



## ARTICLES

### SPECIAL SECTION – REGULATORY COMPETITION IN THE EU: FOUNDATIONS, TOOLS AND IMPLICATIONS

*edited by* Francesco Costamagna

## SOCIOLOGICAL SHORTCOMINGS AND NORMATIVE DEFICITS OF REGULATORY COMPETITION

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ABSTRACT: This *Article* proposes a counter-vision to the regulatory competition model, by building upon conflict-laws constitutionalism. This counter-vision seeks to replace the governance via competitive processes with deliberative political interactions. The approach institutionalizes the *United in Diversity* slogan, representing a sort of third way between the “back to the nation State” idea, strongly supported by Streeck and other commentators, and the Habermasian “More Europe”.

KEYWORDS: regulatory competition – united in diversity – European social model – varieties of capitalism – Streeck – Habermas.

### I. BACK TO THE BEGINNINGS: THE ORIGINS OF A NEW PARADIGM

All academic disciplines engaged in *European studies* are by now prepared to concede that the integration project is entangled in a plethora of difficulties. This, however, is but a principled transdisciplinary consensus. The perceptions of the disciplines and their recipes remain distinct and their ensemble incoherent. The noted commonality is an underspecified commitment, which comprises the willingness to defend the integration project with its “ever closer Union” mantra. A highly selective sample in the concert of

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pertinent voiced on these observations may suffice here. The financial crisis should, and could, be overcome by a further refinement of the new modes of economic governance; this is what economists who understand the present difficulties as functional challenges tend to suggest – without explaining, however, what kind of polity these arrangements would constitute and what kind of constitutional legitimacy they might deserve.<sup>1</sup> What we observe is steady transfer of ever more core State functions to the European level; this looks like progress and business as usual hence – and how about the democratic quality of the processes through which all this is accomplished?<sup>2</sup> After a decade of *de facto* transformation of the state of the European Union, we are well advised to treat this outcome as Europe’s “new normalcy” this is the view of eminent jurists<sup>3</sup> – a normalcy, however, in which the European commitment to democracy and the rule of law has been suspended in essential respects by allegedly purely functional necessities defined by unaccountable bodies.

The crisis came as a surprise but it did not come out of the blue. Especially we lawyers who have once been on the driver seat of European studies have every reason to reconsider the viability of what we have once recommended or tolerated. In the case of *regulatory competition* this juridical foundational moment was the seminal *Cassis de Dijon* judgment handed down by the Court of Justice back in 1979.<sup>4</sup> The judgment has received a variety of both benevolent and critical comments. My own suggestion was to read it in conflicts-law perspectives.<sup>5</sup> The Court had declared the German ban on the marketing of a French liqueur – the alcohol content of which was lower than its German counterpart -- to be incompatible with the principle of free movement of goods (Art. 30 EC Treaty, by now Art. 28 TFEU). This holding, I suggested, could be translated into the language of conflict of laws: what the Court had done was to identify a commonality, a *meta-norm* that both France and Germany had subscribed to. Their common commitment to the free trade objective implied that their readiness to accept that restrictions of free trade must be based on credible regulatory concerns. The Court had convincing-

<sup>1</sup> H. ENDERLEIN, *Economic and Monetary Union as a Showcase of Exploratory Governance: Why “muddling through” Is both Rational and Dangerous*, in M. DAWSON, H. ENDERLEIN, C. JOERGES (eds), *Beyond the Crisis. The Governance of Europe’s Economic, Political and Legal Transformation, Hertie Governance Report 2015*, Oxford: Oxford University Press, 2015, p. 25 *et seq.*, and much earlier H. ENDERLEIN, *Das erste Opfer der Krise ist die Demokratie: Wirtschaftspolitik und ihre Legitimation in der Finanzmarktkrise 2008-2013*, in *Politische Vierteljahresschrift*, 2013, p. 714 *et seq.*

<sup>2</sup> P. GENSCHEL, M. JACHTENFUCHS (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers*, Oxford: Oxford University Press, 2014.

<sup>3</sup> See, prominently, T. BEUKERS, C. KILPATRICK, B. DE WITTE, *Constitutional Change Through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead*, in T. BEUKERS, C. KILPATRICK, B. DE WITTE (eds), *Constitutional Change Through Euro-Crisis Law*, Cambridge: Cambridge University Press, 2017, p. 1 *et seq.*

<sup>4</sup> Court of Justice, judgment of 20 February 1979, case 120/78, *Cassis de Dijon*.

<sup>5</sup> C. JOERGES, *Rethinking European Law’s Supremacy: A Plea for a Supranational Conflict of Laws*, in B. KOHLER KOCH, B. RITTEBERGER (eds), *Debating the Democratic Legitimacy of the European Union*, Lanham, MD: Rowman & Littlefield, 2007, p. 311 *et seq.*, available also as EUI Working Papers, no. 12, 2005.

ly rejected the German argument about the protection of German drinkers: any confusion on the part of German consumers could be avoided, and a reasonable degree of protection against erroneous decisions by German consumers could be achieved by disclosing the low alcohol content of the French liqueur.<sup>6</sup>

My re-reading of *Cassis de Dijon* in the language of another legal sub-discipline was an outlier. What most commentaries suggested instead was a radical shift from legal to economic rationality criteria. This paradigm shift occurred within European law<sup>7</sup> and was in line with what economists had suggested<sup>8</sup> and policy makers were eager to take up. Prominent actors from Germany include Advisory Board of the German Ministry of the Economics<sup>9</sup> and Germany's Monopolies Commission.<sup>10</sup> The arguments which they invoked were much older than we were aware of at the time. Two decades after the move towards regulatory competition, Fritz W. Scharpf<sup>11</sup> has made us aware of a very prominent forerunner. Writing in 1939, Friedrich August von Hayek had anticipated post-war European integration. He predicted that integration occurs as a political endeavour, albeit one, which would promote market-liberalism because the difficulty of coming to terms with political disagreements would hence reduce the institutional capacity to govern the capitalist economy and transform Europe into a welfare State.<sup>12</sup>

<sup>6</sup> This is much too simplistic, Damian Chalmers has argued in his comment to my essay cited in the previous note. "*Cassis de Dijon* is not a widely sold drink. Instead, it was used as the touch paper to resolve a wider redistributive question between German distributors and German producers: namely, whether the former could increase their profits through selling a wider array of alcoholic drinks at the expense of the latter's profits". This was a conflict between German authorities and economically powerful distributors. This is a powerful argument to which I would add a related concern, namely the affinities between *Cassis* and the regulatory restrictions imposed upon State legislatures in the seminal *Lochner* judgment of the American Supreme Court (US Supreme Court, judgment of 17 April 1905, *Lochner v. New York*). Restrictions of economic liberties are legal only in the realm of the so-called police powers (safety, health, morals and general welfare of the public). As Justice Holmes has objected in his legendary dissent, such judicial prescriptions amount to an intrusion into the powers of democratically legitimated legislators. Holmes' dissent reveals the crux of the matter as we will explain in the subsequent section.

<sup>7</sup> See in particular N. REICH, *Competition Between Legal Orders: A New Paradigm of EC Law?*, in *Common Market Law Review*, 1992, p. 861 *et seq.*

<sup>8</sup> E.g., H. SIEBERT, *The Harmonization Issue in Europe: Prior Agreement or a Competitive Process?*, in *Kiel Working Papers*, no. 377, 1989.

<sup>9</sup> Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft, *Stellungnahme zum Weißbuch der EG-Kommission über den Binnenmarkt*, Schriften-Reihe 51, 1986.

<sup>10</sup> Monopolkommission, *Achtes Hauptgutachten der Monopolkommission 1988/1989*, BT-Drucksache 11/7582, 16 July 1990, p. 401

<sup>11</sup> F.W. SCHARPF, *The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"*, *Socio-Economic Review*, 2010, p. 211 *et seq.*

<sup>12</sup> F.A. VON HAYEK, *The Economic Conditions of Interstate Federalism*, in F.A. VON HAYEK (ed.), *Individualism and Economic Order*, Chicago: University of Chicago Press, 1949, p. 255 *et seq.*, reprinted from the *New Commonwealth Quarterly*, 1939, p. 131 *et seq.*

## II. THE CONCEPTUAL GIST OF THE CONTROVERSY

Unsurprisingly, the promotion of *regulatory competition* met with opposition of the defenders of Europe's welfare State legacy and the quest for a *European social model*. This schism between proponents and opponents of market governance is part of a wider debate concerning the benefits and the costs of market governance.<sup>13</sup> This debate is of course illuminating. What von Hayek has added to it is a specific European twist. And precisely this move constitutes a serious fallacy. On what conceptual basis can we assume that States will enter into, or be exposed to, competitive processes which incentivise them to adopt pro-competitive regulatory frameworks, or in the parlance of crisis politics, efficiency enhancing structural reforms? One such assumption is the expectation that within the will-formation processes of constitutional democracies external competitive pressures will overcome the objections of political and societal opponents. This assumption is dubious for both normative and sociological reasons. States will continue to define and pursue what they perceive as their interests. The ensuing *competition* will have little resemblance with von Hayek's "discovery procedure" or any other modelling of competition processes. The second assumption concerns the potential of competitive process to proceed the type of knowledge regulatory bodies and governments would need where they who seek to promote efficiency.

Von Hayek is once more an important source for the discussion of this query. In his seminal essay on *The Use of Knowledge in Society*, he 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.<sup>14</sup> This thesis may capture a great potential of markets but it fails to deliver convincing arguments on the adequacy of that type of knowledge. As Lisa Herzog has argued convincingly,<sup>15</sup> the knowledge which markets can communicate is not the knowledge public authorities need when they have to assess the performance of complex economic orders. Hayek's "competition as a discovery procedure"<sup>16</sup> will not deliver what we should know. Such failings, we have been assuaged, will be compensated by highly professionalised rating 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 which remains affected by loads of uncertainties – and unaffected by the ethics which guides the *praxis* of the classical pro-

<sup>13</sup> For a great summary see S. LUKES, *Invasions of the Market*, in M. MILLER (ed.), *Worlds of Capitalism*, London-New York: Routledge, 2005, p. 298.

<sup>14</sup> F.A. VON HAYEK, *The Use of Knowledge in Society*, in *American Economic Review*, 1945, p. 519 *et seq.*

<sup>15</sup> L. HERZOG, *Markt oder Profession? Die Politik zweier Wissenslogiken*, Lecture at the Institute of Advanced Study Berlin of 18 January 2018, available at [www.wiko-berlin.de](http://www.wiko-berlin.de); L. HERZOG, *The Epistemic Division of Labor in Markets. Hayek, Global Trade, and the Preconditions of Responsible Agency*, Lecture at the Hertie School of Governance, Berlin, 18 April 2018, available at [www.hertieschool.org](http://www.hertieschool.org).

<sup>16</sup> F.A. VON HAYEK, *Competition as Discovery Procedure (Wettbewerb als Entdeckungsverfahren, 1968)*, in *The Quarterly Journal of Austrian Economics*, 2002, p. 9 *et seq.*

fessions. Can we then really expect expertise to accomplish what markets fail to do? In the case of the ratings agencies and the supervision of States by financial markets, one can cite a case of exemplary importance, namely Mario Draghi's famous defence of the Outright Monetary Transactions (OMT) programme of the European Central Bank (ECB) on 26 July 2012.<sup>17</sup> The markets got it wrong, Draghi submitted; this is why the ECB had to step in and to correct their assessments.

Such anecdotal evidence is of course insufficient. The main source on which I rely in my more principled explanation of the limits of competitive processes is Karl Polanyi's economic sociology.<sup>18</sup> Polanyi refutes the conceptualisation of the economy as a self-sustaining system in general and the idea of a self-regulating markets in particular. The economy and its markets are always *socially embedded*, he submitted;<sup>19</sup> *the economic* is inextricably interwoven with politics and States. Polanyi's *Great Transformation* spells this out in much detail. A particularly helpful elaboration is to be found in a later essay entitled *The Economy as Instituted Process*. There Polanyi distinguishes between "a formalist perspective", an understanding of "the market as an idealized, counterfactual construct, to be approximated in reality, for managing scarcity through the price mechanism" on the one hand and a "substantivist" perspective on the other. Both create a tension: "[T]he full marketization of society is not only impossible in principle, but efforts at marketization will produce a reactive self-organization of actors in the economic domain".<sup>20</sup> The tensions between the formalist and the substantivist perspective are not just to illustrate the political dimension inherent in the efforts of economic ordering but also of its political characteristics. We conclude: the neo-liberal conceptualisation of inter-state relations and controversies as competitive processes striving for economic efficiency of the discovery new options is a *stark utopia*. We cannot eliminate *the political* from the integration process. This is in itself but a sociological truth. It is by the same token in particular in the European context anything but a comforting insight. Does it indicate an unruliness of the integration process? Is it instead conceivable to channel and tame this political dimension? Which kind of institutional framework might foster its legitimacy? These are thorny issues. We submit that they must nevertheless be addressed. For our defence of this assertion we will take a detour.

<sup>17</sup> *Verbatim* at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>18</sup> K. POLANYI, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston, MA: Beacon Press, 2001.

<sup>19</sup> For a reconstruction of the debate see S. FRERICHS, *The Rule of the Market: Economic Constitutionalism Understood Sociologically*, in P. BLOKKER, C. THORNHILL (eds), *Sociological Constitutionalism*, Cambridge: Cambridge University Press, 2017, p. 261 *et seq.*

<sup>20</sup> K. POLANYI, *The Economy as Instituted Process*, in C.M. ARENSBERG, H.W. PEARSON (eds), *Trade and Market in the Early Empires*, Glencoe, IL: Free Press, p. 243 *et seq.*

### III. “BACK TO THE NATION STATE” OR “MORE EUROPE”: WOLFGANG STREECK V. JÜRGEN HABERMAS

The debate to which the title of this *Special Section* refers concerns the potential of Europe to defend the legacy of the democratic social State: two master thinkers are engaged in that controversy since many years.<sup>21</sup> Streeck's argument in a nutshell: under the impact of European integration the *democratic Rechtsstaat* experiences an irresistible decline; we should therefore save what can be saved through a defence of the nation State and its institutions against a deepening of economic integration.<sup>22</sup> The nation State and its welfare accomplishments, so Habermas counters, is but 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*).<sup>23</sup>

The controversy can be rephrased in the parlance of constitutionalism. Streeck questions the potential of Europe to establish, at a transnational level, an equivalent to the democratic constitutional State. In Streeck's understanding, which is informed by the constitutional theory of Hermann Heller,<sup>24</sup> *Sozialstaatlichkeit*, as it has been endorsed by the eternity clause of the Basic Law, is a democratic essential, of constitutive importance for the legitimacy of public rule.<sup>25</sup> Habermas shares a commitment to Hermann Heller – small wonder, as Wolfgang Abendroth, with whom he wrote his habilitation thesis, wrote a famous defence of Heller's constitutional theory in the first great post-war *Verfassungsstreit*.<sup>26</sup> The *social* became then more deeply engrained in the discourse theory of law and democracy.

There is hence some unity in the diversity of the two opponents. Both invoke the interdependence of facticity and validity. They share the premise that economic liberalism is far too insensitive to the quests for social justice and should therefore be subjected to political corrections. They disagree about *the level of governance* at which such corrections can be realised. This is anything but a trivial disagreement. It is one which reveals a deep *lacunae* in extensive legal debates on what has been characterised in ever more intensity

<sup>21</sup> The earliest encounter of which I am aware is Streeck's – unpublished – reaction to Habermas' plea for a European constitution in his Hamburg Lecture of 26 June 2001 on *Warum braucht Europa eine Verfassung?*, published in *Die Zeit* and still available at [www.zeit.de](http://www.zeit.de). “Voluntarism” is the core objection in Streeck's paper (*Das 'soziale Europa' und seine Verfassung: Fragen zu einem politischen Projekt*, on file with author).

<sup>22</sup> W. STREECK, *Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas*, in *Constellations*, 2001, p. 213 *et seq.*

<sup>23</sup> J. HABERMAS, *Demokratie oder Kapitalismus. Vom Elend der nationalstaatlichen Fragmentierung in einer kapitalistisch integrierten Weltgesellschaft*, in *Blätter für deutsche und internationale Politik*, 2013, p. 59 *et seq.* (“*nostalgische Kleinstaaterei*”) at p. 62).

<sup>24</sup> See, e.g., W. STREECK, *Heller, Schmitt and the Euro*, in *European Law Journal*, 2017, p. 361 *et seq.*

<sup>25</sup> Art. 79, para. 3, Basic Law.

<sup>26</sup> See C. JOERGES, *The Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process*, in *Comparative Sociology*, 2010, p. 65 *et seq.*

as “Europe’s Justice Deficit”.<sup>27</sup> This notion is of a revealing vagueness. What exactly is Europe supposed to do? Should it compensate justice failures within the Member States, for example, by imposing a uniform *European Social Model*? Should it, instead, supervise the inter-state relations and ensure *justice between* the Member States?

Streeck’s political and normative conclusion builds coherently on his sociological analysis – including his extensive discussion of the varieties of capitalism.<sup>28</sup> His logic is both sociologically and legally compelling: under European rule, the social state cannot survive. We have hence to replace the supremacy of European law by a primacy of the nation State. His argument is also richer than the usual rejection of European claims to supremacy: “[W]hat I would suggest to call the *acquises démocratiques* of the national *demos* in Europe [...] importantly comprises a wide range of political-economic institutions that provide for democratic corrections of market outcomes – for democracy as *social democracy*”.<sup>29</sup>

This is one of the very few suggestions to take the insights of the studies of the varieties of capitalism normatively seriously. I am aware of only three German jurists – there will be more! – who have submitted like arguments, namely Anna Beckers,<sup>30</sup> Ulrich K. Preuß<sup>31</sup> and Gunther Teubner.<sup>32</sup> They have all underlined the legal implications of the varieties studies. Legal rules and institutions do not operate in splendid insulation, but constitute interdependencies. Their coordinated functioning can easier be deconstructed than wilfully established. The deeper level of the gist of the matter can be explained with the help of a famous *dictum* of the German constitutional scholar and Judge Ernst-Wolfgang Böckenförde: secularised democracies, he held, live on normative resources, which they cannot generate themselves.<sup>33</sup> In the European context, the integration project lives on cultural and normative resources, which cannot be produced wilfully or by some political or legislative fiat. In a more mundane version, democratic legitimacy in the EU lives on the quality of the democracies in the Member States, their historical experiences, ideational traditions, and political preferences. Europe can pro-

<sup>27</sup> D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, Oxford: Hart, 2015.

<sup>28</sup> E.g., W. STREECK, *E Pluribus Unum? Varieties and Communalities of Capitalism*, in *Max Planck Institute for the Study of Societies Discussion Paper*, no. 10, 2012.

<sup>29</sup> W. STREECK, *How Will Capitalism End?*, London: Verso Books, 2016, p. 198.

<sup>30</sup> A. BECKERS, *Enforcing Corporate Social Responsibility Codes. On Global Self-Regulation and National Private Law*, Oxford: Hart, 2015, p. 50 *et seq.*

<sup>31</sup> C. OFFE, U.K. PREUß, *The Union’s Course: Between a Supranational Welfare State and Creeping Decay*, in C. OFFE, U.K. PREUß (eds), *Citizens in Europe. Essays on Democracy, Constitutionalism and European Integration*, Colchester: European Consortium for Political Research Press, 2015, p. 15 *et seq.*

<sup>32</sup> G. TEUBNER, *Transnational Economic Constitutionalism in the Varieties of Capitalism*, in *Italian Law Journal*, 2015, available at [www.theitalianlawjournal.it](http://www.theitalianlawjournal.it).

<sup>33</sup> E.-W. BÖCKENFÖRDE, *Die Entstehung des Staates als Vorgang der Säkularisation*, in E.-W. BÖCKENFÖRDE (ed.), *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht*, Frankfurt am Main: Suhrkamp, 1975, p. 42 *et seq.*

mote and protect these accomplishments. To replace national endeavours by the prescription of some uniform political rule risks their destruction.

#### IV. INSTITUTIONALISING THE UNITED IN DIVERSITY VISION

The observations just submitted are somewhat emphatic and abstract. I should not proceed with their defence without mentioning Habermas' objections. His three main points are (I reproduce only the substance of his messages; his command of the German language is at a level which I cannot equate in English):

a) There is a concession to the diversity vision in his plea for the protection of minority cultures: *"In keinem demokratischen Gemeinwesen darf das historisch gewachsene politisch-kulturelle Selbstverständnis nationaler Minderheiten der Assimilation an die Mehrheitskultur geopfert werden"*.

b) However, he continues, we should not equate cultural identities with economic cultures: *"Aber können wir den wohlbegründeten Rechtsschutz für kulturelle Identitäten umstandslos auf Wirtschaftskulturen, auf die, wie Wolfgang Streeck sagt, 'parochialen' Formen des Kapitalismus, z.B. auf Systeme von Arbeitsbeziehungen oder auf sozialpolitische Regime ausdehnen? Ich sehe nicht, wie sich ein kultureller Naturschutz für ein jeweils bestehendes Ensemble von sozioökonomischer Praktiken begründen ließe"*.

c) We should instead trust that a post-national identity and solidarity will emerge: *"Es ist nicht unrealistisch anzunehmen, dass sich die, im Laufe der Nationalstaatsbildung sehr allmählich etablierte staatsbürgerliche Solidarität in dem Maße über die Grenzen des Nationalstaates hinaus erweitert, wie die Bürger von supranationalen Entscheidungen nicht nur betroffen, sondern daran nach demokratischen Verfahren auch beteiligt werden"*.

Never take Habermas lightly. And yet, his categorical distinction between minority cultures and economic cultures is untenable, at least if there is a kernel of truth in Polanyi's analyses of the emergence of "market societies", where "instead of the economy embedded in social relations, social relations are embedded in the economy".<sup>34</sup> His work can be understood as a manifesto urging us to take the interdependence of *the economic* and *the political* seriously. Writing at the end of the Second Great War, Polanyi had witnessed the destruction of liberal economic ordering by Fascism and Nazism. At the end of the 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 correct the unfettered working of the market system. In a particularly optimistic passage of his concluding chapter 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 institu-

<sup>34</sup> K. POLANYI, *The Great Transformation*, cit., p. 57.



tions 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>35</sup>

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, which requires institutional backing and continuous political management. To put it slightly differently, *the political* is inherent in *the economic*; market economies "are polities".<sup>36</sup> A second insight of topical importance follows from 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, so I conclude, *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.

Three follow-up queries, which all concern directly the notion of regulatory competition have to be addressed:

a) Even if we concede that the diversity of the institutional infrastructures of the European economies deserves, in principle, recognition, we have to concede that these infrastructures are not written in stone. Endogenous democratic change must remain possible, and insulation against the impact of Europeanisation and globalisation is inconceivable. What precisely distinguishes a variety of an economic culture from a Habermasian "*Schrebergarten*"?

b) It seems safe to assume hence that both Streeck's defence of the nation State and Habermas' defence of European rule are going a step too far. What we need instead is a channelling of change which institutionalises the united-in-diversity vision, thereby offering an alternative to both Streeck's nation State nostalgia and Habermas' European utopia. Polanyi's plea for cooperation may have been a mere signal of hope. In view of the ever deepening interdependencies cooperation has become a must.

c) The ensuing challenge is to provide a framework within which such cooperation can function and at the same time generate legitimacy. "Autonomieschonend und ge-

<sup>35</sup> *Ibid.*, p. 253 *et seq.*

<sup>36</sup> For a very dense re-construction, see F. BLOCK, *Towards a New Understanding of Economic Modernity*, in B. STRÄTH, P. WAGNER, C. JOERGES (eds), *The Economy as Polity: The Political Constitution of Contemporary Capitalism*, London: University College London Press, 2005, p. 3 *et seq.*

meinschaftsvertraglich" is the formula Fritz Scharpf has coined back in 1993.<sup>37</sup> His intuitions and mine are very similar. My version of such a "third way" is the vision of "conflicts law as Europe's proper constitutional form".<sup>38</sup>

I cannot repeat here what I have explained so often. Suffice it to underline three essentials:

a) The conflict-approach is sensitive to what Streeck has characterised as the "democratic *acquis*"<sup>39</sup> of the institutional infrastructure of the economies of democratic polities. This is inherent in the horizontal deliberative quality of the European constitutional constellation.

b) The legitimacy of conflict-resolution must be generated by the deliberative quality of cooperative problem-solving.<sup>40</sup>

c) It is the vocation of EU law to foster such co-operation by the imposition of constraints on the exercise of national policy-making and the control of their "external effects".<sup>41</sup>

Jürgen Neyer and I have, in the elaboration of our "deliberative supranationalism" built upon Habermasian premises, in particular his discourse theory of law and democracy: 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 within a national framework. Nor is this conceivable in the orthodox understanding of European rule. *Deliberative supranationalism* as elaborated in conflicts-law constitutionalism builds upon 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

<sup>37</sup> F. SCHARPF, *Autonomieschonend und gemeinschaftsverträglich: Zur Logik einer europäischen Mehrebenenpolitik*, in W. WEIDENFELD (ed.), *Reform der Europäischen Union: Materialien zur Revision des Maastrichter Vertrages*, Gütersloh: Verlag Bertelsmann Stiftung, 1996, p. 75 *et seq.*, available also as *Max Planck Institute for the Study of Societies Discussion Paper*, no. 9, 1993.

<sup>38</sup> C. JOERGES, *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form*, in R. NICKEL, A. GREPPI (eds), *The Changing Role of Law in the Age of Supra- and Transnational Governance*, Baden-Baden: Nomos, 2014, p. 125 *et seq.*

<sup>39</sup> Cf. *supra*, footnote 29.

<sup>40</sup> As repeated *ad nauseam* ever since C. JOERGES, Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, in *European Law Journal*, 1997, p. 273 *et seq.*

<sup>41</sup> This is a request which has received Habermas' blessings: "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 [...]", see J. HABERMAS, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, in J. HABERMAS, *Der gespaltene Westen*, Frankfurt am Main: Suhrkamp, 2004, p. 175.

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 co-operative interactions.

Two important implications should be underlined. The first: there is no in-built guarantee that such co-operative 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, however, is by no means a plea for inactivity; it is, instead, a reminder that we have to distinguish between *justice within* consolidated polities, on the one hand, and *justice among* them, on the other, and that we have to work in both spheres.<sup>42</sup>

All this should be only seemingly idiosyncratic. As long as there is diversity in the EU, the law will have to cope with differences. Conflicts-law is simply the name of the discipline doing this. Europe can, in the foreseeable future, not live without it. The normative intuitions which my conflicts-law constitutionalism seeks to institutionalise are certainly outside the mainstream of European studies. But I can point to similar approaches. Among them is Daniel Innerarity's concept of “inter-democracy”.<sup>43</sup> Two of his insights are particularly important for my argument. The first concerns Europe's heterogeneity, which excludes all one-size-fits-all recipes. Innerarity argues 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”. *Inter-democracy* is his key concept: the democratisation of interdependencies must replace State-like or federal hierarchical models.

A second ally, so it seems to me, is Damian Chalmers with his still unpublished essay on the *Democratic Authority and the Resettlement of EU Law*.<sup>44</sup> His quest for a resettlement deserves to be cited at some length:

“EU law allows [Chalmers departs from Article 2 TEU] [...] for another approach in which the European Union's mission become resettled around the promotion of democratic authority within Europe. The central question would be whether a measure has sufficient democratic credentials to warrant obedience over its alternatives, with EU law only justified where it would promote the quality of democracy within a Member State. EU law would,

<sup>42</sup> See C. JOERGES, *Social Justice in an Ever More Diverse Union*, in F. VANDENBROUCKE, C. BARNARD, G. DE BAERE (eds), *A European Social Union After the Crisis*, Cambridge: Cambridge University Press, 2017, p. 92 *et seq.*

<sup>43</sup> D. INNERARITY, *Democracy in Europe. A Political Philosophy of the EU*, London: Palgrave Macmillan, 2018.

<sup>44</sup> On file with author.

thereby, become an instrument for the cultivation of politics and the values of political community rather than something which suppresses these to secure a policy".<sup>45</sup>

## V. INSTEAD OF AN EPILOGUE

"United in Diversity through conflicts-law constitutionalism" is an anti-centralist, a confederal, rather than federal vision, a defence of political autonomy against imposed convergence, combined, however, with duties to co-operative problem-solving. This is a counter-vision to regulatory competition which seeks to replace the governance via competitive processes by deliberative political interactions. How much realism is in this vision? It is no less realistic than the assertion that Europe's present emergency condition has to be understood as a *new normalcy* with a sustainable future.

<sup>45</sup> *Ibid.* (italics in the original).