Economic Constitutionalism and “The Political” of “The Economic”

Christian Joerges

Introduction

“Die Wirtschaft ist das Schicksal” (the economy is our destiny). Walter Rathenau, for a very short period serving as Reichsaußenminister in the first German Republic, was aware of the exploitation of economic and social crises by radical political movements. His famous pronouncement captures well what the recent crises have taught us again: “the economic” and “the political” cannot be neatly separated and treated as two different worlds which operate according to a logic of their own in distinct spheres. “The economic” and “the political” are intertwined. I conclude that “the economic” is – socially and politically – too multifaceted and too important to be left to the expertise of economists.

This thesis is based upon Dani Rodrik’s analysis and critique of the “rule of economics” in present debates, including the current difficulties with the European project. It is a critique with old if widely forgotten credentials: “L’économie politique”, Phillipe Steiner reminds us, “est une science globale de la société”. Rodrik’s political economy is not physiocratic, but is indebted to Karl Polanyi’s economic sociology, which has experienced an unexpected, yet unsurprising, renaissance in the last decade. Polanyi is present in a good

4 See supra in this volume, P. Steiner, « Les Physiocrates, l’économie politique, l’Europe ».
number of contributions, in particular in the introductory chapter. My title signals my own indebtedness and the reasons behind it. Polanyi’s work conceptualizes the economy in precisely the sense just indicated. Through his analyses of the operation of markets, he reveals the societal impact and the social embeddedness of “the economic”.

Interestingly, the Polanyi renaissance can be observed even in legal research, although Dr. jur. Karl Polanyi never made use of the works of my discipline in his academic and political writings. Lawyers, taking note of his economic sociology, are nevertheless impressed. Polanyi’s analyses of market societies illuminate helpfully and constructively the interdependence between the economy, society and law, i.e., the agenda of students of “Wirtschaftsrecht”. Economic Constitutionalism” is well suited for such an exercise.

The materials collected in the course of this project gave me much cause for thought. And although I cannot do justice to the richness of the contributions submitted, I can explain how they have helped me to refine my own understanding of economic constitutionalism. As some of the authors will know, my perception of the European problématique, far from remaining confined to the idea of an “ordoliberalization” of Europe (2.), is an ongoing endeavour to do justice to the fortunate motto of the unfortunate Draft Constitutional Treaty of 2004: how can Europe realize this Treaty’s vision of unitas in pluralitate? (3.) I will not undertake a systematic presentation. Let me, instead, specify the two main concerns which I will pursue throughout the various steps of my deliberations – and their relation to my Polanyian understanding of Economic constitutionalism (1.).

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1 Preliminary Remarks on the Conceptual Framework

1.1 The Law of European Integration and the Ordoliberalization of Europe

My first leitmotiv is – as per Polanyi – the neglect and misperception of “the economic” and its political importance in European legal scholarship. To be sure, the community of European lawyers has meticulously pursued the steady growth of legal provisions which concern the operation of the economy. This perception, however, is committed, mostly implicitly, to an understanding of markets as a world apart, functioning according to an economic logic beyond the scope of democratic constitutionalism, and without discussions of the importance and validity of economic paradigms and rules. As late as 2020, a leading scholar of European constitutionalism wondered where the “E” [conomy] is in Europe’s Constitution.\(^8\)

The most important exception to the mainstream mindset in European law scholarship, namely, German ordoliberalism and its allies, is the target of many critics represented in this project. My queries with this critique are twofold. They concern the validity of essential aspects of the critique, in particular the diagnoses of much more than a “Schmittian flavour”\(^9\) in the ordoliberal tradition; they furthermore concern a misperception and overestimation of the impact of ordoliberal ideas in the past and the presence of the integration project. The presence is particularly worrisome. The “ordoliberalization thesis”, which is so widely shared in analyses of European crisis politics, risks camouflaging the post-liberal essence of the financial and sovereign debt crisis as well as the gradual acceptance of the failings of the integration project.

Our discussion will be focused on the ordoliberal claims as to the proper understanding of European legal provisions and the impact of these ideas on the law of European integration. Following the differentiation between a “micro”- and a “macroeconomic” European constitution first suggested by Kaarlo and Klaus Tuori,\(^10\) and taken up in Chapters 3 and 4, I will deal with the two constitutions separately.

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Inherent in my framing of our problématique is a twofold tension. My critique of mainstream legal scholarship and its failure to cope with “the political in the economic” builds on Polanyi’s economic sociology. The propositions, which ordoliberalism and its neoliberal relatives defend in their conceptualization of the European economic constitution, are irreconcilable with my normative concerns and theoretical commitments to Polanyi’s economic sociology. Building on these commitments and on the critique of the current strands of economic constitutionalism, I will submit my own deliberations on a democratic transformation of economic constitutionalism.

1.2 The European Heterogeneity and the Search for Its Unitas in Pluralitate

Close to my second concern are the contributions in Section 6. The focus of these contributions are inter-state relations. The intra-European modes discussed there are regulatory competition, fiscal federalism, and the kind of federation envisaged by F.A. Hayek in his seminal pre-war essay. All of these modes rely on market-driven mechanisms. The same holds true for the operations institutionalized by the European Semester which promote economic (and “social”) convergence. To be sure, under this regime, each Member State is perceived differently and required to submit country-specific Stability or Convergence Programmes and National Reform Programmes. What remains uniform is the economic paradigm guiding the advice given to the Member States and the evaluation of their performance: strengthening competitiveness is the common objective of these procedures. My disbelief in all these approaches is informed by varieties of capitalism studies, their recent...

13 Initiated in 2001 by P.A Hall and D. Soskice, Varieties of Capitalism: The Institutional Foundations of Comparative Advantage, Oxford, Oxford University Press. A related movement, under-studied in European law scholarship, is the “école de la Régulation” in France, which insisted (since the mid-1970s) on the varieties of mechanisms and institutions (money regulation, competition law, state form, salary relationship, etc.) that constitute the “formes de régulation” which underly the (historically and geographically different) capitalist regimes of societies (competitive/bourgeois regulation, Fordism, financial capitalism, etc.) and which can explain the different types of socio-economic crises (exogenous crisis, endogenous crisis, crisis of the mode of regulation, crisis of the...
Eco-Constitutionalism and “The Political” of “The Economy”

revisions, cultural economics, and, last, but not least, the experience that “unifying law” usually “Ends Up in New Differences”. This is why I suggest that European Law and, even more so, its further political responses to the financial crisis, will have to cope with diversity both now and in the foreseeable future. This challenge is not threatening but entails chances. Once more, I build on Polanyi. To cite the concluding chapter of the *Great Transformation*:

[... ] with the disappearance of the automatic mechanism of the gold standard [Author’s Note: or, in today’s words, the stability criteria and market-oriented procedures of the *EMU*], 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.

Empirically speaking, Polanyi’s visions proved to be overly optimistic. Normatively speaking, however, we have to concede that the “liberty to organize national life at will” is a democratic essential. Has this command been overruled by Europeanization and globalization? I suggest that we should care about its survival and that a survival is conceivable under a re-conceptualization of European and international economic law as “conflicts law” (3.).

Could the responses to the Covid-19 pandemic by the Pandemic Emergency Purchase Programme (*PEPP*) and the Recovery Plan “Next Generation EU” be a

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“critical juncture”, as lots of authors have suggested? Perhaps, but we argue, in our concluding remarks, that to characterize such a profound transformation as nothing but a new variety of economic constitutionalism would overstretch this concept even more than the transformations brought about by the financial crisis.

2 Ordoliberal Economic Constitutionalism in the Integration Project

Has ordoliberalism been taken too seriously in recent debates on European integration? Vincent Valentin shares my doubts. In a conference paper published in 2016, Josef Hien and I characterized ordoliberalism as “an irritating German idea”. We found the ordoliberal conceptual framework defective,
but were even more irritated by the attention that ordoliberalism attracted in academic contributions among political scientists analysing the crisis politics of the EU and Germany's role therein.

This attentiveness is a recent phenomenon. It is a by-product of the financial crisis. Ordoliberalism is read as an explanatory framework for Germany's crisis politics. This explanation was first submitted in an online paper by Sebastian Dullien and Ulrike Guérot. One of the irritating aspects of this interpretation
is that the critics never mention the strong criticism of the leading proponents of the ordoliberal tradition of the EMU\textsuperscript{22} and fail to name German economists of some standing who would define themselves as ordoliberals.\textsuperscript{23}

2.1 **Ordoliberalization of the Microeconomic Constitution?**

2.1.1 **The Law**

The reading of Europe’s microeconomic constitution as an ordoliberal project seems to rest on somewhat firmer grounds. We have to distinguish, however between the foundational period of the integration project and its present state.

2.1.1.1 **The Early Years**

During the foundational period of the integration project, ordoliberalism was still not only politically, but also academically, very influential.\textsuperscript{24} However, the school and its theory of the economic constitution had already – in 1954 – experienced a serious setback from the German Constitutional Court,\textsuperscript{25} which


\textsuperscript{23} The account of political scientists contrasts strikingly with the state of the art in Germany’s academic economics. It is of course true that e.g. the ministerial language often refers to ordoliberal terms and views. However, even Lars P. Feld, formerly the Chairman of the *Sachverständigenrat* of the German Ministry of Economics and still Director of the Walter Eucken Institute in Freiburg does hardly qualify as such a straw man. Feld has very lucidly explained why the pertinent Treaty provisions are disregarded (see his « Europa in der Welt von heute: Wilhelm Röpke und die Zukunft der Europäischen Währungsunion », *HWWI Policy Paper No. 70, 2012*, available at: http://econstor.eu/bitstream/10419/62778/1/722909292.pdf; last consulted on 12 February 2022) and has in his academic work moved beyond Eucken and Hayek towards the “Virginia School” of James Buchanan (see L.P. Feld, E.A. Köhler and D. Nientiedt, « Die Europäische Währungsunion aus traditioneller und moderner ordnungsoekonomischer Perspektive », *ORDO. Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 2018, vol. 69, n°1, pp. 65–84) See also the earlier account of economic historian A. Nützenadel, *Stunde der Ökonomen. Wissenschaft, Politik und Expertenkultur in der Bundesrepublik 1949–1974*, Göttingen, Vandenhoeck & Ruprecht, 2005, pp. 33 ff.


Eco-Constitutionalism and “The Political” of “The Economy” 

was to be followed in 1979 by a second spectacular defeat. However, it was probably that defeat which contributed to the ordoliberal turn to Europe. This move occurred under the leadership of Franz Böhm’s most important disciple, Ernst-Joachim Mestmäcker. His argument had a touch of genius. The German Basic Law, with its commitments to democracy and the social state, seems simply to be irreconcilable with the economic constitutionalism defended by the Freiburg School, and the two judgments just mentioned signalled a clear demarcation. The EEC is different, so Ernst-Joachim Mestmäcker argued in a Festschrift for his academic mentor; the commitment to establish a common market as enshrined in the Treaty, he submitted, is of constitutional significance. Shortly before the publication of the Festschrift, the ECJ had handed down its seminal judgments which provided the EEC with what ordoliberals read as a constitution and which the ECJ was to call somewhat more cautiously a “constitutional charter”. This jurisprudence provided the cornerstone of the legendary “Integration through Law Project”. Ordoliberalism with its idea of economic constitutionalism anticipated the agenda of this project. Beyond German borders, however, hardly anybody in European legal scholarship had ever taken any notice of Germany’s ordoliberalism. However, it is easy to

31 Giandomenico Majone observed soberly: in the 1950s, planification and interventionist practices were commonplace in the founding states in all sectors of the economy – how could defeated Germany, of all countries, have been able to prevail in Europe with a liberal Ordnungspolitik that could not even be implemented domestically? (G. Majone, Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?, Cambridge, Cambridge University Press, 2010, pp. 93 ff).
understand why its proponents embraced the jurisprudence of the ECJ – without paying particular attention to the doctrinal arguments of the Integration through Law Project. There was a perfect fit. In particular, the conceptualization of the economic freedoms as basic rights which Europe's market citizens could invoke against their nation states were in line with ordoliberal notions not only substantively but also because of the EEC’s institutional configuration which entrusted the judiciary with the institutionalization of open markets and the European Commission with their protection against distortions of their competitive ordering. Ordoliberalism offered an original answer to the legitimacy problématique which could not be found within the Integration through Law paradigm. In the second Festschrift für Franz Böhm, Mestmäcker substantiated his position with particular clarity:

The academic school of thought which promotes the Wirtschaftsverfassung [...] is not committed to the elaboration of the political potency of the economic, in order to fall into the arms of the democratic regime, but rather seeks to place that regime in a position whereby it can independently and adequately perform its mandated rule of law and welfare tasks.  

The mainstream of Europe's academic scholarship, however, did not pay much attention to such subtleties and continued to rely on the “integration through law” orthodoxy. The ordoliberal record looks much better in competition law and policy, albeit only in the formative phase. The Commission Directorate General for Competition (DG IV) was something like an ordoliberal stronghold and Mestmäcker among the Commission's most important advisors. This alliance was strong, albeit of limited duration. During the later periods, after the European turn to "a more economic approach", tensions between the ordoliberal tradition and European policy became clearly visible – resulting

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34 See W. Mussler’s appraisal at the occasion of Mestmäcker’s 90th birthday in Frankfurter Allgemeine Zeitung, 22 February 2018, n° 45, p. 22.

in the intense critique of the American law and economic liberalism by Mestmäcker,\textsuperscript{36} that Claire Mongouachon has pointed out.\textsuperscript{37} Even in the field of competition policy, the ordoliberalization thesis is, therefore, anything but realistic.\textsuperscript{38}

My remarks on the law of the microeconomic constitution have underlined the ordoliberal contributions and visions. I have thereby continuously referred to the theoretical ambitions of the school. They are unique in their, so to speak, meta-legal understanding of economic constitutionalism, which addresses the whole of European governance and argues that there is no such thing as a European democratic deficit simply because the economic constitution does not require the credentials of democratic constitutionalism as enshrined in the constitutional democracies of the Member States of the EU. I have also documented the failing of ordoliberal ambitions even in the field of economic law and policy. Frédéric Marty’s distinction between an ordoliberal \textit{Wettbewerbsordnung} and the really existing European competition law since the adoption of “a more economic approach”\textsuperscript{39} is fully in line with the gist of my argument, and much more informative with its insistence on the varieties of neoliberalism in economic theory, competition policy and legal practice. I will supplement my theoretical argument in the following discussion of the contributions of Thomas Biebricher and Werner Bonefeld. However, I first have to underline the discrepancies between ordoliberal visions and the “really existing” European law and then consider the irresolvable tensions between micro- and macroeconomic constitutionalism.

\textbf{2.1.1.2 Microeconomic Constitutionalism and the Turn to Macroeconomic Politics}

The structuring with its distinction between the microeconomic (Section 3) and the macroeconomic constitution (Section 4) follows an influential

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\textit{micro-économique de l’Union européenne » (Section 3), Subchapter 2. \textit{La place ambivalente de l’ordolibéralisme comme outil d’interprétation du marché intérieur.}}


\textsuperscript{37} See \textit{supra} in this volume, C. Mongouachon, « Les difficultés d’une interprétation ordolibérale de la constitution micro-économique de l’Union européenne ».


\textsuperscript{39} See \textit{supra} in this volume, F. Marty, « Évolution des politiques de concurrence en droit de l’UE : de la \textit{Wettbewerbsordnung} ordolibérale à la \textit{More Economic Approach} néolibérale ? » (Part 2, Section 3).

\end{quote}
conceptualization submitted by Kaarlo and Klaus Tuori in their widely noticed monograph. The law of the microeconomic constitution is reconstructed in the contribution of Pieter Van Cleynenbreugel and Xavier Miny and thereafter by Claire Mongouachon with an important differentiation. Both essays underline affinities between ordoliberal theorems and core legal principles of European law. Even though the proponents of the Integration through Law Project did not take notice of the German school of thought, it seems safe to submit that a clandestine alliance exists between the integration through law paradigm and ordoliberal economic constitutionalism. But then we observe a bifurcation. Van Cleynenbreugel and Miny seek to document conceptual coherence in the jurisprudence of the ECJ which they characterize as “market access constitutionalism”; Claire Mongouachon distinguishes between the “first” and the “second” generation of ordoliberal scholarship, and underlines the Hayekian touch. The difference became most clearly visible in the move of competition policy from the control of anti-competitive private practices to the control of anti-competitive public regulation and to the reliance on interstate “regulatory competition”. “Regulatory competition” has macroeconomic implications but is not a macroeconomic policy in the technical sense of this term. Ordoliberalism has no genuine macroeconomic conception. This was visible very early on the critique of ordoliberal scholars of the (short) reliance of German economic policy on Keynesian messages; it became early visible in E-J. Mestmäcker’s doubts about the viability of his quest for “justiciable” yardsticks of macroeconomic policies. This ordoliberal query affects

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42 See supra in this volume, C. Mongouachon, « Les difficultés d’une interprétation ordolibérale de la constitution micro-économique de l’Union européenne », Subchapter 2. La place ambivalente de l’ordolibéralisme comme outil d’interprétation du marché intérieur.
43 See the remarks in Section 3.2. below (Promoting Economic Democracy in the EU through Democracy-Enhancing Conflicts Law).
45 The “judicial system cannot be wiser than contemporary economics in judging macroeconomic relationships”, he conceded already in the 1980’s in his seminal essay: E.-J.
the ordoliberalization thesis with respect to the macroeconomic constitution. The defence of this thesis by Thomas Biebricher and Werner Bonefeld will be criticized in the next subchapter.

As a preliminary step to this critique, we underline the impact of the very advent of European macroeconomic politics on the ordoliberal constitutional project. This impact has a specific neoliberal imprint. Keynesian macroeconomics have co-existed peacefully with the liberty of states to organize their microeconomic politics “at will”. Keynesianism was the dominating economic philosophy of the post-war European nation-state. The ordoliberals of both generations, and even more so F.A. Hayek and Anglo-Saxon Neoliberalism, insisted instead on the primacy of the market mechanisms in both micro- and macroeconomics. The austerity politics of the efforts to rescue the Euro after the financial crisis have radicalized this re-orientation. The new strategy of the so-called structural reforms has subjected microeconomic politics to assumed functional necessities.

In the law of the microeconomic constitution, as per Pieter Van Cleynenbreugel and Xavier Miny’s reconstructions, such tensions are not visible simply because their account of the law of the micro-constitutionalism mirrors neoliberal economic theorems. Hans-W. Micklitz with his dedication to “the social distributive justice” in all compartments of private law and a notion of access justice which seeks to realize at least a “thin version of social distributive justice”, finds himself in a less comfortable position. To be sure, European crisis politics have not directly intervened in the domains of private law. Macro-economic exigencies have nevertheless had a strong impact. Micklitz observes a “shift from consumer protection law to consumer law without protection”, in more general terms, the dedication of European politics to economic efficiency and marketization of all spheres of European society. Micklitz seems nevertheless to be confident with regard to the survival of the social accomplishments of the European project. The social embeddedness

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48 See supra in this volume, H.-W. Micklitz, « Society, Private Law and Economic Constitution in the EU ».

theorem of Polanyi’s economic sociology to which he refers\textsuperscript{50} may, by contrast, lead us to place more hopes on the national, rather than the European level.\textsuperscript{51}

2.1.2 Political Science

Two renowned political theorists have contributed to the discussion of economic constitutionalism in the present project. I have – again – to be very selective in my comments on their works.

2.1.2.1 \textit{Thomas Biebricher’s Neoliberal Lineages of an “Economic Constitution”}

Thomas Biebricher has addressed ordoliberalism from many perspectives, recently also in a critique of the questioning of the ordoliberalization thesis by Josef Hien and myself.\textsuperscript{52} Political theorists tend to avoid the nitty-gritty of legal debates as I have resumed it above,\textsuperscript{53} in favour of more abstract theorizing.

In the case of Biebricher, however, I see some convergence. One is that Biebricher appreciates the ordoliberal concern with economic power and Germany’s organized capitalism,\textsuperscript{54} which, in order to be successful, does indeed require a “strong state”, but certainly not the strong state which Carl Schmitt called for in his “Address to Business Leaders” of 1932.\textsuperscript{55} Equally significant is Biebricher’s very precise differentiation between the various strands of neoliberalism and the significant breaks with the ordoliberal tradition. There is a difference of paradigmatic dimensions between Walter Eucken, the

\textsuperscript{50} See supra in this volume, H.-W. Micklitz, « Society, Private Law and Economic Constitution in the EU ».

\textsuperscript{51} See C. Joerges, « Private Law in Europe’s Political Economy after the Financial Crisis », in M. Ruffert (ed.), \textit{European Economy and People’s Mobility}, Tübingen, Mohr Siebeck, 2016, pp. 101–125, esp. p. 125: It is simply inconceivable that the entire body of the law which constitutes the infrastructure of the EU can be subjected to the “structural reforms”. The pretense of knowledge, which characterizes Europe’s monetary policy, may well encounter the limits of its “power fantasies” in the ordering functions of private law.


\textsuperscript{53} See supra, Subchapter 2.1.1.


\textsuperscript{55} C. Schmitt, « Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern », \textit{op. cit.} On this point see Subchapter 2.1.2.2. below (Werner Bonefeld’s analysis of the underlying “Authoritarian Liberalism” of Economic Constitutionalism).
economic advisor of Böhm, and Friedrich A. von Hayek’s “competition as a discovery procedure” and “spontaneous, catallactic ordering”, which Mestmäcker brought to bear in his entire oeuvre.\(^{56}\) There is again a difference with the constitutionalism of the “Virginia School” of James Buchanan which was adopted in Germany by Viktor Vanberg and Lars. P. Feld.\(^{57}\) What I note here is that the contours of economic ordoliberalism become therefore ever more nebulous and difficult to apply to EU integration. Biebricher seems to concede this to some degree. In his *replica* to Hien and Joerges,\(^{58}\) he ends up with the characterization of ordoliberalism as being culturally embedded in German traditions. This characterization is widely shared\(^{59}\) and confirmed by Heike Schweitzer, a renowned disciple of Mestmäcker’s – who has underlined that she is not aware of a single legal scholar in the younger German generation who could be called a confessing ordoliberal.\(^{60}\)

2.1.2.2 \textbf{Werner Bonefeld's Analysis of the Underlying “Authoritarian Liberalism” of Economic Constitutionalism}

Bonefeld’s record of analyses of the ordoliberal tradition is outstanding.\(^{61}\) The notion of the “strong state” to which he regularly refers, is one of Carl Schmitt’s best-known infamous terms. For stringent reasons, affinities of an intellectual tradition with the Dark Lord of German constitutionalism are wearing and incriminatory, and somewhat paradoxical insofar as the democratic and liberal constitutional order was at the centre of Schmitt’s critique, as Grégoire and Miny note in their introduction to the project.\(^{62}\) Such affinities do exist.\(^{63}\)

\(^{56}\) See *supra* in this volume, C. Mongouachon, « Les difficultés d'une interprétation ordolibérale de la constitution micro-économique de l'Union européenne ».  
\(^{58}\) T. Biebricher, « Zur Ordoliberalisierung Europas – Replik auf Hien und Joerges, », *op. cit.*.  
\(^{62}\) See *supra* in this volume, G. Grégoire & X. Miny, « Introduction – La Constitution économique : Approche contextuelle et perspectives interdisciplinaires ».  
the foundational ordo-manifesto, further publications, and the reports on Franz Böhm’s readiness to advise some Nazi leaders at the dawn of the Third Reich are no fairy tales. Rudolf Wiethölter, Böhm’s successor in Frankfurt, does not fail to refer to them in his grandiose homage. Yet, there are reasons to plead “not guilty”. One such reason is Schmitt’s emphatic call for “courage of action” in his introductory remarks. “Business leaders” so encouraged are not expected to support and implement competition law. In the later polemic against “a certain side”, namely, the advocates of economic democracy, Schmitt is crystal clear about the addressees of his call for action. Is Schmitt’s “strong state” the one that ordoliberals have requested and envisioned? “This sort of Schmittianism is certainly not Franz Böhm’s world”, Wiethölter submits. An equivocation seems indeed inadequate. Schmitt’s strong state was to establish the priority of politics over the economy without consideration for the law, while the ordoliberals were advocating a stable legal framework for the economy which political rulers would have to respect.

2.2 **Ordoliberalization of the Macroeconomic Constitution?**

The following remarks on the macroeconomic constitution seek a way out of a dilemma. I resort, therefore, to the famous *barzelletta* of the Bavarian comedian Karl Valentin in a fictive funeral address: “Es ist schon alles gesagt, nur noch nicht von allen” (everything has been said about the deceased, albeit not by all of us). There are of course differences, some significant and others much less so, among the commentators on the so-called macroeconomic constitution and my own pertinent publications. However, rather than explaining and evaluating these, I will, instead, take up two issues: one is again the

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69 See also *supra* in this volume, S. Audier, « Le néolibéralisme : Un “libéralisme autoritaire” néo-schmittien ? ». 
ordoliberalization thesis; the second is the poverty, if not the absence, of alternative theories and the attempt to propose a Polanyian explanation of the responses to the crisis, leading to the polemical characterization of the current regime as “central bank capitalism” (Zentralbankkapitalismus). This is quite an agenda and I have to be brief.

I feel quite safe with the first point. More than a decade ago, I started my analyses of the ordoliberal framing of the integration project with a “melancholic eulogy”, in which I highlighted the incompatibility of the EMU with the ordoliberal legacy. In another publication, I pointed to the critique of the Maastricht Treaty by renowned proponents of the ordoliberal tradition; I then submitted that the establishment of EMU does not deserve a “constitutional” characterization if that notion is to indicate more than pure facticity, and finally submitted that the law has been “running out” in European crisis politics. This is strong language. It is, however, in substance identical with the analysis of Francesco Martucci and the diagnoses of other critics, in particular that of Hjalte Lokdam and Michael A. Wilkinson in Section 4. The latter underline that the institutionalization of the EMU was inherently contradictory and no mechanism was foreseen for a legitimate resolution of controversies. The Maastricht Treaty, the authors continue, subjected instead “governmental discretion to constitutional rules rather than ordinary political contestation”.

Can this be qualified as “ordoliberalization”? Where is, to paraphrase Neil Walker, “the C” in that “macroeconomic constitutional superstructure”? To read into the Treaty a mandate which would legitimate the ECB to “resolve” the

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74 See supra in this volume, F. Martucci, « Les racines historiques et théoriques de l'Union économique et monétaire » (Section 4).
tensions between national fiscal and economic policies, on the one hand, and monetary policy, on the other – through the ECB acting with de facto unlimited discretion –, is, to paraphrase the Karlsruhe Court "schlechterdings nicht mehr nachvollziehbar" ("simply not comprehensible").

My second query is more demanding. If we do not content ourselves with exegetical exercises which seek to confirm the legality of Europe’s “new modes of economic governance”, but seek, instead, a conceptual frame which allows us to avoid equations of the facticity of crisis politics with their normative justifiability, we have to be prepared to engage in meta-legal debates. Lokdam and Wilkinson resort here to political economy. Political theorist Steven Klein has recently submitted a related, yet distinct, analysis which is inspired by Polanyi’s economic sociology. Next to the “Great Transformation”, Klein relies on Polanyi’s later essay on the “Economy as an Instituted Process”, in which Polanyi complemented his analyses of the marketization of the three “fictitious commodities”, which are: land, labour and money. Market economies, he submits, cannot rely exclusively on marketization, but will be also forced to institutionalize “non-market modes of economic co-ordination”. Among the three fictitious commodities, “money” is, in the present context, of particular importance. Market societies, Polanyi suggested, used to understand money “as a purely economic category, a commodity used for the purpose of indirect exchange”. However, these societies experienced, Klein submits, that, in order to ensure a sustained ongoing economic activity, it was essential to provide for “the supply of liquidity and credit”; this liquidity, he insists, has to be “guaranteed by the political power of the state, operating through agencies like central banks that are willing to use ‘any means necessary’ to respond to market uncertainty during times of liquidity crises”. This “non-market modes of

economic co-ordination” can be qualified as “re-distributive”, e.g., where they have to resort to bailouts. The logic, on which Klein’s argument builds, seems compelling. EMU has deprived the Member States of the potential to protect their currency autonomously. The safeguarding of “money as payment” has, as the CJEU has repeatedly underlined, to be concerned with “the Euro area as a whole.” This is the source of the tensions between the power of the Member States in fiscal and economic policy. Contrary to the expectations underlying Article 125 TFEU, the invisible disciplining strength of financial markets has been replaced by the visible strength of the ECB. The implications are well known. As Klein puts it:

The paradox of the European order after the crisis is the simultaneous strengthening of constitutional constraints on member states and relaxing of legal constraints on European-level actors, such as the ECB... The tragic irony of the Eurozone crisis is that the effort to remove money from the hands of states ended up creating a new concentration of power in the ECB less accountable than those that came before.85

The legitimacy of the ECB’s praxis has been questioned by the economist Ashoka Mody,86 its creation been called a “constitutional monstrosity” by political scientist Giandomenico Majone,87 and the political economy of it operations has been characterized as “central bank capitalism” (Zentralbankkapitalismus).88 The mainstream in legal scholarship is less concerned.89 Lawyers understand

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89 It seems remarkable in light of the discussions on the ordoliberalization of EU politics that the « Kronberger Kreis », a group with commitments to the ordoliberal tradition (L.P. Feld, C. Fuest, J. Haucap, H. Schweitzer, V. Wieland and B.U. Wigger), has criticized the ECB’s
that the functional logic of the present constellation requires that the genuine means of monetary policy have to be complemented by a machinery of economic governance which seeks to commit Member States to the objective of strengthened competitiveness. The tragic consequences of this type of governance are increased asymmetries within the EU, new tensions between its Member States and an erosion of the legitimacy of European rule.

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Unitas in Pluralitate: Conflicts-Law Constitutionalism versus Economic Constitutionalism

Steven Klein’s diagnosis of Europe’s entrapment in a dead-end alley corresponds to the views of many analysts, contributors to this project included. I take it as an encouragement of the search for unconventional responses to the present impasses of the European project. The best known conventional response is the quest for “more Europe” through complementing the EMU by a fiscal union. A less demanding alternative or complement is an upgrading of the political accountability of the ECB.90 Less conventional ideas are the re-conceptualization of the EU as a “demoi-cracy”,91 increased differentiation,92 or targeted disintegration.93 Instead of reviewing all these suggestions, I conclude my preceding analyses by a restatement of my own “conflicts-law constitutionalism”, an approach which I have long since defended and refined, most recently as “democracy-enhancing conflicts law”.94 Conflicts law (private international reading of its mandate, albeit somewhat cautiously: “Dismantling the Boundaries of the ECB’s Monetary Policy Mandate: The CJEU’s OMT Judgement and its Consequences”, Kronberger Kreis Studies No. 61, 2011, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2767622 (last consulted on 12 February 2022).


law in the continental parlance) is concerned with the determination of the applicable law in cases with relations to a diversity of jurisdictions. Has the conflicts-law approach anything to say about economic constitutionalism of any kind discussed in this volume? It does so, I submit, not only at transnational, but also at the national, level.

3.1 Economic Democracy at National Level

To explain the latter assertion, I depart from Guillaume Grégoire’s remarks on the idea of economic democracy developed “by a certain side” under the Constitution of Weimar. This side sought to “bring about a sound and organic interaction between the political and economic spheres of life”. Grégoire\(^{95}\) refers with this citation to the key figure on that side, Hugo Sinzheimer, whose visions continue to attract some attention.\(^{96}\) It is not by chance, however, that the project of economic democracy is taken up by the legal historians – and lawyers informed by history – in this project.\(^{97}\) Only some traces of Weimar are still visible, in particular in Germany’s co-determination which the Constitutional Court has defended against the proponents of an economic constitution.\(^{98}\) However, the much more comprehensive concepts developed under the Weimar constitution cannot be transferred to the present. It is here where conflicts law constitutionalism can step in.

To explain this very briefly: contemporary conflicts law cannot content itself with the search for some “spatial justice” like the *lex locus delicti*, as the Savignyian tradition has cultivated it. Conflicting laws regularly pursue policy objectives – and conflicts law has to mediate between competing policies and concerns. This mediating operation is omnipresent also within the legal systems of constitutional democracies.\(^{99}\) These systems legitimize a great variety

\(^{95}\) See *supra* in this volume, G. Grégoire, « The Economic Constitution under Weimar. Doctrinal Controversies and Ideological Struggles ».


\(^{97}\) See *supra* in this volume, H. Rabault, « Le Concept de Constitution économique : émergence et fonctions » and P.C. Caldwell, « The Concept and Politics of the Economic Constitution ».

\(^{98}\) BVerfG, judgment of 1 March 1979, *Co-determination, loc. cit.*

\(^{99}\) R. Wiethölter, « Begriffs- oder Interessenjurisprudenz – falsche Fronten im IPR und Wirtschaftsverfassungsrecht. Bemerkungen zur selbstgerechten Kollisionsnorm », in
of policies which can be invoked by the parties to a dispute: examples which I have discussed at some length are provided by legal provisions concerning the quality of consumer goods, the responses to planned obsolescence, and automobile dealer and franchising contracts. The very existence of such multifaceted environments is my legal reading of Polanyi’s “social embeddedness” of contracts and the market, or, in a contemporary terminology, the moralization and politicization of the economy, and the characterization of the economy as a polity. Legislatures generate such competing rules but refrain from providing answers in conflict constellation. This, now, is my core point: the conflicts are often fought out before the judiciary, but their resolution – and the answers of the judiciary – are prepared in many more arenas. The generation of conflict resolution, I have characterized as “discovery procedure of practice”. This notion contradicts Friedrich A. von Hayek’s understanding of competition as a discovery procedure. The Hayekian view of “competition” is too one-dimensional, in its fixation on the free definition and pursuit of interests. The litigants pursue interests but they also invoke normative arguments and political concerns. The generation of law is thereby socially embedded. The judiciary is the proper forum for an evaluation of such competing claims.

3.2 Promoting Economic Democracy in the EU through Democracy-Enhancing Conflicts Law

What is true within constitutional democracies is obvious in interstate relations. Where cases are connected with several jurisdictions, a search for the proper law has to consider the validity of their claims for application and examine the policies underlying the potentially applicable rules. This is my

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understanding of conflicts law. This understanding departs from the views of the mainstream of private international law scholarship. It corresponds, however, to the reality of European harmonization politics and European legislation. Where Europe sought to overcome obstacles to the freedom of intra-community trade generated by the legal diversity of its Member States through legislative acts or functionally equivalent means, it encountered “the political”, a diversity of national policies and conflicts of interest between the defenders of national positions and actors expecting advantages from the promotion of integration.

How can and how should these interest configurations be resolved and overcome? Through freedom of trade and market integration, according to the promises and concepts of the integration project. “Laissez-faire was planned”: Polanyi’s insight can properly be called the DNA of the European Community. Due to the complexity of our legal systems, harmonization policy experienced often enough unsurmountable difficulties; the “traditional approach” had to be revised and replaced by the “new approach to harmonization and standards”, complemented by the Cassis de Dijon principle of mutual recognition and the concept of regulatory competition. All of these innovations are compatible with the notion of economic constitutionalism: they all share commitments to economic rationality criteria and operate through, or in accordance with, competitive processes – and promise to enhance through such exposure “economic competitiveness”. Economic constitutionalism has, as Damien Piron documents, exerted a particularly strong influence within Belgium, and is, of course, present in all the contributions to Section 6 in their discussion of interstate relations. The reliance on competitive processes is, however, exposed to strong regulatory countermoves – and not so strong moves towards a “social Europe”.

I have sketched out the theoretical basis of my rejection of a reliance on competitive processes in my critique of Hayek’s conceptualization of “competition as discovery procedure” in the previous subchapter. Hayek is once more an important target of my critique of the reliance on market processes in the ordering of interstate and international relations. In his seminal essay on “The use of knowledge in society”, Hayek has tried to make us believe that markets are unique in their capacity to collect, process and co-ordinate knowledge which is dispersed in society. This thesis captures a great potential of markets.

105 Supra, Subchapter 2.1.1.2. Microeconomic Constitutionalism and the Turn to Macroeconomic Politics, text accompanying notes 42 ff.

However, it fails to deliver convincing arguments on confirming the adequacy of that type of knowledge for the resolution of the controversies over market-promoting and market-correcting policies within constitutional democracies and even more so in transnational contexts. As Lisa Herzog has persuasively argued, the knowledge which markets can communicate is not the knowledge that public authorities need and actually make use of when they have to assess the performance of complex economic orders. Controversies in the EU have just as many as those within nation states to deal with normative reasons, political preferences and economic interests. The conflicts-law approach seeks to ensure the comprehensiveness of debates and their evaluation in legislative processes and/or judicial proceedings. But how could it foster a democratization potential in a socially, economically and politically-heterogeneous Union?

“The Political of the Economic” – the title of my essay – is inspired by Karl Polanyi’s economic sociology and his messages. The one I am referring to here again stems from the concluding chapter of the Great Transformation: “Governments will find it possible to drop the most obstructive feature of absolute sovereignty, the refusal to collaborate in international economics. At the same time, it will become possible to tolerate willingly that other nations shape their domestic institutions according to their inclinations”. This vision concerns our project directly. “The liberty to organize national life at will” characterizes constitutional democracies. “Economic constitutionalism”, as understood by its proponents, restricts that freedom. The restraining force to which Polanyi referred was the “automatic mechanism of the gold standard” mentioned above. The restraints today stem from the assumed functional necessities of the financial stability of the Eurozone and the logic of globalization.

The foundational idea of “conflicts law constitutionalism” was a related, yet distinct concern. The operation of nation states ordering their economies at (democratic) will has restraining impacts on non-nationals. The external effects of national activities are unavoidable and ever more important with the increasing interdependence of Europe’s Volkswirtschaften (national

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Eco-Constitutionalism and “The Political” of “The Economy”

These are the external effects of internal processes and decisions. None other than Jürgen Habermas has underlined this concern in his analysis of the “postnational constellation”: “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 co-ordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level”. In view of these democracy deficits of nation-state democracies, the establishment of a transnational authority tasked with a control of these effects seems normatively irrefutable. The constitutional implication of all this has been articulated most stringently by Ulrich K. Preuß: only through transnational cooperation “can under conditions of interdependency the domination of others be transformed into legitimated rule. In that understanding the integration project, if properly institutionalized, is not democratically deficient but a necessary precondition of democratic rule within constitutional democracies”.

All this reads like a blueprint of the argument that Jürgen Neyer and I have submitted back in 1997. We followed the Habermasian theorem that the citizens of democracies must be able to interpret themselves as the political co-authors of the law with which they are expected to comply, and concluded that the EU Member States are democratically deficient. The constitutional dilemma of the European project is then not the democracy deficit of the Union – as a homogeneous polity –, but the inability of its Member States to ensure democratic accountability. It follows that:

We must conceptualize supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state’s constitutional legitimacy but at the same time clarifies and

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sanctions the commitments arising from its interdependence with equally democratically legitimized states and with the supranational prerogatives that an institutionalization of this interdependence requires...

[S]upranationalism does convey political rights and not just economic freedoms to Community citizens. Supranationalism is therefore to be understood as a fundamentally democratic concept. ‘Supremacy’ of European law can and should be read as giving voice to ‘foreign’ concerns and imposing corresponding constraints upon Member States. What supremacy requires, then, is the identification of rules and principles ensuring the co-existence of different constituencies and the compatibility of these constituencies’ objectives with the common concerns they share.\textsuperscript{113}

It is this passage which provoked Peter Lindseth’s critique.\textsuperscript{114} Our difference in a nutshell: I retain and defend a notion of European democratic constitutionalism, which seeks to base European governance on the commitment to the correction of the structural democracy deficits of the nation states. Lindseth characterizes these activities as judicial and administrative.\textsuperscript{115} This is a discrepancy which is of limited significance. Our dissent is deeper when it comes to the evaluation of Europe’s present constellation and the correction of its deficits. Lindseth is inclined to accept this constellation as Europe’s new normalcy and even cites approvingly Adam Tooze’s defence of the activities of Europe’s “overmighty citizen”, the ECB, as “the only agency engaged in economic policy worthy of the name” and “the one part of the complex European constitution that actually functions with real authority and clout as a federal institution”.\textsuperscript{116} This is to equate validity with facticity. I believe, instead, as submitted below, that the democracy deficits of European governance have to be corrected by an involvement of the national polities in co-operative normative arrangements, rather than an ever more daring delegation of judicial and administrative functions.

\textsuperscript{113} Ibid., pp. 294–295.


\textsuperscript{115} See also infra in this volume, P. Lindseth & C. Fasone, « The Eurozone Crisis, the Coronavirus Response, and the Limits of European Economic Governance ».

The sociological premises and legal principles of “deliberative supranationalism” should be easily understandable; their implementation, however, is a complex exercise. In the elaboration of the conflicts-law approach, I have developed three variants:  

(1) The first deals with the tensions between European rules and national law. The core concern here, to borrow Fritz Scharpf’s terms, is to mitigate between “community and autonomy”. Often enough, fortunate solutions to this constellation have been found. More complex are “diagonal” conflicts, i.e., situations in which European law covers only one aspect of a legal controversy, while other aspects remain a national competence. The response to this constellation is the doctrine of “pre-emption”, which has to determine whether national law is ruled out or remains in place. This doctrinal framing was de facto overruled by the disregard of the enumerated powers principle long before and then continuously during the financial crisis. But the problématique which it has to address has gained ever more importance. In many cases, national courts and the ECJ/CJEU have found creative answers. The by far most important of all “diagonal conflicts”, however, namely, the tension between European monetary policy and national fiscal and economic policies, remains on the European agenda as an unruly issue. The ongoing tensions between the CJEU and the German


118 F.W. Scharpf, Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe, Frankfurt am Main, Campus, Max Planck Institute for the Study of Societies, 2010.


Constitutional Court over the mandate of the ECB provide drastic illustration.122

(2) The second variant deals with regulatory politics. The essay by Neyer and myself just cited123 re-constructs the operation of the European committee system in the foodstuff sector. Our optimistic reading was that this system has generated practices of deliberative problem-solving. “Deliberative” as opposed to orthodox supranationalism was the term we coined and defended.124

(3) The third variant responds to the “privatization” of regulatory tasks and the development of new “governance arrangements” in which governmental and private non-actors are involved. Under what conditions do such arrangements “deserve recognition”? Under what conditions is the involvement of non-governmental actors in regulatory policies beneficial? How can the operation of self-regulation be evaluated? A case of exemplary importance is the role of non-governmental organizations at all levels of governance in the development of standards and their certification.125

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In all of these three dimensions, the conflicts-law approach advocates the reliance on “deliberative” interactions. The law’s task, then, is the establishment and supervision of procedures which promote deliberative debates and protect deliberative problem-solving.

Is all this just a “stark utopia”? “Democracy-enhancing conflicts law” can build on the work of the Harvard political economist Dani Rodrik. Rodrik questions the viability of widely shared confidence in the problem-solving potential of transnational governance arrangements. His critique has been inspired by a group of renowned political scientists. His suggestions can be understood against the background of his famous “trilemma-thesis”, developed back in 2011. Here, Rodrik asserted the impossibility of the simultaneous pursuit of economic globalization, democratic politics, and national determination (autonomy), highlighting a trilemma in which only two goals can be paired: economic globalization and democratic politics, or democracy and national autonomy. For Rodrik, the European Union furnishes dramatic illustration of this thesis. On the one hand, the European Union could “transnationalize” democracy through federalization and thus defend the advantages of the internal market; at the same time, however, it would be forced to establish a common European politics to legitimize its necessary assumption of fiscal and social policy, with negative consequences for national sovereignty. In the absence of such a de-nationalizing prospect, the European Union will have to give up the common currency and accept economic disintegration. This is not simply a pessimistic scenario. It can be better understood as a case for the toleration of diversity. In the passage already cited, Rodrik submits that “the policy failures that exist arise not from weaknesses of global governance,

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126 Affinities with the Lindseth & Fasone essay are again apparent in our references to this author (supra in this volume, « The Eurozone Crisis, the Coronavirus Response, and the Limits of European Economic Governance », Subchapter 2. The Fundamental Fracture Between Power and Legitimacy in European Integration).


but from distortions of domestic governance”. He adds: “As a general rule, these domestic failures cannot be fixed through international agreements or multi-
lateral cooperation”. This twofold reserve is an innovative move. Governance failures must be corrected where they occur. In view of their manifold causes and forms, they cannot simply be expunged by transnational fiat. What the supranational level should do instead is to encourage self-corrections at national level “with global oversight restricted to procedural safeguards – such as transparency, accountability, use of scientific/economic evidence – intended to reinforce democratic deliberation”.

The “discovery procedure of practice” as a chance to promote economic democracy in the complex European polity? Admittedly, there is idealism in such suggestions. Nevertheless, they also share a merit in their refusal to become “bogged down in undemocratic transnational technocracy”. And there is no easy way out anywhere. Peer Zumbansen concludes his recent comprehensive survey on the notion of economic law with a query: “the question still on the table is whether and how it might be possible to think of an economic law from the perspective of transnational democratic politics”.130 This query denotes a demanding transformative agenda. The contours of this agenda have become visible in a new crisis.

Concluding Remarks – The COVID-19 Pandemic Responses or the Limits of Epistocratic Economic Constitutionalism

The pandemic is another drastic illustration of the regulatory limits and democratic deficits of national governance. Irresponsible inactivity as well as misguided activities on the part of the Member States can impose burdens on their neighbours. Hjalte Lokdam and Michael A. Wilkinson, Susanna Maria Cafaro, Peter Lindseth and Cristina Fasone, Stephen Gill and Thibault Bischacie all concur. This pandemic concerns the EU as a whole – the pandemic fight must be understood as a European commitment. The Pandemic Emergency Purchase Programme as well as the Recovery Plan “Next Generation EU” indicate that this has indeed been understood. However, the programme is a response with its own ambivalences. It is a chance for the integration project, and, at the same time, a threat to the integrity of the Union’s constitutional constellation.131 All

131 As evidenced by the pending applications before the German Constitutional Court: BVerfG, 2 BvR 547/21 (concerning the Recovery Plan “Next Generation EU”) and BVerfG 2 BvR 420/21 (concerning the PEPP programme).
of the queries so well known from the unfinished debates on the management financial crisis are for a second time on the agenda. It is irrefutable that the pandemic fight has to resort to all sorts of expertise. Should, hence, international expert communities be entrusted with the design and the implementation of these responses? How should the burdens which the pandemic imposes on the societies of the Union be shared and financed? Is this a “constitutional moment” in which the Union will overcome the restraints of the “no taxation without representation” objection against the request for national contributions? What kind of conditionalities are required and justified to ensure the proper use of financial assistance. Is the management of the financial crisis a fortunate model? We have addressed this problématique above in the introductory remarks to Subchapter 3. Following Lisa Herzog, economic ordering in a democratic polity needs to take three varieties of knowledge into account: the knowledge provided by the “discoveries” generated in market processes, the debates within expert communities, and the evaluation of deliberations. As a response to the financial crisis, European law has, instead, entrusted the ECB with – at best – loosely-controllable discretionary powers in the definition of exercise of monetary policy. To put it more drastically: epistemic infallibility has been complemented by the protection of political independence. This is anything but a promising future for the constitutionalization of Europe. It rather documents again the insufficiencies of macroeconomic constitutionalism and likewise microeconomic constitutionalism as advocated by the proponents of the private law society. “Democracy-enhancing conflicts-law constitutionalism” may provide, however, if only provisionally, an alternative vision.

See L. Herzog, « Markt oder Profession? Die Politik zweier Wissenslogiken », op. cit., and the elaboration in her recent Democratic Knowledge. Markets, Experts, and the Epistemic Infrastructure of Democracy, op. cit., Chapters III and VII. The “Discovery Procedure of Practice” to which I have referred in Subchapter 3.1. Economic Democracy at National Level is the operational mode of law generation which has the potential of realizing such co-ordination.

Select Bibliography


