

How Is a Closer Union Conceivable Under Condition of Ever Deeper Socio-Economic and Political Diversity: Constitutionalising Europe's Unitas in Pluralitate

Joerges, Christian

Veröffentlichungsversion / Published Version

Arbeitspapier / working paper

Empfohlene Zitierung / Suggested Citation:

Joerges, C. (2018). *How Is a Closer Union Conceivable Under Condition of Ever Deeper Socio-Economic and Political Diversity: Constitutionalising Europe's Unitas in Pluralitate*. (ZERP-Arbeitspapier, 2). Bremen: Zentrum für Europäische Rechtspolitik (ZERP) an der Universität Bremen. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-62274-8>

Nutzungsbedingungen:

Dieser Text wird unter einer Deposit-Lizenz (Keine Weiterverbreitung - keine Bearbeitung) zur Verfügung gestellt. Gewährt wird ein nicht exklusives, nicht übertragbares, persönliches und beschränktes Recht auf Nutzung dieses Dokuments. Dieses Dokument ist ausschließlich für den persönlichen, nicht-kommerziellen Gebrauch bestimmt. Auf sämtlichen Kopien dieses Dokuments müssen alle Urheberrechtshinweise und sonstigen Hinweise auf gesetzlichen Schutz beibehalten werden. Sie dürfen dieses Dokument nicht in irgendeiner Weise abändern, noch dürfen Sie dieses Dokument für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, aufführen, vertreiben oder anderweitig nutzen.

Mit der Verwendung dieses Dokuments erkennen Sie die Nutzungsbedingungen an.

Terms of use:

This document is made available under Deposit Licence (No Redistribution - no modifications). We grant a non-exclusive, non-transferable, individual and limited right to using this document. This document is solely intended for your personal, non-commercial use. All of the copies of this documents must retain all copyright information and other information regarding legal protection. You are not allowed to alter this document in any way, to copy it for public or commercial purposes, to exhibit the document in public, to perform, distribute or otherwise use the document in public.

By using this particular document, you accept the above-stated conditions of use.

ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK
CENTRE OF EUROPEAN LAW AND POLITICS

University Bremen

ZERP

Christian Joerges

**How Is a Closer Union Conceivable Under
Condition of Ever Deeper Socio-Economic
and Political Diversity**

Constitutionalising Europe's *Unitas in
Pluralitate*

ZERP-Working Paper 2/2018

Contribution to the conference “Europe in Hard Times – What's to be Done?”,
8-9 February 2018, Tallinn University, Estonia.

Christian Joerges is Professor of Law and Society at the Hertie School of Governance, Berlin and Co-Director of the Centre of European Law and Politics, Bremen.

Editorial

Publisher &
Distributor: Zentrum für Europäische Rechtspolitik
Fachbereich Rechtswissenschaft
Universität Bremen
Universitätsallee, GW 1
28359 Bremen
www.zerp.eu

Reproduction: Subject to editor's permission

ISSN (Internet): 1868-7520

Bremen, April 2018

Contents

Contents	1
I. “The Economic” in Economic Sociology	2
II. Implications and Options.....	3
III. The State of the Union after a Decade of Crisis Politics.....	6
III.1 An ill-designed Treaty	6
III.2 Two Dead-end Alleys	8
III.3 Authoritarian Managerialism.....	9
IV. “United in Diversity”	11
V. Epilogue.....	15

Abstract

The expectation that the common currency would foster economic convergence and even force Europe into deeper political integration was once widespread. It never materialised. Under the impact of the financial crisis socio-economic divergence even among the members of the Eurozone deepened dramatically. European crisis politics therefore thought to impose convergence through budgetary prescriptions and austerity measures. The essay does not only raise normative objections; based on the economic sociology of Karl Polanyi and insights of the varieties of capitalism studies it submits that these efforts are bound to generate serious resistance. The follow-up query is whether Europe would be better advised to replace its one-size-fits-all mantra by policies tolerating diversity and fostering cooperative problem-solving. To what degree such a return to the “united in diversity” motto of the Constitutional Treaty of 2014 would be economically beneficial is unpredictable. It seems highly likely, however, that it could help to overcome the increasing aversion against the European integration project.

Keywords

Crisis politics; socio-economic divergence, Böckenförde’s theorem; social embeddedness; varieties of capitalism; united in diversity

Introduction

The relationship between the title and the subtitle of this essay requires some explanatory remarks. The main title may imply an unfortunate dichotomy. Socio-economic, cultural and political diversity are widely perceived as an obstacle to integration, and hence as something which should be overcome on the road to an “ever closer union”. This, however, is by no means the message of these pages. Quite to the contrary, we suggest that the Union would be well advised to live *with* diversity, that diversity can be a politically sound and economically beneficial alternative to the kind of convergence which the integration through law agenda of the formative period of the integration process and the crisis politics of the past decade have pursued so rigorously. But our thesis has a prominent precursor, albeit one, which remained an unspecified proclamation. “United in Diversity” was the fortunate motto of the ill-fated Draft Constitutional Treaty of 2004. The motto did not make it into the Treaty of Lisbon. This does not mean that it is outdated. The times Europe is going through are so hard that we cannot shy away from rethinking the project, from re-considering its foundations, from citing Germany’s greatest poet in a translation through which the beauty of his language gets lost, “what holds Europe together at its innermost”. What could that be? Is our highest commitment to ensure “the financial stability of the euro area as a whole ... and of the Union itself”?¹ Jan-Werner Müller² has recently recalled Ernst-Wolfgang Böckenförde’s famous transferral of Goethe’s query into the parlance of constitutionalism: secularised democracies, he submitted, live on normative resources, which they cannot generate themselves.³ What if we bring this dictum to the peoples of Europe? A tentative and somewhat enigmatic will be submitted in the concluding remarks. The argumentation leading to that conclusion are more mundane. We will take four steps:

1. The first is an explication a substantive understanding of “the economic”, which is informed by the economic sociology of Karl Polanyi;
2. against this background section two will proceed to a critique “one-size-fits-all” integration strategies;
3. section 3 will criticise the efforts of Europe’s crisis politics to impose

1 Judgment of 27 November 2012 in *Pringle v. Ireland*, C-370/12, EU:C:2012:756, para. 5.

2 *NZZ*, 26.8.2017, available at: <https://www.nzz.ch/feuilleton/das-boeckenfoerde-diktum-was-haelt-demokratien-zusammen-ld.1312681>.

3 Ernst-Wolfgang Böckenförde, “Die Entstehung des Staates als Vorgang der Säkularisation”, in id. *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht*, Frankfurt a.M.: Suhrkamp 1975, 42-64.

convergence on the economies of the Union;

4. “United in Diversity”, the just mentioned motto of the Constitutional Treaty of 2004 is read as an alternative vision, which section 4 will substantiate;

“What could hold Europe together at its innermost?” The epilogue will return to this query (V.).

I. “The Economic” in Economic Sociology

“European economic law” is a discipline of huge proportions which explores meticulously every angle of the legal provisions which concern the European economy, the integration process, and governance arrangements which this process has generated. Why should there be a reason to re-consider these activities in the light of Polanyi’s economic sociology? The surplus of such an exercise stems from conceptual deficiencies of the prevailing views in both law and economics and their understanding of markets or, rather, “the economic”. The deficiency which has, in this author’s view, to be cured is the insulation of economic processes from their embeddedness in society. This insulation is, to paraphrase another Polanyian notion, “fictitious”. To be sure, it is by now common knowledge that the operation of markets, pre-supposes the establishment of institutional frameworks; we are equally well aware of many micro-economic and macro-economic policies supporting or correcting the functioning of the economy. And yet, in the prevailing conceptualisations, the economy is portrayed as machinery, which is distinct from political and societal spheres, from *Staat und Gesellschaft*. In particular, markets are understood as autonomous, self-regulating entities. The contrast is striking: “A self-regulating market”, so Polanyi has famously stated, “could not exist for any length of time without annihilating the human and natural substance of society; it would have physically destroyed man and transformed his surroundings into a wilderness”.⁴ I do not try to dig deeper but conclude with the summarising submission that the economy “is” a polity,⁵ that its sustainability depends, to paraphrase Böckenförde, on social and moral resources which it cannot generate autonomously.

4 Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston MA: Beacon Press 2001 (with Foreword by Joseph Stiglitz and Introduction by Fred Block), 3.

5 Christian Joerges, Bo Stråth and Peter Wagner, *The Economy as Polity: The Political Constitution of Contemporary Capitalism*, London: UCL Press 2005.

II. Implications and Options

How should such an understanding of the economy as polity affect our views of European economic integration? I refrain from a systematic elaboration and take instead a shortcut. Karl Polanyi's *Great Transformation* is concerned with the emergence of "market societies", where "instead of the economy embedded in social relations, social relations are embedded in the economy".⁶ Writing at the end of the Great War, Polanyi had witnessed the destruction of liberal economic ordering by Fascism and Nazism. However, by now, at the end of the Second World War, the rebirth of alternative counter-movements was in sight and nurtured hopes in a better national and international future: alternatives to the Fascist transformation, namely, social counter-movements which would undermine the working of the market system. His somewhat enigmatic views are difficult to decipher. "*The Great Transformation* can legitimately be read either as an anti-capitalist manifesto or as a social democratic bedtime story".⁷ Be that as it may, my shortcut is a passage in which Polanyi considers that:

"... with the disappearance of the automatic mechanism of the gold standard, governments will find it possible to [...] tolerate willingly that other nations shape their domestic institutions according to their inclinations, thus transcending the pernicious nineteenth century dogma of the necessary uniformity of domestic regimes within the orbit of world economy. Out of the ruins of the Old World, cornerstones of the New can be seen to emerge: economic collaboration of governments and the liberty to organize national life at will."⁸

Was this just wishful thinking? The passage was written at a time when Keynes and the like-minded American economist and politician Harry Dexter White were working towards the post-war settlement of Bretton Woods. There were reasons to envisage a better future. Polanyi's considerations deserve attention for three additional and interrelated reasons. For one, he re-states his foundational argument that the capitalist market economy is not an evolutionary given but a political product – "*laissez-faire* was planned"⁹ – which requires institutional backing and continuous political management. To put it slightly differently, "the political" is inherent in "the economic"; market economies "are polities".¹⁰ A second insight of topical importance follows from

6 Polanyi (note 4), 57.

7 Gareth Dale, *Karl Polanyi. A Life on the Left*, New York: Columbia UP, 2016, 286.

8 Polanyi (note 4 above), 253-254.

9 "...planning was not", Polanyi, at 147.

10 For a very dense re-construction, see Fred Block, "Towards a New Understanding of Economic Modernity", in: Christian Joerges *et al.* (eds), n. 5 above, 3-16.

this: capitalist market economies will exhibit varieties which mirror a variety of political preferences, historical experiences, and socio-economic configurations. This is what we can expect, and should respect, once our societies have gained the “liberty to organise national life at will”. The third point is only alluded to in half a sentence. It is an implication of the new freedom. Polanyi predicts and advocates “collaboration”; diversity, we can assume, is there to stay.

Let me postpone the discussion of this somewhat vague prospect and hope, and underline first its more substantiated basis and background. Since the “varieties of capitalism” studies were initiated by Peter A. Hall and David Soskice in 2011,¹¹ it has become common knowledge that the operation of market economies is anything but uniform. Their institutional configurations vary, instead, significantly. The co-ordinated market economies of northern Europe and the Anglo-Saxon liberal market economies have become paradigmatic examples; mixed market economies haven been more recently identified in Southern Europe.¹² The discovery of Lucio Baccaro and others of “Growth Models and Distributive Dynamics” has diversified the landscape further.¹³ A cobbler like myself should stick to his last. What I find most noteworthy and what the varieties studies neglect is Polanyi’s characterisation of economic ordering as a *political and societal process*.¹⁴ This is a dimension which another forerunner of the varieties studies, namely, Walter Eucken, left aside when he conceded that the “characteristics of national competitive orders ... manifest differently, for example, in Germany, Belgium, or the United States”.¹⁵ This political-process dimension, however, is a legal essential. We need to under-

11 Peter A. Hall and David Soskice (2011), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford: Oxford UP, 2011.

12 Anke Hassel, “Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe” (17 April 2014); available at SSRN: <https://ssrn.com/abstract=2426198>. In much more detail and with many provisos, see Gareth Dale, “Double movements and pendular forces: Polanyian perspectives on the neoliberal age”, (2012) 60 *Current Sociology*, 3-27; id., “Social Democracy, Embeddedness and De-commodification: On the Conceptual Innovations and Intellectual Affiliations of Karl Polanyi”, (2010) 15 *New Political Economy*, 369-393.

13 See Lucio Baccaro and Chiara Benassi (2017): “Throwing out the Ballast: Growth Models and the Liberalization of German Industrial Relations”, (2017) 15 *Socio-Economic Review*, 85-115.

14 Much later elaborated in Karl Polanyi, “The Economy as Instituted Process” [1957], in: Mark Granovetter and Richard Swedberg (eds), *The Sociology of Economic Life*, 2nd ed. (Boulder CO-San Francisco CA-Oxford: Westview Press, 2001), 31-50.

15 Walter Eucken, “What is a competitive order?” [1952], in Thoms Biebricher and Frieder S. Vogelmann (eds), *The Birth of Austerity: German Ordoliberalism and Contemporary Neoliberalism*, London: Rowman and Littlefield, 99-108, 100.

stand the normative fabric of our economic orders as an *acquis sociale*, which is, of course, subject to changes, but nonetheless deserves to be protected against illegitimate intrusions. A strong indicator of the importance of this point is the fierce controversy that it has provoked between Wolfgang Streeck and Jürgen Habermas. Streeck opts for a defence of the nation state and its institutions against a deepening of economic integration.¹⁶ Habermas' critique is that this is a nostalgic option, a hideaway in the sovereign powerlessness of the overrun nation (*eine "nostalgische Option für eine Einigelung in der souveränen Ohnmacht der überrollten Nation"*).¹⁷ I cite a recent re-statement of Streeck:

“[W]hat I would suggest to call the *acquires démocratiques* of the national *demoi* in Europe ... importantly comprises a wide range of political-economic institutions that provide for democratic corrections of market outcomes – for democracy as social democracy.”¹⁸

I must admit that I find Streeck more Habermasian than Habermas himself. I read his defence of the national constellation as the plea to take deliberative democracy seriously. This plea is, of course, linked to sociological premises and political assessments. Streeck simply does not believe that a European social democracy is a conceivable option. But are we really entrapped in the dichotomy?

Back to Polanyi, however. The passage that I have cited is not about output legitimacy, let alone economic efficiency. Polanyi's appeal to the liberty of societies is, instead, concerned with ideational and cultural dimensions of “the economic”. His argument takes seriously, or is at least open to, what the varieties of capitalism studies tend to neglect. Precisely for this reason his position seems so topical. Ideational, cultural, historical aspects are an indispensable element of an adequate understanding of “the economic”. A whole new sub-discipline (“cultural political economy”) focusing on this dimension is emerging.¹⁹ This seems particularly important in view of the deep diversities within

16 Wolfgang Streeck, “*Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas*”, (2014) 21 *Constellations*, 213-221.

17 Jürgen Habermas, “Demokratie oder Kapitalismus. Vom Elend der nationalstaatlichen Fragmentierung in einer kapitalistisch integrierten Weltgesellschaft”, *Blätter für deutsche und internationale Politik* 5/2013, 59-70 (“Nostalgische Kleinstaaterei”, 62).

18 Wolfgang Streeck, *How Will Capitalism End?*, London: Verso Books, 2016, 198, n. 20.

19 See Bob Jessop and Ngai-Ling Sum, *Towards a Cultural Political Economy. Putting Culture in its Place in Political Economy*, Cheltenham: Edward Elgar Publishing, 2013; “Cultural Political Economy: Logics of Discovery, Epistemic Fallacies, the Complexity of Emergence, and the Potential of the Cultural Turn”, (2010) 15, 445-

the European space. The works of economic historians such as Werner Abelshausen and the path-breaking comparative law studies of Gunther Teubner share this view and add that “cultures” tend to be remarkably resistant to imposed change.²⁰ Both underline that interventions into the respective social and institutional fabric of European economies can hardly be subtle and sufficiently fine-tuned to accomplish the desired re-orientation.²¹

III. The State of the Union after a Decade of Crisis Politics

The normative value of diversity does not inform us how this value might be established and preserved. Before entering into such uncharted waters and evaluating the risks of such an endeavour, we have to consider the state of the Union after a decade of crisis politics. The event from which we depart is the establishment of the EMU in the Maastricht Treaty. This is by no means to camouflage earlier unfortunate decisions and developments.²² But it nevertheless seems obvious that the specific patterns of the crisis have been shaped by this Treaty.

III.1 *An ill-designed Treaty*

This Treaty has produced a hybrid, an odd merger of ordo-liberal principles and French endeavours to ensure some political governance of the economy. Germany was successful with the defence of its stability philosophy through substantive principles and statutory norms; France established a counterweight in the procedural norms of the General ECB Council.²³ Our focus here will be

451.

20 Werner Abelshausen, *Kulturkampf. Der deutsche Weg in die neue Wirtschaft und die amerikanische Herausforderung*, Berlin: Kadmos; Werner Abelshausen, David Gilgen, and Andreas Leutzsch “Kultur, Wirtschaft, Kulturen der Weltwirtschaft“, in: Abelshausen, Werner, David Gilgen and Andreas Leutzsch (eds) *Kulturen der Weltwirtschaft*, Göttingen: Vandenhoeck and Ruprecht, 9-29; Gunther Teubner, “Legal Irritants: Good Faith in British Law Or How Unifying Law Ends Up in New Differences”, (1998) 61 *Modern Law Review*, 11-32.

21 Anke Hassel, “Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe” (13 May 2014). LEQS Paper No. 76. Available at: SSRN: <https://ssrn.com/abstract=2436454>.

22 See Giandomnico Mahone, *Rethinking the Union of Europe post-Crisis – Has Integration Gone Too Far?*, Cambridge, Cambridge UP, 2014, passim.

23 In a similar vein, see Sergio Fabbrini, “The Euro Crisis and its Constitutional Implications”, in: Sergio Champeau, Carlos Closa, Daniel Innerarity and Miguel Poiarés

the tension between the conferral of exclusive powers in the – albeit undefined – field of monetary policy administered by a bank with unprecedented autonomy and the reservation of economic and fiscal policies by the Member States. This dichotomy was not wilful or accidental, but simply mirrored the concern of the Member States for “the power of the purse”. The ensuing dilemmas were predictable. Already in 1992, the socio-economic diversity within the Union and within the eurozone was considerable, and it deepened continuously. The implications can be derived from the insights into the socio-economic, political and cultural variety sketched out in the previous section. European monetary policy is uniform, but it is confronted with an ever deeper variety of national configurations. “One size fits none” – Henrik Enderlein’s *barzelletta* captures this well.²⁴ The difficulties of macro-economic steering are exacerbated by the deeply engraved cultural diversities which render the Eurozone-wide communality of policy implementation illusory.

Hence, in a sense, the Maastricht regime embodied a kernel of wisdom. Article 119 TFEU provided for no more than “the adoption of an economic policy which is based on the close coordination of Member States’ economic policies” as substantiated in Article 121 TFEU. This instrument was a *lex imperfecta*. The same holds true for the Stability and Growth Pact of 1997. By the same token, however, this wisdom was not strong enough to prevent what was going to happen.

The tensions under the thin “constitutional” veneer of the Maastricht Treaty remained latent for a couple of years. As we know, post-2007, the success of the early years of the EMU was only due to good economic luck and constant political bargaining. The real life of the constitutional compromise was a *praxis* of muddling. Under the conditions of the common currency, the socio-economic diversity within the eurozone was deepening irresistibly. After the financial and the sovereign debt crises, this diversity was to become an explosive constellation. We have experienced highly differential growth and inflation rates, cyclical divergences. We have learned about the reasons and mechanisms of these disastrous developments. Under the EMU, responses to these problems were not available. The fundamental design failure and constitutional deficit of this regime is the lack of a political infrastructure and institutional framework in which democratic political contestation could continue and legitimate a completion or improvement of the imperfect edifice that had been established.²⁵

Maduro (eds), *The Future of Europe. Democracy, Legitimacy and Justice After the Euro Crisis*, London-New York: Rowman and Littlefield, 2015, 19-36.

24 Henrik Enderlein, “One Size Fits None”, (2005) 16 *Central Banking*, 24-28, 2005.

25 The story of the European responses has been told often enough. Out of my own

III.2 Two Dead-end Alleys

My whole thesis depends on the explanation of this dilemmatic constellation. What went wrong? My message is anything but comforting: Europe had no chance! Let us consider the two options which the designers of the Treaty had in mind. One can be understood as a version of economic constitutionalism. It is characterised by the lack of a legitimated political authority. No such transnational political authority was needed if, and, if so, because financial markets can be expected to supervise the performance of the Member States. The famous no bail-out clause of Article 125 of the Lisbon Treaty made it illegal for one member to assume the debts of another. We were thus protected against moral hazard. Or were we? The weakest link in this chain of arguments is the reliance on financial markets. To be sure von Hayek has tried to make us believe that markets are unique in their capacity to collect, process and coordinate knowledge which is dispersed in society.²⁶ But, as Lisa Herzog has objected with particular clarity,²⁷ the knowledge which markets can communicate is not the knowledge we need when we have to assess the performance of complex economic orders. Hayek's wonderful conceptualisation of "competition as a discovery procedure"²⁸ will not deliver what we need to know. Such asymmetries, we have been assuaged, will be compensated by highly professionalised ratings agencies which produce and offer such advice under competitive conditions. This, again, is all too wishful thinking. The famous three big ratings agencies embody expert knowledge but not the ethics of the classical professions. Can we expect expertise to accomplish what markets fail to do? This is a complex story in general. In the case of the ratings agencies, however, I can simply refer to Mario Draghi's famous defence of the OMT programme

contributions see, e.g., "Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation", (2014) 15 *German Law Journal*, 985-1028. The descriptions, analyses and discussions fill libraries; an analysis with an exceptional sensitivity for the normative, legal and political aspects of the "rule of economics" is Klaus Tuori's "The Eurosystem and the European Economic Constitution: A Constitutional Analysis of Common Central Banking Before and During the Crisis", PhD Thesis Helsinki, 1017, available at: <https://helda.helsinki.fi/handle/10138/200392>.

26 "The Use of Knowledge in Society", (1945) 35 *American Economic Review*, 519-530.

27 Out of the works of Lisa Herzog, see Lisa Herzog, "Markets", *Stanford Encyclopedia of Philosophy* 2013, 1-28; available at <https://plato.stanford.edu/entries/markets/>.

28 Friedrich A. von Hayek, "Competition as Discovery Procedure" (*Wettbewerb als Entdeckungsverfahren*, 1968), (2002) 5 *The Quarterly Journal of Austrian Economics*, 9-23.

of the ECB on 26 July 2012.²⁹ The markets got it wrong, he argued; this is why the ECB had to step in.

Draghi's "whatever it takes" announcement leads us to the second alternative: Are public authorities to step in where private organisations are not so reliable. Again, I hear von Hayek knocking at the door. He not only praised the performance of markets so impressively back in 1945; three decades later, he complemented his argument in his Nobel Prize Lecture on the "Pretence of Knowledge".³⁰ The lecture is thoroughly neglected in the debates on the performance of the ECB or European crisis politics. This is difficult to justify. Hayek's reserves against economic planning and steering deserve to be taken seriously. But this is again a matter which is too complex to be dealt with in passing. However, for my thesis, I can let this rest. The line of arguments that I have re-constructed upon the basis of Polanyi's economic sociology, the varieties of capitalism studies, and the insights into the importance of economic cultures are sufficiently instructive. It is, against this background, simply inconceivable that the ensemble of European economies will respond to the voices of public authorities in the same way; and it is even less likely that these authorities will be in able to design and to implement sufficiently fine-tuned programmes targeted at the diversity of the constellation in the Eurozone.

III.3 Authoritarian Managerialism

It seems, against this background, but "logical" that European crisis politics operated as it did, namely, *extra legem* and in an authoritarian managerial mode.³¹ The first to underline this dilemma was the former constitutional judge Ernst-Wolfgang Böckenförde, tellingly a confessed Schmittian.³² The treatment of law, Böckenförde explained in a comment published by the *Neue Zü-*

29 Verbatim at: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

30 "The Pretence of Knowledge", Nobel memorial Lecture, 11 December 1974, (1989) 79 *The American Economic Review*, 3-7, available at: <http://pavroz.ru/files/hayekpretence.pdf>.

31 Christian Joerges and Maria Weimer, "A Crisis of Executive Managerialism in the EU: No Alternative?", Maastricht Faculty of Law Working Paper No. 2012-7, available at: SSRN: <http://ssrn.com/abstract>; revised version in Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amicorum for David M Trubek*, Oxford: Hart Publishing, 2014, 295-322.

32 On Böckenförde's indebtedness to Carl Schmitt, see the interview with Dieter Gosewinkel, in idem (ed.), *Wissenschaft, Politik, Verfassungsgericht. Aufsätze von Ernst-Wolfgang Böckenförde*, Frankfurt a/M: Suhrkamp 2010, 359-391.

richer Zeitung in June 2010,³³ was “outrageous” (*abenteuerlich*). And, indeed, there is much to be irritated about. A particular intriguing characteristic of Europe’s new modes of economic governance is the form of its crisis management. This managerialism is problematic for three inter-dependent reasons. First, through the supervision and control of macro-economic imbalances, it disregards the principle of enumerated powers, and, by the same token, cannot respect the democratic legitimacy of national institutions, in particular, the budgetary powers of the parliaments of the states receiving assistance. Second, in its departure from the one-size-fits-all philosophy orienting European integration in general and monetary policy in particular, it nonetheless fails to achieve a variation, which might be founded in democratically-legitimated choices; quite to the contrary, the individualised scrutiny of all Member States is geared to the objective of budgetary balances and seeks to impose the necessary accompanying discipline. Under the conditions of monetary unity, the Member States can only respond to pertinent requests through austerity measures: an “internal devaluation” via reductions of wage levels and social entitlements.³⁴ Third, the machinery of the new regime with its individualised measures which are oriented only by necessarily indeterminate general clauses is regulatory in its nature, establishing a transnational executive machinery outside the realm of democratic politics and the form of accountability which the rule of law used to guarantee. Core concepts used by new economic governance cannot be defined with any precision, either by lawyers or by economists, and are therefore not justiciable.³⁵ This implies that rule-of-law and legal protection requirements are being suspended.³⁶ This type of de-legalisation is accompanied by assessments of Member State performance, which cannot but operate in a highly discretionary manner.

The most drastic illustrations were provided by the Six-pack and the Two-pack Regulations, which seek to prevent and/or to correct excessive macroeco-

33 Ernst-Wolfgang Böckenförde, “Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung” (Does necessity not know rules? Design flaws of the EU and the necessity of a new political decision), *Neue Züricher Zeitung*, 21 June 2010.

34 See, e.g., Mark Dawson and Floris de Witte, “Constitutional Balance in the EU after the Euro-Crisis”, (2013) 76 *Modern Law Review*, 817-844, at 825-7, notes 33-37.

35 See Dariusz Adamski, “National Power Games and Structural Failures in the European Macroeconomic Governance”, (2012) 49 *Common Market Law Review*, 1319-1364; Fritz W. Scharpf, “Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability”, in: Wolfgang Streeck and Armin Schäfer (eds), *Politics in the Age of Austerity*, Cambridge: Polity, 108-142, at 139.

36 See Michelle Everson, “The Fault of (European) Law in (Political and Social) Economic Crisis”, (2013) 24 *Law and Critique*, 107-129.

conomic imbalances. As Fritz Scharpf has pointed out, the very logic of the excessive balance procedure “dictates that it must operate without any pre-defined rule and that the Commission’s *ad hoc* decisions must apply to individual Member States in unique circumstances rather than to the EMU states in general. Regardless of the comparative quality of its economic expertise, the Commission lacks legitimate authority to impose highly intrusive policy choices on Member States.³⁷ Precisely, this is foreseen for an undefined range of policy areas in which the EU still lacks hard-law competences.

IV. “United in Diversity”

Critics are expected to explain what they have to offer. Such requests tend to have silencing effects. The discussion on the management of the crisis is dominated by economists and their expertise. A cobbler should stick to his last, goes a proverb in many languages. And, indeed, among both lawyers³⁸ and political scientists,³⁹ the prevailing view is that we should learn to live with the “new normalcy”. After all, the transformations which European crisis politics has brought about have been legalised by the European Court of Justice.⁴⁰

This is a premature end. We simply cannot know how stable the new normalcy really is. What we know for sure, however, is that, the jurisprudence of the CJEU notwithstanding, the present state of the Union is threatening the legitimacy of the integration project. What I will hence try to do in the remaining minutes is to sketch out an alternative, a series of intuitions about the socio-economic basis, the normative essentials and the constitutional form of an alternative approach. As announced in the first section, I will depart from Polanyi’s economic sociology and his quest for co-operation among political autonomous polities, proceed to the trilemma thesis of the Harvard political economist Dani Rodrik, move from there to the political philosophy of the EU recently submitted by Daniel Innerarity, and conclude with the thesis that con-

37 See Fritz W. Scharpf, n. 35 above and id., “Monetary Union, Fiscal Crisis and the Preemption of Democracy”, MPIfG Discussion Paper 11/11, Cologne 2011.

38 See, prominently, Thomas Beukers, Claire Kilpatrick and Bruno De Witte, “Constitutional Change Through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead”, in: id. (eds), *Constitutional Change through Euro-Crisis Law*, Cambridge: CUP 2017, 1-24.

39 E.g., Tanja Börzel, “Researching the EU (Studies) into Demise”, (2018) 25 *JEPP*, 475-485.

40 *Pringle* (n. 1 above); judgment of 16 June 2015 in *Peter Gauweiler and others v. Deutscher Bundestag*, C-62/14, EU:C:2015:400.

flicts law is the proper constitutional form of the EU.

This is quite a journey.

1. But the first step is very short. To cite the passage from the beginning again: “Out of the ruins of the Old World, cornerstones of the New can be seen to emerge: economic collaboration of governments *and* the liberty to organize national life at will.”⁴¹ Political autonomy should not get lost in integration but be preserved in co-operative arrangements.
2. Dani Rodrik has never cited Polanyi in his works on globalisation. But these works are infiltrated with Polanyian ideas, and Rodrik has acknowledged his indebtedness to Polanyi explicitly.⁴² For our context, his most famous theorem seems particularly instructive. In his book, *The Globalization Paradox*,⁴³ Rodrik asserts the impossibility of simultaneous pursuit of economic globalisation, democratic politics and national determination (autonomy), highlighting a trilemma in which only two goals can be paired: economic globalisation and democratic politics, or democracy and national autonomy. For Rodrik, the EU furnishes dramatic illustration of his thesis. On the one hand, the EU could transnationalise democracy through federalisation and thereby defend the advantages of the common market; at the same time, however, it would be forced to establish a common European politics to legitimise its necessary assumption of fiscal and social policy, with negative consequences for national sovereignty. In the absence of such a denationalising will, the EU must give up the common currency and accept economic disintegration.⁴⁴ What is lacking here is Polanyi’s “Third Way”: to wit, co-operation. This is the alternative which I would like to defend.⁴⁵

41 Karl Polanyi, *The Great Transformation*, n. 4 above, at 253-254 (emphasis in original).

42 See http://rodrik.typepad.com/dani_rodriks_weblog/2017/03/a-foreword-to-kari-polanyi-levitt.html.

43 Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, New York-London: W.W. Norton, 2011.

44 Dani Rodrik, “The Future of European Democracy”, ms. Princeton NJ, 2014, available at: <https://www.sss.ias.edu/files/pdfs/Rodrik/Commentary/Future-of-Democracy-in-Europe.pdf>.

45 Rodrik’s recent *Straight Talk on Trade. Ideas for a Sane World Economy*, Princeton NJ-Oxford: Princeton UP, 2017, has a chapter with an update on Europe (pp. 48-78). Therein Rodrik repeats: “If European democracies are to regain their health, economic integration and political integration cannot remain out of sync. Either political integration catches up with economic integration or economic integration needs to be scaled back (at 76). There are, however signals of a re-orientation. The in my view

3. Fortunately enough, there is an elaborated philosophical underpinning for this vision available, to be found in Daniel Innerarity's concept of "inter-democracy".⁴⁶ Two insights are particularly important for my argument. The first concerns Europe's heterogeneity which excludes all "one-size-fits-all" recipes. Instead: "If the EU is going to be more democratic, it will be so in the style of complex democracies. And that complexity is not only related to the diversity of its citizens but to the variety of issues about which it needs to decide, some of which may require proximity, but others that demand a certain distance."⁴⁷ "Inter-democracy" is his key concept: the democratisation of interdependencies must replace state-like or federal hierarchical models, he argues forcefully. And: "The states are increasingly more incapable of democratic action because they cannot include everyone affected by their decisions in the electoral process and, on the flip side, citizens cannot influence the behaviour of those who are making decisions in their name. This is the principal democratic deficit that the European Union should rectify. Extraterritorial effects and the burdens that one state imposes on others cannot be justified by recourse to domestic democratic procedures and require another type of legitimacy. That is why we can affirm that the fact that national actors keep outside interests in mind may improve the representation of true domestic interests, since they are no longer circumscribed by the state arena either. In this sense, we might think that the EU helps strengthen the democratic authority of the member states, to the extent to which it can serve as a measure to manage externalities in an efficient fashion."⁴⁸
4. The so-called principle of external effects has such ardent critics as Alexander Somek,⁴⁹ and such prominent defenders as Jürgen Habermas.⁵⁰

most promising of these is in line with his more general ideas about globalization. Globalisation requirements must remain consistent with democratic delegation; they must "enhance democratic deliberation domestically" (at 65). On such affinities with the conflicts-law approach see more systematically Fabian Bohnenberger and Christian Joerges, "A Conflicts-Law Response to the Precarious Legitimacy of Transnational Trade Governance" (1 June 2017), forthcoming in *Research Handbook on the Sociology of International Law*, edited by Moshe Hirsch and Andrew Lang. Available at: SSRN: <https://ssrn.com/abstract=3009914>.

46 Daniel Innerarity, *Democracy in Europe. A Political Philosophy of the EU*, London: Palgrave Macmillan (forthcoming March 2018).

47 Introduction at 7.

48 Chapter 3, at 10.

49 "The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement", (2010) 16 *European Law Journal*, 315-344; "The Argument

Jürgen Neyer and I first submitted it back in 1997 in an essay on European comitology.⁵¹ The basic premise and intuition is very simple: it is a core premise of theories of democracy, most notably of Habermas' discourse theory of law and democracy, that we, the citizens, must be able to understand ourselves as the authors of the legal provisions with which we are expected to comply. Under conditions of Europeanisation and globalisation and ever more growing interdependences, this is no longer conceivable. To cite Habermas himself: "Nation-states ... encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level"⁵² It is difficult to reject these insights. The implications are, of course, controversial. Among the three just-named alternatives – state-building, down-scaling of integration, co-operation – I opt for the third. In the European case, we can build on European law's potential to compensate for the legitimacy deficits of national rule. European law can derive its own legitimacy from this function: its mandate is to implement the commitments of the Member States towards each other by two legal claims, namely, the requirement to take the interests and concerns of their neighbours into account when designing national policies, and by imposing a duty to co-operate. The very notion of co-operation indicates that this kind of rule cannot be some "command and control" exercise, but must rely on the deliberative quality of cooperative interactions. Two important implications should be underlined. The first: there is no in-built-guarantee that such cooperative efforts will, in the end, be successful; but such limitations need not be damaging per se; quite to the contrary, they may document mutual respect of essential, yet distinct, values and commitments of the other (the *ordre public* in the parlance of conflict of laws and private international law). The second implication is more drastic: socio-economic, institutional, political and cultural diversity is particularly strong and difficult to overcome. This,

from Transnational Effects II: Establishing Transnational Democracy", (2010) 16 *European Law Journal*, 375-394.

50 See Jürgen Habermas, "Does the Constitutionalization of International Law still have a Chance" (translated by Cirian Cronin), in Jürgen Habermas, *The Divided West*, Cambridge: Polity Press, 113-193.

51 Christian Joerges and Jürgen Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", (1997) 3 *European Law Journal*, 273-299.

52 Habermas, n. 50, at 176.

however, is by no means a plea for inactivity; it is, instead, a reminder that we have to distinguish “justice within” consolidated polities, on the one hand, and “justice between” them, on the other - and that we have to work in both spheres.⁵³ Last, but not least, it should, in view of the objections raised above against the discretionary mode of crisis governance, be underlined that the conflicts approach defend the ideas of law-mediated legitimacy of public rule.

V. Epilogue

How much realism is in this “united in diversity” vision defended here? It is to be conceded that this perspective is a response to the social deficits of Europe’s crisis politics and the normative fragility of its present constitutional constellation. The *praxis* which this vision envisages certainly depends, to invoke Böckenförde’s famous dictum again,⁵⁴ on cultural and normative resources which cannot be produced wilfully or by some political or legislative fiat. European integration research used to be aware of such dependencies and has sought to identify them. As, for example, Joseph Weiler, in his insightful first reflection on supranationalism and intergovernmentalism, has underlined, the supremacy of European law was anything other than self-sustaining; instead, acceptance for its operation was held in precarious equilibrium, and dependent upon continuous political processes of intergovernmentalism and continuing commitment to the defence of the community spirit.⁵⁵ “*Fin-de Siècle* Europe” with its appeal to peace, prosperity and supranationalism was a similar, only slightly more mundane, suggestion.⁵⁶ “Political Messianism” is a more desperate, crisis-driven version.⁵⁷ Lawyers with their normative sensibilities are by no means the only ones who try to spell out what might hold societies in general and Europe in particular together. To take the two “Polanyians”

53 Christian Joerges, “Social Justice in an Ever More Diverse Union”, in Frank Vandebroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis*, Cambridge University Press 2017, 92-119; available at: SSRN: <http://ssrn.com/abstract=2697440>.

54 “Die Entstehung des Staates”, n. 3 above.

55 “The Community System: The Dual Character of Supranationalism”, (1981) 1 *Yearbook of European Law*, 257-306.

56 Joseph H.H. Weiler, “Fin-de-Siècle Europe”, in Renaud Dehousse (ed.), *Europe after Maastricht: an Ever Closer Union?*, Munich: C.H. Beck 1994, 203-216.

57 Joseph H.H. Weiler, “Europe in Crisis – On ‘Political Messianism’, ‘Legitimacy’ and the ‘Rule of Law’”, (2012) *Singapore Journal of Legal Studies*, 248-168; available at: SSRN: <https://ssrn.com/abstract=2255263>).

referred to before: *laissez faire*-liberalism, Polanyi has argued, is but a “stark utopia”; it will provoke, and be accompanied by, protective counter-movements.⁵⁸ Dani Rodrik’s trilemma theorem suggests that “deep economic integration” among constitutional democracies will soon, rather than later, have to be either complemented by political union or downscaled. Can legal scholarship remain for long forgetful about the *proprium* of law? Can political science⁵⁹ refuse to consider whether the “new normalcy” of the rule of economics, to take up Habermas’ formula, “deserves recognition”? Will Europe’s constitutional courts continue to follow the lead of the CJEU when they are told that “the financial stability of the euro area as a whole ... and of the Union itself” is a commitment that trumps the essentials of their constitutional traditions? Will such messages incentivise the peoples of Europe to oppose populist demagogism?⁶⁰

58 Polanyi, n. 4 above, at 3.

59 Tellingly, political scientists who do not share the prevailing normative complacency in their own discipline, search for support in legal academia – with limited success; see Christian Kreuder-Sonnen, “Beyond Integration Theory. The (Anti-) Constitutional Dimension of European Crisis Governance”, (2016) 54 *Journal of Common Market Studies*, 1350-1366; id., “An Authoritarian Turn in Europe and European Studies?”, (2018) 25 *Journal of European Public Policy*, 452-464.

60 This essay was finalized on 27 January; this is a date at which the concern for financial stability signals a crisis rather than a noble commitment.

Jüngste ZERP-Diskussionspapiere

(in Papierform oder elektronisch auf www.zerp.eu)

- DP 1/14 *Christian Joerges / Tobias Pinkel / Ulf Uetzmann* (Hrsg.), Josef Falke zum 65. Geburtstag, May 2014
- DP 1/13 *Christian Joerges / Peer Zumbansen* (Hrsg.), Politische Rechtstheorie Revisited. Rudolf Wiethölter zum 100. Semester, März 2013
- DP 1/11 *Christian Joerges / Tobias Pinkel* (Hrsg.), Europäisches Verfassungsdenken ohne Privatrecht – Europäisches Privatrecht ohne Demokratie?, May 2011
- DP 3/10 *Michelle Everson / Frank Rodriguez*, What Can the Law do for the European System of Central Banks? Good Governance and Comitology 'within' the System, December 2010
- DP 2/10 *Andreas Fischer-Lescano*, Europäische Rechtspolitik als transnationale Verfassungspolitik. Soziale Demokratie in der transnationalen Konstellation, February 2010
- DP 1/10 *Andreas Fischer-Lescano / Christian Joerges / Arndt Wonka* (Hrsg.), The German Constitutional Court's Lisbon Ruling: Legal and Political-Science Perspectives, January 2010
- DP 3/09 *Andreas Fischer-Lescano/Lena Kreck*, Piraterie und Menschenrechte. Rechtsfragen der Bekämpfung der Piraterie im Rahmen der europäischen Operation Atalanta, June 2009
- DP 2/09 *Poul F. Kjaer*, Three-dimensional Conflict of Laws in Europe, March 2009
- DP 1/09 *Florian Rödl*, Europäische Arbeitsverfassung, February 2009
- DP 8/08 *Sjef van Erp*, Security interests: A secure start for the development of European property law, November 2008
- DP 7/08 *Sergio Nasarre Aznar*, Eurohypothecc & Eurotrust. Two instruments for a true European mortgage market after the EC White Paper 2007 on the Integration of EU Mortgage Credit Markets, September 2008
- DP 6/08 *Tobias Pinkel*, Das Buch VI des Entwurfs eines Gemeinsamen Referenzrahmens (DCFR): Nichtvertragliche Schuldverhältnisse aus Schädigung Dritter. Eine kritische Analyse des Modellgesetzes eines europäischen Deliktsrechts, August 2008
- DP 5/08 *Julia Cassebohm*, Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention – Voraussetzungen, Wege und Folgen, July 2008
- DP 4/08 *Claudio Franzius*, Der Vertrag von Lissabon am Verfassungstag: Erweiterung oder Ersatz der Grundrechte?, July 2008

Online verfügbare ZERP-Arbeitspapiere

(ZERP-Arbeitspapiere erscheinen nur online)

- WP 1/2018 *Christoph Schmid / Peter Sparkes*, Cross Border Transactions with Immovables, Februar 2018
- WP 3/2016 *Eva-Maria Riedel*, Punitive Damages – Ein Vergleich des englischen, US-amerikanischen und deutschen Rechts, Oktober 2016
- WP 2/2016 *Caterina Mugelli*, Economic Growth and Property Rights in China: The Role of Courts in Filling Legislative Gaps and Balancing Competing Interests, September 2016
- WP 1/2016 *Eldar Badzic*, Demokratische Repräsentation in ethnisch geteilten Postkonfliktstaaten am Beispiel Bosnien und Herzegowinas, März 2016
- WP 3/2015 *Annika Klopp*, Werbung gegenüber "Kinderverbrauchern" im deutschen und europäischen Wettbewerbsrecht, November 2015
- WP 2/2015 *Ulf Uetzmann*, Glückwünsche von Schülern zu Josef Falke's Geburtstag, Mai 2015
- WP 1/2015 *Olga Batura / Olga Kretova*, Opportunities of Trade in Services between the EU and Ukraine: the Case of Telecommunications Services under the GATS and the Association Agreement, May 2015
- WP 3/2014 *Yuriy Fesh de Jour*, Das vielfältige Gesicht der organisierten Kriminalität: Ihre Organisationsformen und Strukturen am Beispiel chinesischer, japanischer und italienischer krimineller Organisationen, October 2014
- WP 2/2014 *Ulf Uetzmann*, Einige Bemerkungen zum neuen Schema allgemeiner Zollpräferenzen der Europäischen Union, June 2014
- WP 1/2014 *Christian Joerges / Jürgen Neyer*, Deliberativer Supranationalismus in der Krise, January 2014
- WP 2/2013 *Batura, Olga*, Liberalisierung der Telekommunikationsdienstleistungen, December 2013
- WP 1/2013 *Christoph Schmid / Jason Dinse*, Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court of Human Rights on Tenancy Law, Juli 2013
- WP 2/2012 *Christoph Schmid*, The Dutch and German Notarial Systems Compared, Dezember 2012

- WP 1/2012 *Silvia Sonelli*, Constitutional Rights without a Constitution: The Human Rights Act under Review, Januar 2012
- WP 3/2011 *Katharina Ewert*, Die Überprüfung von Schiedssprüchen auf ihre Vereinbarkeit mit europäischem Kartellrecht im Anschluss an die Eco Swiss-Entscheidung des EuGH, September 2011
- WP 2/2011 *Andreas Fischer-Lescano / Carsten Gericke*, The ICJ and Transnational Law. The “Case Concerning Jurisdictional Immunities” as an Indicator for the Future of the Transnational Legal Order, September 2011
- WP 1/2011 *Klaus Sieveking*, Ende einer Dienstfahrt: Erinnerungen an eine Bremer akademische Professionalisierung, May 2010
- WP 4/2010 *Thurid Ilka Gertich*, Menschenrechte in Chile am Beispiel des Zugangs zu AIDS-Medikamenten, April 2010
- WP 3/2010 *Christian Joerges / Christoph Schmid*, Towards Proceduralisation of Private Law in the European Multi-Level System, January 2010
- WP 2/2010 *Andreas Fischer-Lescano / Carsten Gericke*, Der IGH und das transnationale Recht. Das Verfahren BRD ./.. Italien als Wegweiser der zukünftigen Völkerrechtsordnung, January 2010
- WP 1/2010 *Johanna Wallenhorst / Marie Vaudlet*, Rechtsfolgen des Einsatzes privater Sicherheits- und Militärfirmen, January 2010
- WP 10/2009 *Klaus Sieveking*, Introduction of political participation rights for non-EU-national immigrants in Germany, November 2009
- WP 9/2009 *Christoph U. Schmid*, The ‚Three Lives‘ of European Private Law, Oktober 2009
- WP 8/2009 *Franz Christian Ebert*, Between Political Goodwill and WTO-Law: Human Rights Conditionality in the Community’s New Scheme of Generalised Tariff Preferences (GSP), September 2009