies. After the French Revolution, nation states have not 'existed in isolation as bounded geographical totalities, and they are better thought of as multiple overlapping networks of interaction'.[25] This is a process very much speeded up by the EU, which has 'established the bold idea to disconnect nationality and citizenship, and this idea may well evolve to a general principle which ultimately transforms the ideal of cosmopolitan citizenship into reality'.[26] In this respect the EU pursues the modern idea of statehood, as divorced from nationhood: the polity is not bound by pre-political bounds. It is not necessary for citizens to be each other's brother or sister, or neighbour, or native inhabitant, for political integration to come about.

In the CIDEL project, possible identitarian alternatives to nationalism were considered, notable among which was *constitutional patriotism*.[27] Constitutional

patriotism elicits a post-national and rights-based type of allegiance, a sense of allegiance that is not derived from pre-political values and attachments steeped in a culture, tradition or a way of life, but from a set of principles and values that are universal in their orientation. It portrays loyalty in political terms; it hinges on the validity of legal norms, the justification of policies, and the wielding of power in the name of *fairness or justice*. Constitutional patriotism is a mode of allegiance that brings about support and emotional attachment because the universalistic principles are embedded in a particular context – a particular geographical setting and set of traditions. They are interpreted and entrenched within a particular institutional setting. The universal principles help entrench a set of procedures that, when made to operate within a particular context, render this self-reflective, and hence, responsive to change.

Constitutional patriotism thus provides one set of answers or recommendations for how to reconcile universal values with context-specific ones, whilst also retaining sensitivity to difference and diversity. But these comments also underline that constitutional patriotism is premised on a *democratic* constitution. This underscores the general observation, namely that utility, values and rights do not constitute self-sufficient and exhaustive legitimacy bases for political orders. They must all be considered in relation to democracy, and under modern conditions legitimation has become proceduralized and reflexive.

Democracy as procedure

Many students of modern politics today subscribe to the tenet that democracy is the sole remaining legitimation principle of political domination. Of the long-established authorities – religion, law, state and tradition – only democratically enacted law has survived the corrosion process of modernity.[28] Religion and tradition are exhausted forces as bases for political legitimacy in modern (Western) societies. Procedural forms of legitimation have replaced substantive, theocentric forms, and hence the conception of the common good has also become abstract and has retreated into institutional procedures:

> Our common good, then – the good and interests we share with others – rarely consists of specific objectives, activities, and relations; ordinarily it consists of the practices, arrangements, institutions, and processes that, in Traditionalist's terms again, promote the well-being of ourselves and others – not, to be sure, of 'everyone' but of enough persons to make the practices, arrangements, etc. acceptable and perhaps even cherished.[29]

One may however not follow Robert A. Dahl when he suggests that it is the purely formal aspects of the procedure that warrant legitimacy: 'The opportunity to disagree about specific choices is the very reason for valuing the arrangements that make this opportunity possible.'[30] Legitimacy is not mere acceptance, but a function of decision-makers' compliance with norms – or pre-established procedures – that generate rationally motivated approval (based on good

reasons) from the subjects. Consequently, the procedures must be of a certain kind and quality if they are to generate legitimacy. *Fair procedures* make actors comply even when political decisions or laws are in conflict with their preferences or interests. Legitimacy then stems from the citizens' reasons for holding these beliefs – basically from the actual ability of the system to protect and further the community's integrity, its values and interests. The procedures that make such an assessment possible are the legitimating reasons on which the validity of legitimation is based. In this way it is the presuppositions for reasonable agreement themselves that have been turned into a principle.[31] The modern constitutional–democratic state testifies to the transition from material principles based on substantive common values to the procedures and presuppositions of unconstrained agreement as the legitimating forces. Legitimation has become proceduralized: the outcome is correct when it has been decided through correct procedures.

From this we may infer that the most basic procedure to be complied with in a democracy is that of *publicity*. Publicity is the test of the legitimacy and fairness of politics. 'All actions relating to the rights of others are wrong if their maxim is incompatible with publicity'.[32] Only laws that can be defended in a free and open rational discourse among all affected can claim to be legitimate.[33] Procedurally open deliberative processes lend legitimacy to substantive values and functional results, as well as to claims for rights and policies. In other words, only public deliberation can get political results *right*, as it entails the act of justifying the norms to the people who are bound by them. While this basic democratic principle may not be controversial, it does not translate into a clear answer to the question of which institutional form democracy in Europe should take. What kind of democracy should be institutionalized in Europe? The problem is not only to choose between participatory and representative forms, or between presidential or parliamentary democracy, but also, and in particular, on what level(s) democracy should be institutionalized.

European democracy revisited

The academic debate on European democracy is multifaceted. It brings up the nature and character of the integration process; the issue of conceptualizing democracy; the question of community and common values; political ambitions and possibilities; globalization's many faces; and the character of the changing world order, etc. In terms of the scale and the scope of how democracy is envisaged to be institutionally configured, this multifaceted debate can be pinned down to three core axes or institutional configurations.

Rescuing or uploading democracy?

The first, most widespread and dominant axis, takes as its key premise that the nation state is the harbinger of democracy. The conundrum facing proponents of national democracy is that in today's Europe, a range of processes generally

labelled under the heading of globalization are seen to *undermine* the salience of the nation state as the embodiment of democratic government. Euro-sceptics, notably of a conservative bent, see European political integration as synonymous with the factors that drain out the essence of nationhood.[34] Social democrats and communitarians claim that the European integration process sustains a neo-liberal supranational order, an order that undercuts both the systems of risk-regulation and the measures of solidarity that were such characteristic traits of the European welfare state.[35] Taken together these factors are seen to sustain a system of multi-tiered democratic deficits. Many students of democracy go further and argue that the democratic deficit is not merely a contingent matter relating to the effects of globalization, but refers to lack of core democratic components such as a common European public sphere. Some underline the structural character of the problem: it highlights built-in limitations in the *scale* of representative democracy. Robert A. Dahl for instance, has argued that, beyond a certain scale, representative democracy simply cannot work; thus, extending representative democracy to the European level lengthens the democratic chain of legitimation and *heightens citizens' alienation*.[36] The most obvious solution is to roll back integration. But can the rolling back of European integration really *rescue* national democracy under conditions of interdependence and globalization?

The merit of this solution (rolling back integration) is disputed by other analysts who argue that the main challenge to national democracy does not emanate from European integration, but instead from decisional exclusion, as a result of denationalization and globalization under which international crime, environmental degradation, and tax evasion thrive. Many of the decisions affecting national citizens are made elsewhere. Indeed, these processes reveal decreasing steering capacities on the part of the nation state.[37] When framed in this light, analysts such as Habermas see European integration not as the nemesis of democracy, but as a means of *uploading* democracy to the European level.[38]

Both positions in this debate take the nation state as their frame of reference and discuss the prospects for democracy in these terms. Proponents of a European federal state[39] would for instance argue that instituting democracy at the supranational level is the best assurance for sustaining democracy also at the Member State level. But within such a configuration the Member States could no longer be sovereign *nation* states. Whether the European level could foster a viable nationalism is highly questionable. Hence, the standard federal solution fails to lay to rest the question of nationalism's relationship to democracy. The answer hinges at least in part on how we view the communitarian claim that without a collective identity, there can be no democracy.

Decentring democracy?

The second axis of debate is made up of transnationalists and multilevel governance scholars, who argue that the challenge facing Europe is neither to rescue the nation state, nor to upload state-based democracy to the EU level. The EU is

seen as a possible *alternative* to the nation state model.[40] Further, some analysts hold the EU up as a type of polity that has prospects for developing democracy *beyond* the nation state.[41] Ruggie sees the EU as a case of unbundling of state authority, and with this a change in the constitutive principle of territoriality.[42] Transnationalists and multilevel governance scholars portray the EU as made up of a host of new governance structures that combine to make up an alternative to a government above the nation state. To them, sovereignty resides with the problem-solving units themselves.[43] Dense transnational networks and administrative systems of co-ordination have been intrinsic to the legitimacy of the EU, and some see these as amounting to a form of *transnational constitutionalism.*[44] They are based upon the private law framework of legal institutions 'that claim legitimacy beyond their own will or self-interest'.[45] This debate focuses on the conditions under which such issue areas can be deemed to be legitimate. If the self-governing collectivity is part of several communities – national, international and global – the locus–focus of democracy becomes a puzzling matter.[46]

Multilevel governance scholars and transnationalists share the focus on new forms of governance, but they also differ in disciplinary orientation and focus. Multilevel governance scholars (who are generally political scientists) focus mainly on structural features of the EU. Hooghe and Marks for instance sketch two models of multilevel governance that are both radical departures from the centralized state.[47] Transnationalists (many of whom are lawyers, political theorists and sociologists) focus less on structures and more on modes and forms of interaction. Some, notably Cohen and Sabel,[48] and Bohman,[49] straddle the line between the second and third (cosmopolitanism) axes of debate through opting for a 'cosmopolitanism restrained' which blends elements of cosmopolitanism[50] with (a regional notion of) transnational governance. They argue for the normative validity of a kind of polycentric system of directly-deliberative polyarchy.[51] This entails a model of direct participation and public deliberation in structures of governance wherein the decision-makers – through 'soft law', benchmarking, shaming, blaming, etc. – are connected to larger strata of civil society. The claim is that transnational civil society, networks and committees, NGOs and public forums, all serve as arenas in which EU actors and EU citizens from different contexts – national, organizational and professional – come together to solve various types of issues and in which different points of access and open deliberation ensure democratic legitimacy. The EU is seen as a multilevel, large-scale and multi-perspectival polity based on the notions of a disaggregated democratic subject and of diverse and dispersed democratic authority.

There are observations to support such a view and also the notion of the EU as a non-coercive deliberative system, with re-regulatory and market redressing effects.[52] The critical question, however, pertains to whether transnational governance structures can meet with the core democratic requirements of public accountability and congruence. Can the democratic requirements of equal access, transparency and openness be met or is citizens' participation restrained to *a limited segment of the citizenry*? In other words, does deliberation and

problem-solving in transnational networks have democratic value? If so, what are the institutions and mechanisms we should look for? The crucial question that this debate brings forth is whether the state form and a collective identity are necessary preconditions for democracy to prevail. In short, can democracy prevail without state and nation?

Cosmopolitan democracy?

The third 'cosmopolitan' axis of debate focuses on Europe as a particularly relevant site, for the emergence of cosmopolitanism.[53] This cast of scholars draws variously on transnationalism; on the notion of the EU as a new form of Community; and on the EU's global transformative potential through acting as a 'normative power' or 'civilian power'.[54] Cosmopolitanism, Rumford notes 'is not part of the self-identity of the EU'.[55] Scholars nevertheless recognize the EU as a part of, and as a vanguard for, an emerging democratic world order. It is seen to connect to the changed parameters of power politics through which sovereignty has turned conditional upon respecting democracy and human rights. It is posited as one of several emerging regional–cosmopolitan entities that intermediate between the nation state and the (reformed) UN, and which become recognized as a legitimate independent source of law.[56] In the Westphalian order, states are sovereigns with fixed territorial boundaries and are entitled to conduct their internal and external affairs autonomously; without any possibilities for external actors to control the protection of human rights. But one of the main thrusts of legal developments over the last half-century has been to protect human rights. The development of the UN (and regional entities such as the ECHR), whose global entrenchment has been re-enforced through multilateral arrangements for regulating economic international affairs (such as Bretton Woods, the GATT and the WTO), and their accompanying set of institutions, first delimited, and later redefined, the principle of state sovereignty. Aggressors can now be tried for crimes against humanity, and offensive wars are criminalized. State sovereignty is in the process of becoming *conditional*; conditioned on compliance with *citizen's sovereignty*. Democracy can thus no longer stand for a national 'community of fate' that autonomously governs itself.

The debate on European democracy makes it clear that the core issue is to establish what democracy *can mean* when the nation state no longer serves as the taken-for-granted foundation. The most critical issue that the multidimensional debate on democracy in Europe brings up is how to conceptualize democracy as an organizational arrangement within a post-Westphalian global context, where states are deeply intertwined. It is marked by *complex interdependence embedded in a multilevel governance configuration*. Europe's conundrum is that it cannot simply do away with this structure without facing democratic losses. But neither can it simply rely on this structure to resolve its democratic problems. The solution is to *reconstitute* democracy, which starts from the recognition that only a political system that is able to address the complexities and contradictions brought forth by the process of continental integra-

tion – which has been step-wise through several rounds of enlargement – can ensure a viable democracy in Europe today.

Reconstituting democracy

Reconstituting democracy in Europe should take the European multilevel structure as the point of departure. This structure consists of intergovernmental as well as supranational and transnational elements; each of these entails different model constructions of how a democratic Europe would look. In other words, when we apply the democratic principle to the multilevel structure we get to three different European democratic orders.[57]

Reconstitution through audit democracy

The first model envisages democracy as directly associated with the nation state. The presumption is that it is only the nation state that can foster the type of trust and solidarity that is required to sustain a democratic polity. On the basis of a well-developed collective identity, the citizens can participate in opinion-forming processes and put the decision-makers to account at regular intervals, as well as continuously through public debate. In this model, the emerging structure in Europe is seen as a regulatory regime deeply embedded in extensive institutional arrangements of public (or semi-public) character.

The model posits that the Union be mandated to act within a delimited range of fields. The model presumes that the Member States delegate competence to the Union, a competence that in principle can be revoked. Democratic authorization by Member States today, however, takes the form of a supranational Union-wide representative body. In order to account for this in an intergovernmental perspective, its democratic purpose would have to be delimited to serve as an agent of *audit democracy*, not representative democracy. The representative body would, together with transnational and/or supranational institutions (such as a court and an executive), be set up to help Member States supervise and control the Union's actions. These would be specifically mandated to hold intergovernmental decision-making bodies to account. They would be constitutionally barred from legitimizing and authorizing law-making, as well as from expanding Union competencies. Delegation works better in some issue-areas than in others: the general stipulation is to solve problems that the Member States cannot handle alone, and to delegate control where this will not undermine national democratic arrangements.

In accordance with the logic of democratic delegation, that is, which issues can be delegated without severe loss of democratic self-governing ability, the EU's conferred competencies would be foremost in the operation of the Common Market. The scope for common action in other policy fields would be quite narrow, as would be the scope for redistribution. According to this model, the present-day EU would have to be slimmed down and would not be suited to handle many of the challenges of the nation states posed by globalization. Since

the fate of national democracy is intrinsically linked to developments at the EU level, another strategy is that of reconstituting democracy at this level.

Reconstitution through federal multinational democracy

The democratic credo posits that all political authority emanates from the law laid down in the name of the people. The legitimacy of the law stems from the presumption that it is made by the people or their representatives – the *pouvoir constituant* – and is made binding on every part of the polity to the same degree and amount. A legally integrated community can only claim to be justified when the laws are enacted correctly, and the rights are allocated on an equal basis. The conventional shape of such a community is the democratic constitutional state, based on direct legitimation, and in possession of its own coercive means.

For this model to work properly within the complex European setting, which has obvious traits of deep diversity, we have to take heed of the existence of *multiple* nation-building/sustaining projects. This model can then also be modified to accommodate the fact that nation-building at the EU level would be taking place *together with* nation-building at the Member State (and partly even regional) level. The modified version would be a *multinational federal European state*. In its institutional design, such an entity would have to coordinate the self-government aspirations and the rivalling nation-building projects that would occur within the European space.[58] In constitutional terms, a multinational federation presupposes that the principle of formal equality be supplemented with particular constitutional principles. These are intended to provide some form of 'recognitional parity', for national communities at different levels of governance (in the EU at Union and Member State levels). Wayne Norman cites seven such principles: (a) partnership; (b) collective assent; (c) commitment and loyalty; (d) anti-assimilationism; (e) territorial autonomy as national self-determination; (f) equal right of nation-building; and (g) multiple and nested identities.[59] This model is premised on the tenet that a uniform national identity is not a core precondition for the democratic constitutional state. The multinational federal state requires citizens' allegiance; in the form of a *constitutional patriotism*, which is embedded in contextualized basic rights that ensure both an individual sense of 'self' and a collective sense of membership. This requires a positive identification of Europe, and the distinguishing of Europeans from others so as to make up the requisite social basis and 'we-feeling' for collective action and for regulatory and redistributive measures. However, as there is not much support for the idea of a 'super-state' in Europe, a third strategy is that of a regional–cosmopolitan variant of democracy.

Reconstitution through regional-European democracy

The third model envisages democracy *beyond* the template of the nation state and the states' system. This model posits the EU at the trans- and supranational level of government in Europe, and as one of the regional subsets of a larger

cosmopolitan order. This implies that the Union will be a post-national government, a system whose internal standards are projected onto its external affairs; and further, that it will be a system of government that subjects its actions to higher-ranking principles – to 'the cosmopolitan law of the people'.

The EU has obtained competencies and capabilities that resemble those of an authoritative government, which we may define as the political organization of society, or in more narrow terms, as the institutional configuration of representative democracy and of the political unit. The idea is that since 'government' is not equivalent to 'state', it is possible to conceive of a non-state, democratic polity with explicit government functions. Such a government structure can accommodate a higher measure of territorial–functional differentiation than can a state-type entity, as it does not presuppose the kind of 'homogeneity' or collective identity that is needed for comprehensive resource allocation and goal attainment. Such a governmental structure is based on a division of labour between the levels that relieves the central level of certain demanding decisions. The problem is how such an entity can be effective – implementing decisions against a dissenting minority, in the absence of state-type coercive measures. When it is the Member States that keep the *monopoly of violence in reserve*, such an order can only be effective to the degree that actors comply on the basis of voluntary consent. The EU's decisions are implemented through authorized and democratically supervised national administrations. Collective decision-making and implementation in the EU thus takes place within a setting of already legally institutionalized and politically integrated orders, which can help ensure compliance. However, one may ask how such an order can 'deliver'; how can it bring about changes required by justice? How can it ensure equal access and public accountability in the complex multilevel constellation that makes up the EU? Any attempt to set up such a system in one corner of the world only, with Europe as a vanguard, is likely to be a fickle construction.

Conclusion

This chapter has offered a brief overview of the intellectual framework we developed in the CIDEL project which disentangled legitimacy into several components (utility, values and rights) and held these up against the European Union's development. The European Union has developed beyond that of international organization and derivative democratic construct (an entity whose democratic quality would be entirely derived from the Member States). But the step from negative determination to positive identification of type of entity requires an analytical scheme that takes the character of the polity configuration properly into account. The Union embarked on a constitution-making process, which lent symbolic credence to the notion that the question of the Union's legitimacy really must be considered as intrinsic to the question of democracy in Europe. The European integration process impinges on Member States' democratic arrangements, and the Member States shape the democratic arrangements at the Union level.

The real challenge facing Europe pertains to the nature and status of *democracy*, or rather democratization, in Europe. Europe's democratic conundrum is that it cannot simply do away with the structure that has been wrought at the EU-level, without facing democratic losses. But this structure in its present form and shape also produces democratic problems. Therefore, the key issue facing Europe is the need for *reconstituting* democracy in Europe. Acknowledging this does not foreclose the issue; it offers a wide range of conceptions of democracy and standards of legitimacy. We have demonstrated that, within an interdependent world, this can take the EU in a statist or in a cosmopolitan direction. The Union's ability to pursue these directions hinges on internal as well as external factors, *including* macroscopic ones such as the future of the states' system.

Given this range of options, there is an obvious need for a clear intellectual map which sets out the main democratic options, and serves as key to more detailed assessments of the *multilevel constellation* that makes up the EU in order to establish in what direction it moves and where it fits within this vast terrain.

We have here proposed three such models for democratic reconstitution of Europe. The analytical framework that makes up these models permits us to engage with the many paradoxes, aporias and dilemmas that haunt Europe, and global processes more generally. They help shed light on the profound challenges facing contemporary Europe: overcoming nationalism without doing away with solidarity; establishing a single market in Europe without abolishing the welfare state; achieving unity and collective action without glossing over difference and diversity; preserving identity without neglecting global obligations; achieving efficiency and productivity without compromising rights and democratic legitimacy; and ensuring law-based rule as well as popular sovereignty.

Notes

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