



## OVERVIEWS

# SPECIAL SECTION – DEMOCRATISING THE EURO AREA THROUGH A TREATY?

### COMMENTS ON THE DRAFT TREATY ON THE DEMOCRATISATION OF THE GOVERNANCE OF THE EURO AREA

TABLE OF CONTENTS: I. The main concerns of the T-Dem initiative. – II. Europe in troubled waters. More Europe the solution? – III. No alternative?

I. The explanatory statement to the Draft Treaty on the Democratisation of the Governance of the Euro summarises in less than 1000 words the uneasiness with the *praxis* of European crisis politics.<sup>1</sup> The outrageousness which Böckenförde observed back in 2010 has become a trademark of a plethora of measures taken since then.<sup>2</sup> Suffice it here to emphasise three points:

a) The first concerns the equality and political dignity of the Member States of the EU. This is a principle which defines the Union as Union. Sadly and tellingly, it has not only been disregarded by European politics, but it has also – in particular – been neglected by the German Constitutional Court in its judgment on the rescue package for Greece of 11 September 2011,<sup>3</sup> where it defended the budgetary power of the German *Bundestag* while, by the same token, not caring at all for the rights of the Greek Parliament.<sup>4</sup> More widely noticed are the measures – all too euphemistically called memorandums of understanding. To be sure, they were legalised by the amendment of Art. 136 TFEU in 2011.<sup>5</sup> My

<sup>1</sup> Explanatory statement to the Draft Treaty on the Democratization of the Governance of the Euro, available at [piketty.pse.ens.fr](http://piketty.pse.ens.fr).

<sup>2</sup> E.-W. BÖCKENFÖRDE, *Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung*, in *Neue Züricher Zeitung*, 2010, p. 305 *et seq.*

<sup>3</sup> German Federal Constitutional Court, judgment of 7 November 2011, 2 BvR 987/10.

<sup>4</sup> C. JOERGES, *Der Berg kreiβte – gebar er eine Maus? Europa vor dem Bundesverfassungsgericht*, in *WSI-Mitteilungen*, 2012, p. 560; M. EVERSON, *An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht*, in *European Law Journal*, 2015, p. 474 *et seq.*

<sup>5</sup> European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, Art. 1, para. 3: “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”.

point here is that the *praxis* of conditionality is irreconcilable with the foundational values of the European project. Europe is not to transform the principles of equality, mutual respect and co-operation into command-and-control relationships. This constitutes an unacceptable intrusion into the practice of democratic political will-formation.<sup>6</sup>

b) Democracy was not, and could not be, in the DNA of the Treaty of Rome and the European Economic Community (EEC). However, it has been a shared understanding throughout both the affirmative and critical assessment of the technocratic legacy of the integration project that Europe must not pervert democratic constitutionalism into technocratic rule. It has to justify, and, by the same token, to de-limit the resort to non-majoritarian institutions. The executive summary highlights a significant strengthening of the executive capacity of European institutions in the field of economic policy. The upshot here is the strengthening of the power of the European Central Bank. The assumption that a Bank or the European System of Central Banks, which is not legitimated by a democratic vote and cannot be held accountable by Europe's citizens, can be empowered to take far-reaching distributional decisions and intervene even if it is only indirectly or behind a veil of public inadvertence in policy fields in which the Union lacks powers, is simply indefensible.<sup>7</sup>

c) A comprehensive list of queries would be much longer.<sup>8</sup> The *de facto* by far most important means by which the constitutional transformation was accomplished was the replacement of the Community method by what the German Chancellor has characterised as the Union method. To be sure, resort to international law has occurred throughout the history of the integration project. However, it has never been so spectacular and so obviously beyond the commitments of the Union to the rule of law and democracy.

The Union method is for very good reasons the focus of the explanatory memorandum. The response to it is a U turn: "the 'T-Dem' replicates the *modus operandi* of both the TSCG and the ESM Treaty [the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and the Treaty Establishing the European Stability Mechanism] (as validated by the Court of Justice of the European Union in its *Pringle* ruling from November 2012) to address the financial crisis but does so in order to engage in a democratising effort".<sup>9</sup> Alternative conditionality is the submitted alternative to the TINA (There Is No Alternative) message repeated *ad nauseam* by Chancellor Merkel throughout the long years of crisis politics. It is a response with analytical and normative strength. This strength stems from the implicit acknowledgement that the finan-

<sup>6</sup> A. ALBI, *Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-Operative Constitutionalism'*, in *Vienna Journal of International Constitutional Law*, 2015, p. 151 *et seq.*

<sup>7</sup> J. WHITE, *Authority After Emergency Rule*, in *Modern Law Review*, 2015, p. 589.

<sup>8</sup> C. JOERGES, *Pereat iustitia, fiat mundus: What is Left of the European Economic Constitution After the OMT-Litigation*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 112-116.

<sup>9</sup> Explanatory statement, *cit.*, p. 2.

cial crisis has generated an emergency.<sup>10</sup> Quite obviously, a “return to the rules” as they had been established prior to both the crisis and nearly a decade of hectic activities and the production of hundreds of pages of legal texts.<sup>11</sup> It cannot be made undone, but it can be changed. This message is encouraging. But how about its normative credentials and its political realism?

II. The life of the integration project has been a life with crises which at the end have always strengthened the Union. We know this mantra. Whenever Europe is in difficulties, the proper reaction has always been and should be: more Europe. What sounds so familiar has become essentially unbelievable. The cascade of crises to which we are exposed is of such magnitude and depth that we cannot count on some miraculous constitutional moment but should first expose ourselves to a theoretical moment, long enough to discuss intensively the conditions and prospects of a re-invention of our project. Pertinent efforts are under way. The one on which I focus in the following remarks is Daniel Innerarity's *Philosophy of the European Union*, because of both the inherent qualities of this study and also because of its theoretical orientation.<sup>12</sup> Innerarity's ambition resonates perfectly well with the intentions of the T-Dem initiative. He provides us with a new vision of the future of democracy in the Union. However, this is by no means a one-sided relationship. The T-Dem may open avenues for a realisation of this Philosophy of the European Union.

The indicators of such complementarity are manifold. Among the countless proposals for the future of Europe, T-Dem is the one most credibly pursuing a commitment to democracy. This credibility stems from the exposure of all the involved disciplines, law, political science, sociology, even economics, to democratic values and claims. In its institutional suggestions, the T-Democracy proposal takes up the main concerns of the critics, namely, the critique of technocratic rule with its pretence of infallible or incontestable, sacrosanct expert knowledge; the insulation of this type of rule against democratic objections and accountability claims by the establishment of a co-operative parliamentary body (the “Parliamentary Assembly of the Euro” entrusted with “the final say on the vote of the Euro area budget, the base and rate of corporate tax, and any other

<sup>10</sup> Böckenförde's (see *supra*, note 2) reference to this category is by now no longer exceptional; cf. K. DYSON, *Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency*, in *Journal of European Integration*, 2013, p. 207 *et seq.*; J. WHITE, *Emergency Europe*, in *Political Studies*, 2015, p. 659 *et seq.*; C. KILPATRICK, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, in *Oxford Journal of Legal Studies*, 2015, p. 325 *et seq.*; C. KREUDER-SONNEN, *Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance*, in *Journal of Common Market Studies*, 2016, p. 1350 *et seq.*

<sup>11</sup> The compilation of *The Key Legal Texts of the European Crises* by Fernando Losada and Agustín José Menéndez comprises 795 pages. The collection is available at [www.sv.uio.no](http://www.sv.uio.no).

<sup>12</sup> D. INNERARITY, *Democracy in Europe. A Political Philosophy of the EU*, London: Palgrave Macmillan, 2018 (forthcoming).

legislative act foreseen by the T-Dem").<sup>13</sup> As already underlined, the idea of an alternative conditionality does not seek to do away with the co-ordination within European economic governance, but exposes its exercise to political contestation and requirements of democratic accountability.

Daniel Innerarity's *Political Philosophy of the EU* operates on more abstract theoretical levels and over much longer time horizons. His analysis is not restricted to the last decade but identifies a series of deficiencies of the integration project, which were partly dormant for a long time, and partly triggered by the conflict constellations of the recent crises. Innerarity is, of course, not the first philosopher to build bridges between the debates on Europe as they unfold in the various disciplines – law, political science, sociology, political economy – and philosophical enquiries into the legitimacy of a transnational polity. His philosophical agenda is, in significant aspects, indebted to the Habermasian theory of deliberative democracy and Habermas' anti-technocratic normativism. However, he is much more specific and realistic in his democratic visions than Habermas with the latter's ideas about the dual national and European citizenship as the basis and source of a transnational European democracy.<sup>14</sup> Throughout his discussion of the various dimensions of the *problématique* of a democratisation of Europe, he underlines that this project has to do justice to both the complexity of the European system and the interdependencies which the integration process has generated. The message of the book throughout the whole range of issues that it addresses is inspired by the analytical and normative implications of these insights: the complexity of Europeanisation has a democratic potential, which needs to be spelled out analytically and used politically. Implicit in this message is a critical stance. The lack of such perspectives in so many domains of European studies contributes to their fallacies and impasses in their responses to the critical state of the EU and of transnational governance in general.

In these perceptions, Innerarity's arguments deploy significant affinities with the *Draft Treaty on Democratisation*. What we are witnessing today is a regressive re-establishment of strict disciplinary boundaries. While economists have become the principle advisors of political leaders, they tend to restrict themselves to functionalist arguments; political scientists try to polish up their outlived integration theories; lawyers forget about the normative *proprium* of their medium and content themselves with meticulous descriptive accounts of ongoing transformations. Under such conditions, a philosophical voice, which insists on the need for renewed analytics and concepts, is a valuable interlocutor for the protagonists of a democratic conditionality. While they will appreciate Innerarity's normative concerns, the latter can draw upon their institutional suggestions in the further elaboration of his visions.

<sup>13</sup> Explanatory statement, cit., p. 2.

<sup>14</sup> J. HABERMAS, *European Citizens and European Peoples: The Problem of Transnationalizing Democracy*, in *The Lure of Democracy*, Cambridge: Polity Press, 2015, p. 29 *et seq.*

III. Should all of these affinities imply a common deficiency when reminded of Hegel's *Ohnmacht des Sollens*? Such concerns have indeed to be taken seriously. They can be specified with the help of a passage from Karl Polanyi's *Great Transformation*. What Polanyi tried to explain was the destruction of liberal economic ordering by Fascism and Nazism. However, the end of the Second World War nurtured hopes in a better national and international future.

"[W]ith 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".<sup>15</sup>

The passage is extraordinary for three reasons. For one, it replicates the Polanyian argument that the capitalist market economy is not an evolutionary accomplishment, let alone an autonomously functioning machine, but a political product – "*laissez-faire* was planned"<sup>16</sup> – which requires institutional backing and continuous political management. "The political" is inherent in "the economic" – markets are "polities".<sup>17</sup> A second insight follows from this: capitalist market economies will exhibit varieties, which mirror a variety of political preferences and socio-economic conditions. This is what he means when he says that our societies enjoy the "liberty to organize national life at will". The third is only alluded to in half a sentence: Polanyi advocates a "collaboration of governments". This is a political vision below or beyond the elimination of divergences. Let us first glance briefly at the second insight.

Since the varieties of capitalism studies were initiated by Peter A. Hall and David Soskice in 2011, Polanyi's second point has become common knowledge. These studies both confirm and underline that the operation of market economies is not uniform because their institutional configurations vary significantly. What they neglect are ideational commitments, cultural traditions and normative aspects, which accompany and orient the ordering of the economy.<sup>18</sup> Both the authors of the Draft Treaty on the De-

<sup>15</sup> K. POLANYI, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston: Beacon Press, 2001, pp. 253-254 (emphasis in original).

<sup>16</sup> "[...] planning was not", *ibid.*, p. 147.

<sup>17</sup> F. BLOCK, *Towards a New Understanding of Economic Modernity*, in C. JOERGES, B. STRÄTH, P. WAGNER (eds), *The Economy as Polity: The Political Construction of Modern Capitalism*, London: Cavendish, 2005, p. 3 *et seq.*

<sup>18</sup> The democracy notion captures these aspects in similar ways; cf. K. NICOLAÏDIS, M. WATSON, *Sharing the Eurocrats' Dream: A Democratic Approach to EMU Governance in the Post-Crisis Era*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The End of the Eurocrat's Dream*, Cambridge: Cambridge University Press, 2016, p. 50 *et seq.*; F. CHENEVAL, F. SCHIMMELFENNIG, *The Case for Democracy in the European Union*, in *Journal of Common Market Studies*, 2013, p. 334 *et seq.*

mocratisation of the Governance of the Euro and Daniel Innerarity in his *Political Philosophy of the EU* seem in this respect to be more sensitive. Be that as it may, I do believe that these aspects have to be taken into account. They are, in my view, an indispensable element of an adequate understanding of the economic, in particular in view of the diversities within the European space. The work of economic historians such as Werner Abelshausen and the path-breaking comparative law studies of Gunther Teubner emphasise that culture tends to be remarkably resistant to imposed change.<sup>19</sup> Both underline that interventions into the respective social and institutional fabric of European economies can hardly be subtle and fine-tuned enough to accomplish the desired re-orientation.<sup>20</sup>

Against this background, the difficulties of European crisis politics with the imposition of structural, convergence of the southern with the northern economies of the Eurozone is anything but surprising. There is a normative side to these historical, sociological and legal findings: command-and-control interventions, which are guided by the presumption that one size will fit all, are accompanied by the risk of destructive effects. The imposition of changes with disintegrative impact is not only unwise it is also illegitimate. I submit that the normative fabric of the economic orders within Member States on which the proper functioning of their economies rests deserves to be recognised as a "*social acquis*".<sup>21</sup> The *social acquis* is a moving target. To respect it would not mean to petrify national constellation but to strengthen the political autonomy of political preferences and social orientations, generated and formed by specific historical experiences, political contestation and societal learning and continuous political decision-making. It has to be added that the *social acquis* has not only been threatened by European crisis politics of 2007-2008 but also by the jurisprudence of the CJEU which, only shortly prior to the beginning of the financial crisis, subjected the labour law and related welfare of the Member States to the economic freedoms.<sup>22</sup> A protection of the *social acquis*

<sup>19</sup> W. ABELSHAUSER, *Kulturkampf. Der deutsche Weg in die neue Wirtschaft und die amerikanische Herausforderung*, Berlin: Kadmos, 2003; W. ABELSHAUSER, D. GILGEN, A. LEUTZSCH, *Kultur, Wirtschaft, Kulturen der Weltwirtschaft*, in W. ABELSHAUSER, D. GILGEN, A. LEUTZSCH (eds), *Kulturen der Weltwirtschaft*, Göttingen: Vandenhoeck & Ruprecht, 2012, p. 9 *et seq.*; G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Differences*, in *Modern Law Review*, 1998, p. 11 *et seq.*

<sup>20</sup> A. HASSEL, *Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe*, in *LSE Europe in Question Discussion Paper Series*, no. 76, 2014.

<sup>21</sup> Cf. F.W. SCHARPF, *After the Crash. A Perspective on Multilevel European Democracy*, in *European Law Journal*, 2014, p. 384 *et seq.*; M. HÖPNER, A. SCHÄFER, *A New Phase of European Integration: Organized Capitalisms*, in *West European Politics*, 2010, p. 344 *et seq.*; W. STREECK, *E Pluribus Unum? Varieties and Commonalities of Capitalism*, in *MPIfG Discussion Papers*, no. 12, 2010.

<sup>22</sup> Cf., (in)famously, Court of Justice, judgment of 11 December 2007, case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [GC]; Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan und Svenska El-*

would require a European judicial restraint in labour law issues, which, according to the Treaty, remain a prerogative of the Member States.<sup>23</sup>

Further queries follow from this. One concerns the effect of democratisation. The opening up of by now authoritatively ordered vertical and horizontal conflict constellations in the realms of economic and financial policies would lay bare conflicts of interests and of policy preferences among the affected national and European actors and institutions. It is the specific characteristic of democratic processes and political contestation that their outcome is unpredictable. It seems also quite likely that such openness would require a loosening of the disciplining powers of the common currency.<sup>24</sup> The unwillingness to embark on such an uncharted sea, however, is by no means a guarantee for political and social peace, not even for economic stability.<sup>25</sup>

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*ekrikerförbundet* [GC]; Court of Justice, judgment of 3 April 2008, case C-346/06, *Rechtsanwalt Dr. Dirk Ruffert v. Land Niedersachsen*.

<sup>23</sup> For an elaboration of this point, J. BAST, F. RÖDL, J. TERHECHTE, *Funktionsfähige Tarifvertragssysteme als Grundpfeiler von Binnenmarkt und Währungsunion*, in *Zeitschrift für Rechtspolitik*, 2015, p. 230 *et seq.*

<sup>24</sup> See on these implications and conceivable responses F.W. SCHARPF, *Vom asymmetrischen Euro-Regime in die Transferunion und was die deutsche Politik dagegen tun könnte*, in *MPIfG Discussion Papers*, no. 15, 2017; F.W. SCHARPF, *Forced Structural Convergence in the Eurozone*, in *MPIfG Discussion Papers*, no. 15, 2016; F.W. SCHARPF, *De-Constitutionalization and Majority Rule. A Democratic Vision for Europe*, in *MPIfG Discussion Papers*, no. 14, 2016; most recently, F.W. SCHARPF, *International Monetary Regimes and the German Model*, in *MPIfG Discussion Papers*, no. 1, 2018.

<sup>25</sup> The T-Dem initiative has recently gained prominent support: D. RODRIK, *Sans la création d'un budget européen, Macron ne peut réussir*, in *La Tribune*, 12 May 2017, [www.latribune.fr](http://www.latribune.fr). Rodrik underlined his agreement with the characterization of Macron's "yesterday's Europe" in T. PIKETTY, *Straight Talk on Trade. Ideas for a Sane World Economy*, Princeton and Oxford: Princeton University Press, 2018, p. 73. Piketty added: "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". *Ibid.*, p. 76.

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