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Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism

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Abstract

This paper argues that the relationship between law and politics must be reconfigured within the European Union. Dissecting recent crises in Europe with reference to the three 'fictitious' commodities of Karl Polanyi, we find that law in Europe has contributed to de-legalisation, de-socialisation and disenfranchisement. Reviewing potential for law to respond to crisis through new paradigms of conflict resolution as suggested by Ralf Dahrendorf, we find that the steering capacity of law is limited where it fails to establish a relationship with politics. Our conclusions are modest: conflict-law constitutionalism cannot solve Europe's crises. However, it does represent a new procedural paradigm of law within which relations between European law and European politics might be re-established - a vital step to overcoming crisis.

Keywords

Dahrendorf – European Monetary Union – Environmental Policy – European Citizenship – Integration Through Law – Polanyi – Private International Law – Social Democracy

Introduction

The time has come to reconfigure the relationship established between the law and the politics of the integration project. Above all, we believe that a ‘conflicts-law approach’ represents an innovative effort ‘to change the debate on Europe’. We do not simply assume that there is widespread familiarity with the ‘conflicts-law approach’,¹ but will not start with a restatement of its main theses, and will instead postpone that plea for a re-conceptualisation of European law until we have examined the law’s problems with the current crisis. This is why we first detail the legacy of the integration through law project, and then critically examine the current state of that project in the light of the founding precepts of Karl Polanyi’s economic sociology. Thereafter, we turn to Ralf Dahrendorf, in order to shed light on the current failings of global law in the effort to construct new institutions of conflict resolution. Only then, and in counterpoint to our earlier findings, do we re-state the ideals of conflicts-law constitutionalism. The concluding section will substantiate how the approach might respond to European law’s current difficulties.

The legacy of the ‘integration through law’ project

‘Integration through Law’ has been the trademark of the European project since the early 1980s. It denotes one of Europe’s great accomplishments, namely the taming of the Weberian *Nationalstaat* – or concentration of economic and political power within the nation – by means of establishment of a supranational legal order and the transformation of the state of nature amongst the member states of the Union into a Kantian *Rechtszustand* with legally binding commitments. However, the role of law, as it was envisaged in the formative period of the European Union (EU), was not one of disempowering politics. In Joseph Weiler’s famous conceptualisation of the European constellation, legal supranationalism was complemented and accompanied by political bargaining processes.² As we read his argument, the legal-political relationship is not carved constitutional stone, but is rather one which can more adequately be characterised as a ‘precarious equilibrium’ which lacks any form of stabilising mechanism.

During the dynamic integration project since the mid-80s, the relationship between ‘law’ and ‘the political’ has been continuously re-institutionalised. The tragedy within this process, however, is the weakness of *politics* in the Union; a weakness for which so many European protagonists seek to compensate for with juridical techniques; a process that overburdens law and its legitimating potential. This misconceived reliance upon law is visible within the legalisation of monetary policy, the search for social justice and a ‘European social model’ and, most recently, in new debates on nuclear energy in Europe, where legal treaties have become a barrier to establishment of energy politics.

¹ See, recently, C. Joerges, ‘Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form’, in C. Joerges and T. Ralli (eds), *After Globalisation: New Patterns of Conflict and their Sociological and Legal Re-constructions*, RECON Report 15, (Oslo: ARENA 2011), 65-124.

² J. H. H. Weiler, ‘The Community System: The Dual Character of Supranationalism’, (1981) 1 *Yearbook of European Law*, 257-306.

Europe's 'socio-economic malaise' and Karl Polanyi's economic sociology

Karl Polanyi's reconstruction of the core instability of industrial capitalism lays emphasis on the role played within capitalist society by three 'fictitious commodities': money, labour and land. These fictitious commodities denote 'goods' which predate and transcend 'the market', and whose subsequent 'commodification' not only provokes crises within capitalism, but also proves to be an impetus for the development of counter-movements to the market.³ In view of by now chronic instability within European monetary and economic union, the steady erosion of national labour and/or social constitutions, as well as new conflicts in the area of energy policy, Polanyi's theses and conclusions appear to have gained a depressing degree of general topicality. The following analysis, however, limits itself within this paradigm to the European 'integration through law project'; more particularly, to the question of what European law has contributed to current crisis.

De-legalisation

The contours of economic and monetary union were laid down in the 1992 Maastricht Treaty. Monetary Union was without doubt a political project; albeit one that was to be shielded strictly from the influence of daily politics and entrusted to the medium of law instead. The reasons for this are to be found outside the law. From the early 1970s onwards, and following its own post-ordoliberal 'Keynesian moment', Germany dedicated itself to the realisation of the 'magical quadrant' – price stability, high employment, balance of payments and appropriate economic growth.⁴ Germany then pursued a monetarist programme encompassing an institutional constellation that was thereafter reproduced at European level. This vision was served well by means of establishment of an independent central bank far removed from all political influence and placed firmly outside the institutional structures of the Union. In the meantime, Giandomenico Majone has denounced this construction as a 'constitutional monstrosity';⁵ nonetheless, as Fritz Scharpf has summarised, Germany co-existed well with this re-configuration⁶. Post-Keynesian monetarism was established in the same manner as pre-Keynesian liberalism. Following Polanyi's analysis, the 19th century market economy did not come into being 'on its own account' but was, instead, a product of the planned realisation of the functional institutions, upon which it relied in order to be able to operate.⁷ *Cum grano salis*, the same might be said for the ending of the welfare/social consensus in the 1970s. The old arrangement was declared to be no longer tenable and a fundamental re-orientation of economic and social policy was

³ K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston MA: Beacon Press, 2001 [1944]), 69 *et seq.* We do not present a systematic account of Polanyi's work, and do not claim to fill the research gap with respect to the role of law in Polanyi's work. That gap is getting smaller; see, most cogently, M. Amstutz, 'Globalising Speenhamland: On the Transnational Metamorphosis of Corporate Social Responsibility', in C. Joerges and J. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart Publishing 2011), 359-93.

⁴ Legally anchored within its 1967 stability law (*Stabilitätsgesetz*).

⁵ G. Majone, *Europe as the Would-be World Power: The EU at Fifty* (Cambridge: Cambridge University Press 2010), 34 *et seq.*, see also 162.

⁶ F. W. Scharpf, 'Monetary Union, Fiscal Crisis, and the Pre-emption of Democracy', *MPIfG Discussion Paper 11/11* (Cologne: Max Planck Institute for the Study of Societies 2011), 5.

⁷ Polanyi, *supra* note 3, 135 *et seq.*

set in motion.⁸ Europe made ready use of the new *zeitgeist*; initially with the intensification of Jacques Delors' 'Single Market programme', within which the institutionalisation of economic rationality became the dominant theme to the tune of which all political dealings were forced to dance.⁹ The 'monetarist' Monetary Union, together with its accompanying Stability Pact¹⁰ followed this model. The law also availed itself of this new constellation: the institutional contours of the internal market were laid down with the aid of innovations which allowed the law to engage with the evolution of the market in such a manner that the Union might also be deemed to be a 'regulatory state'.¹¹ Nonetheless, the later claim that this re-regulatory re-structuring encompassed a 'counter-movement' in the terms described by Polanyi is clearly a false one.¹² The only *planning* that was visible within the functionalist synthesis of market and law within the internal market was one which owed its genesis to the policy of *laissez-faire*.

Our initial concern here is with the function of law within an economic and monetary union that was once seen as the crowning moment of internal market policy, and is often still conceived of as forerunner for federal conclusion of the European project.¹³ Here, the notion of 'integration through law' is also seen as one which will determine the process of the 'constitutionalisation' of Europe. At the same time, however, the German Constitutional Court has retained a jurisdiction for itself in its judgment on the Maastricht Treaty, according to which the *sine qua non* for German participation within monetary union remains the material and institutional substitution of legal rules for politics.¹⁴ This jurisdictional assertion was made in the course of a curious chain of reasoning. The Court first addressed the arguments of the main plaintiffs, in particular the argument that the European Union possessed such wide-ranging competences that nation states could no longer take action with regard to their own 'fundamental' tasks. Such a situation was argued to endanger the future of *democratic statehood*, in particular with regard to monetary policy. The Court nonetheless countered, arguing that law had endowed monetary union with a democratic political structure of its own. Law had made of *ordo-liberal* and monetarist theorems instruments of 'its own', or had given them a 'democratised' legal form: economic integration, so it was maintained, was an autonomous and apolitical process, which might and must take place beyond the reach of member state influence. By virtue of a

⁸ M. Glasman, *Unnecessary Suffering: Managing Market Utopia* (London and New York, NY: Verso 1996), 96 *et seq.*

⁹ Terms taken from M. R. Lepsius, 'Institutionalisierung und Deinstitutionalisierung von Rationalitätskriterien', in G. Göhler (ed.), *Institutionenwandel, Leviathan Special Issue 16/1996*, (Opladen: Westdeutscher Verlag 1997), 57 *et seq.*; for application to Europe, see M. R. Lepsius, 'The European Union as a Sovereignty Association of a Special Nature', in C. Joerges, Y. Mény and J. H. H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Florence: European University Institute 2000), 203 *et seq.*

¹⁰ Decision of the European Council on the Stability and Growth Pact, *Official Journal of the European Union* C 236 of 2 August 1997 (Article 12).

¹¹ On this concept, G. Majone, 'The European Community as a Regulatory State', *Collected Courses of the Academy of European Law 1994-V/1* (Den Haag: Martinus Nijhof 1996), 321 *et seq.*

¹² M. Höpner and A. Schäfer, 'Polanyi in Brussels: European Institutions and the Embedding of Markets in Society', *MPIfG Discussion Paper 10/ 8* (Cologne: Max Planck Institute for the Study of Societies 2010).

¹³ See, G. Majone, *The EU in Comparative Context: Regional Integration and Political Transaction Costs* (Cambridge: Cambridge University Press 2011), chapter 5.

¹⁴ On the following, C. Joerges, 'States without a Market: Comments on the German Constitutional Court's Maastricht-Judgment and a Plea for Interdisciplinary Discourses', *NISER Working Paper* (Utrecht: NISER 1996). Available at: <<http://eiop.or.at/eiop/texte/1997-020.htm>>.

constitutional commitment to price stability and rules that guarded against inappropriate budgetary deficits, monetary union was correctly structured. Accordingly, all doubts about the democratic legitimacy of economic integration could be denied.¹⁵

The sustainability of this legal construct proved to be of short duration. Germany, France, the Netherlands, as well as others, failed to respect the rules of the stability pact. The Commission's much vaunted efforts to take action against deficits dwindled into nothing. Why did this happen and why did it get so much worse? Why is the Union now experiencing an emergency moment of its own, a moment of derogation from Article 122(2) TFEU and provision of 'inappropriate' solidarity payments,¹⁶ a moment of European Central Bank (ECB) departure from its own statutes,¹⁷ a moment of emergency (national) parliamentary sittings, and a moment during which Greece has learned that its sovereignty is limited? As yet, no explanatory academic reference has been made to Polanyi and his analysis of the 'good' of money:¹⁸ nonetheless, it now seems more than appropriate to recall his classification of money as a 'fictitious commodity',¹⁹ as well as his identification of the risks of destruction to the functional conditions for market economies that are to be found within broader society. The legal constitution of EU Monetary Union Europeanised ordoliberal-monetarist conceptions; law, however, could not hope ever to substitute for the necessary historical evolution of equally Europeanised social preconditions for successful monetary operation. Majone concludes that the ECB is a 'constitutional monstrosity' because the Bank is required to pursue its aim of monetary stability within a political vacuum and might not make adjustments for socio-economic disparities within the Union.²⁰ As Scharpf adds, the institutionalised inability to do anything other than react to instability with intensified austerity programmes, not only threatens the well-being of European citizens, but also endangers social acceptance for the Union.²¹

Crisis results in 'de-legalisation'. As lawyers concerned with the integrity of the rule of law, we would not advocate that compliance with Treaty provisions should be re-established: Monetary Union would then be at an end. Yet, the process of 'de-legalisation' is thus all the more dramatic. 'The law' has been replaced by governmental and administrative operations outside the rule of law. Certainly,

¹⁵ A surprising conclusion only matched by the fact that so many lawyers failed to take note of it, focusing instead upon the Court's famous description of democracy as requiring a 'relatively homogeneous people'; see, J. H. H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', (1995) 1 *European Law Journal*, 219-58.

¹⁶ The German Constitutional Court deliberated on solidarity payment to Greece and the European solidarity (*Griechenlandhilfe & Euro-Rettungsschirm*), handing down judgment 2 BvR 987/10 on 7 September; see press release no. 55/2011 of 7 September 2011. An instructive justification for the constitutional complaint by D. Murswiek can be accessed at: <<http://www.jura.uni-freiburg.de/institute/ioeffr3/forschung/gutachten>>; for a contrasting perspective, see C. Calliess, 'Perspektiven des Euro zwischen Solidarität und Recht: Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms', (2011) *Zeitschrift für europarechtliche Studien*, 213-81.

¹⁷ M. Seidel, 'Der Euro Schutzschild oder Falle?', *ZEI Working Paper* B01/2010 (Bonn 2010).

¹⁸ See, M. Amstutz, 'Eroding Boundaries: On Financial Crisis and an Evolutionary Concept of Regulatory reform', in Poul Kjaer and Gunther Teubner (eds), *The Financial Crisis in Constitutional Perspective* (Oxford: Oxford University Press 2011), 223-66, at 233.

¹⁹ 'Money [...] is merely a token of purchasing power which, as a rule, is not produced at all, but comes into being through the mechanism of banking or state finance', Polanyi, *supra* note 3, 72.

²⁰ Majone, *supra* note 5.

²¹ Scharpf, *supra* note 6.

lawyers can argue that governmental co-operation outside the framework of the Treaty is needed in difficult times;²² justifying abolition of democratic institutions as ‘an act of solidarity’.²³ Yet, this is an over-instrumentalisation of the indeterminacy theories of the US Critical Legal Studies (CLS) movement; we do not understand them to favour the camouflaging of problems, intentions and events. Instead, we must not lose sight of risks inherent to establishment of a second layer of governance in the EU: its transformation into mechanisms of ‘non-transparent post-democratic domination’.²⁴ To rephrase in more conventional legal terms: the lack of legal competences at European level which would enable the Union to engage in fiscal policy and other macro-economic activities cannot legitimise the evolution of pan-European neo-liberalism and disregard for democratically-legitimated national institutions and their powers.

De-socialisation

Labor is only another name for a human activity which goes with life itself, which in its turn is not produced for sale, but for entirely different reasons, nor can that activity be detached from the rest of life, be stored or mobilized.²⁵ To allow the market mechanism to be the sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society [...] [N]o society could stand the effects of such a system of crude fictions even for the shortest stretch of time unless its human and natural substance as well as its business organization was protected against the ravages of this satanic mill.²⁶

In Polanyi’s prognosis this would prompt the evolution of ‘counter-movements’, which he then found in the 19th Century:

While the organization of world commodity markets, world capital markets, and world currency markets under the aegis of the gold standard gave an unparalleled momentum to the mechanism of markets, a seep-seated movement sprang into being to resist the pernicious effects of market-controlled economy. Society protected itself against the perils inherent in a self-regulating market system [...].²⁷

Following WWII, he identified counter-movements within the welfare state programmes which were also designed to prevent the return of the recent fascist

²² See D. Thym, ‘Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsrechtliche Kontrolle’, (2011) 25 *Europäische Zeitschrift für Wirtschaftsrecht*, 167-71; but see B. de Witte, ‘The European Treaty Amendment for the Creation of a Financial Stability Mechanism’, *SIEPS Working Paper*, June 2011, Stockholm 2011. Available at <<http://www.sieps.se>>.

²³ Calliess, *supra* note 16.

²⁴ J. Habermas, ‘Democracy is at Stake’, *Presseurop*, 27 October 2011. Available at: <<http://www.presseurop.eu/en/content/article/1106741-juergen-habermas-democracy-stake>>.

²⁵ Polanyi, *supra* note 3, 73; as Glasman, *supra* note 8, 4, puts it: ‘Labour is the activity through which people combine their knowledge and energy in order to reproduce their culture and satisfy their needs’.

²⁶ Polanyi, *supra* note 3, 73.

²⁷ Polanyi, *supra* note 3, 76.

past.²⁸ Certainly, during a period of ‘embedded liberalism’²⁹, the European Economic Community and the national welfare/social state were at first to co-exist peaceably, notwithstanding the fact that the EEC was conceived of as an exclusively economic project such that the sphere of the ‘social’ was considered to be a purely national matter. This situation was nonetheless not sustainable as the Europe of the 1980s chose to diagnose its economic ills as sclerosis and institutionalised the programme for completion of the internal market in such a manner that this programme would become the binding reference point for politics.³⁰ These consequences were, at the time, anything other than obvious. The internal market programme and, above all, its constitution as a ‘regulative state’ were not meant to reproduce the battle cry against redistributive politics that had been sounded at national level; rather, much faith was invested in the French socialist background of Delors and a subsequent hope that the integration project would also develop a stronger ‘social dimension’ which would lay the foundation for a *European* social model.³¹

The eastern enlargement process, however, had a fundamental impact upon the constellation, undermining re-socialisation efforts at EU level. Enlargement brought with it intensified socio-economic disparities within Europe. By the same token, political efforts to deepen integration – noticeably by means of the promise of a European constitution – were also forced to renew their commitment to a ‘European social model’. At the same time, however, it became readily apparent that Europe’s ‘social dimension’ would not function as an equivalent for any one of the national models, and much less would it result in the synthesis of national social models. Even following Maastricht, Amsterdam and Lisbon, Europe still lacked the necessary social competences; a fact which was much less an accident and much more a result and expression of socio-economic disparities and historical and political divergence. A far more sensible approach might thus have been one which admitted that political room for manoeuvre was highly limited; one which re-modelled Europe’s social agenda as a simple compatibility agenda, minimising conflicts between national social constitutions and the openness of European markets; or one which left the social question for another more propitious political moment. This was not to be: enlargement of the European space instead heightened promises of increased European wealth. Massive redistribution along the lines of the German reunification model was not an option. The sole strategy that was available was a market-oriented one.

This strategy was pursued with vigour by the European Commission, together with interested parties in old and new Europe, and found its most powerful expression within the legal medium. The *Viking*, *Laval* and *Rüffert* judgments³² are the most characteristic and discussed legal elements of this strategy:

²⁸ Polanyi, *supra* note 3, 127 *et seq.* For prominent confirmation, see, T. Judt, *Postwar: A History of Europe since 1945* (New York, NY: Penguin Press 2005), 791 *et seq.*, and now also his *Ill Fares the Land* (New York, NY: Penguin Press 2010), 127 *et seq.*

²⁹ G. S. Ruggie, ‘International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order’, (1982) 36 *International Organization*, 375-415.

³⁰ See Majone, *supra* note 5; Scharpf, *supra* note 6; Glasman, *supra* note 8.

³¹ See, for more detail, Christian Joerges, ‘Will the welfare state survive European integration?’ (2011) 4 *European Journal of Social Law*, 4-19, at 10.

³² C-438/05, *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779; C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*,

Article 43 EC is to be interpreted to the effect that collective action [...] which seeks to induce a private undertaking [...] to enter into a collective work agreement with a trade union [...] constitutes a restriction within the meaning of that article;

(*Viking*)

Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union [...] to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers;

(*Laval*)

Directive 96/71, interpreted in the light of Article 49 EC, precludes an authority of a Member State [...] from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which [...] agree [...] to pay their employees [...] at least the remuneration prescribed by the collective agreement in force at the place where those services are performed.

(*Rüffert*)

This is not simply tortuous English. Instead, it is no less and no more than the judicial toppling of the post-war *acquis* of European labour law constitutions.³³

Can the Court of Justice of the European Union (CJEU) be 'allowed to' refashion national labour law constitutions and why? The answer is simple: the Union has proved itself incapable of supplementing its market constitution with a labour constitution because its new (eastern) members view market rights as guaranteeing their own development potential; European law has also swung into action because welfare state jurisprudence has been eroded in the old (western) member states. Law and case law played a decisive part in the integration through law project and its constitutionalisation. The acceptance of the project derived from the fact that this newly made law might be understood as a common European project situated far beyond traditional political schisms. With its recent jurisprudence, however, the CJEU has now prised open national constitutions and alienated the national constitutional jurisdiction without, however, being able to offer anything in return other than a neo-liberal European perspective. European law has become political – and with this has undermined the normative integrity of the 'integration through law' project.³⁴

We are not socially conservative defenders of 'domestic justice' with no sensitivity for the quest for transnational justice and solidarity. Nonetheless, and speaking legally, what is wholly unacceptable is judicial assumption of a power to destruct the welfare state simply because the EU does not have the competence to evolve its own comprehensive 'social model'. As Simon Deakin has pointed out, the chain of cited

Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan und Svenska Elektrikerförbundet, [2007], ECR I-11767; C-346/06, *Rechtsanwalt Dr. Dirk Rüffert v Land Niedersachsen*, [2008], ECR I-01989.

³³ Amongst a wealth of comment, the clearest formulation is to be found in A. Lyon-Caen, 'Droit communautaire du marché v.s. Europe sociale', *Symposium des Bundesministeriums für Arbeit und Soziales*, Berlin, 26 June 2008. Available at: <www.cgsp-irw.be/fr/documentation/europe-sociale.html>.

³⁴ M. Everson, 'From *Effet Utile* to *Effet Néolibéral*: Why is the ECJ Hazarding the Integrity of European Law?', in C. Joerges and T. Ralli (eds), *European Constitutionalism without Private Law: Private Law without Democracy*, RECON Report 14/2011 (Oslo: ARENA 2011), 31-46.

judgments came in the immediately aftermath of financial crisis. There is, Deakin adds, no direct link discernable either to that financial crisis or to the sovereign debt crisis. What is apparent, however, is that developments in the constitutional architecture of the EU, of which the ECB is one of the most prominent examples, have helped to legitimize a specific way of thinking about the relationship between the legal system and the process of economic integration.³⁵ What also seems very clear is that the Court's jurisprudence is celebrated by the protagonists of a strand of neo-liberalism which qualifies labour law and social protection as inherently restrictive of economic freedoms. The Court promotes 'de-socialisation'.

Disenfranchisement

'Land, by the same token, is simply another word for the nature that is not produced by man'.³⁶ It is natural for us to translate the fictitious commodity of 'land' into the term, 'environment', and to denote the concept of environmental protection to be one of those measures designed to prevent the inexorable commodification of this resource. This is a daring reliance on the Polanyian notion of 'land'. Yet, there is a kernel of truth in our extensive interpretation: the transformation of atomic energy into the market good of electricity has a fundamental impact upon nature and life. Supranational regulation of 'protection' within the Union is one of the greatest achievements of the integration project. Yet, atomic energy is very deliberately excluded from this achievement. The Euratom Treaty of 1957³⁷ emphasised in its preamble that 'nuclear energy is an indispensable aid for the development and invigoration of the market and for peaceful advance'. Declaring itself to be 'determined to create the conditions for the establishment of a powerful nuclear energy industry,' the Treaty similarly left the decision for or against the use of this form of energy to individual nation states. The Lisbon Treaty has not deviated from this position, re-iterating instead in Article 194(2) that: 'each Member State has the right to determine the conditions for the use of its own energy resources, to choose between different energy resources and to determine the general structure for its energy provision'.

This respect for national political autonomy is misconceived. In common with many other environmental risks, the dangers posed by nuclear energy cannot be contained within national borders. If we believe that democratic constitutions guarantee the right of citizens to act as the last instance of decision in relation to legal acts that impact upon them, the cross-border risks of atomic energy might be argued to embody a structural deficit within the territorial organisation of democracy. By the same token, it may similarly be argued that it is the role of European law to compensate for this deficit and that the legitimation of this law derives from its capacity to bridge the gap between 'participation and impact'.³⁸ Nuclear energy represents perhaps one of the most critical areas with regard to compensatory functions: European law must surely not acquiesce to the structural democratic

³⁵ S. Deakin, 'The Lisbon Treaty, the *Viking* and *Laval* Judgments, and the Financial Crisis: In Search of New Foundations for Europe's "Social Market Economy"' (Cambridge May 2011).

³⁶ Polanyi, *supra* note 3, 107.

³⁷ Consolidated version in *Official Journal of the European Union* C 84, 1 of 30 March 2010.

³⁸ The formula ('*zwischen Teilnahme und Betroffenheit*') is to be found in J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Annex II 'Citizenship and National Identity' (Cambridge: Polity Press 1996), 491-516.

deficit. Yet, just as is the case with regard to the social deficit, the refusal to transfer decisional competences in the area of nuclear energy derives from insoluble interest conflicts and divergent political-normative conceptions. What can law do, what politics do within such a constellation?

The CJEU was confronted with this problem in the course of conflict between the federal 'Land' of Upper Austria and the Czech Republic on the operation of the nuclear power station at Temelín.³⁹ The conflict stretches back to 1985,⁴⁰ and clearly demonstrates tensions between legal-institutional competences and practical-political operational pressures. As late as 2001, AG Jacobs opined that 'according to Community law', member states retain exclusive (or, almost exclusive) competence in technological questions of nuclear safety.⁴¹ Following the Chernobyl disaster and the process of eastern enlargement, the old member states of the atomic community were confronted with nuclear technologies and industries to which they did not wish to grant this degree of autonomy. An answer was sought in the 'Melk' process, a coordinative exercise somewhere between law and politics, and was seemingly found in a technological upgrading of Temelín to satisfy European Commission demands.⁴² This arbitration fell on the deaf ears of Upper Austria, who reacted to Temelín with an *actio negatoria* designed to proscribe the potential for cross-border ionising radiation from the plant (paragraph 364(2)). The Czech owners of the plant countered, pointing to the Czech authorisation for the plant and to paragraph 364(a)(II) of the Austrian Civil Code, making enabling provision for monetary compensation for any damage suffered following an official authorisation. At this stage, the European context becomes clear: is Austria required to recognise a Czech authorisation? Might Austria assert a successful claim that it would never have granted an authorisation since an Austrian constitutional amendment of 1999 proscribes the establishment and operation of nuclear plants?⁴³

This is a complex interest conflict: Austrian and Czech law contradict one another. Europe has no explicit competence allowing for a clear decision between an Austrian 'no' and a Czech 'yes'. Last but not least, the conflict also encompasses 'temporal dimensions', or to use long established legal terminology, a possible *lex cessante*: to what degree might the 1957 Euratom Treaty still be considered to be binding given that it refers to out-of-date technical data and bases itself on laudations for nuclear energy that have since been fully discredited? The CJEU nonetheless remained unimpressed and re-iterated the European legal *acquis*: the non-discrimination principle, proscribing discrimination upon grounds of nationality, also held good in the realm of nuclear energy. The failure to recognise the Czech authorisation had the same result as discriminatory treatment upon the grounds of nationality.⁴⁴

Although this was not a judgment made with explicit reference to fundamental political conflict on nuclear energy, it was nevertheless a judgment that demanded more from a nuclear opposition than it did from its users, imposing a 'toleration duty'

³⁹ C-115/08, *Land Oberösterreich v ČEZ*, judgment of 27 October 2009, not yet reported.

⁴⁰ W. Hummer, 'Temelín: Das Kernkraftwerk an der Grenze', (2008) 63 *Zeitschrift für öffentliches Recht*, 501-57.

⁴¹ Advocate General Jacobs, 13 December 2001, C-29/99, *Commission v Council*.

⁴² Hummer, *supra* note 40, 506.

⁴³ 'Bundesverfassungsgesetz für ein atomfreies Österreich', *Bundesgesetzblatt I* Nr. 149/1999.

⁴⁴ Case C-115/08, *supra* note 39, paragraph 72.

upon them. The debt of the Euratom Treaty to a traditional international legal model of sovereignty – a model not impinged upon by Article 114(2) – gives rise to an enduring constellation: the whole of the Union must tolerate nuclear dangers for so long as just one of its member states remains attached to this form of energy. This conclusion immortalises the democratic deficit that is found within the structures of the nation state. Yet, one of the strongest legitimating bases for European law is its ability to compensate for such deficits. The new ‘Citizens Initiative’ laid down in Article 11(4) TFEU might accordingly be viewed as a means whereby fundamental conflict about nuclear energy could be brought to a ‘European’ political arena. However, the Citizens Initiative is, in itself, a poor substitute for a European referendum, opening up instead a simple possibility that citizens might make suggestions about themes that they feel require a legal act of the Union in order to change the Treaties.⁴⁵ The exact legal impact of the Citizens Initiative remains a matter for discussion: do the formulations of Article 11(4) preclude the possibility that citizens might demand changes to primary European law such as provisions of the Euratom Treaty? The Commission and Green Party within the European Parliament agree with this position.⁴⁶ Yet, if citizens have been denied the right to demand legal changes to the 1957 Euratom Treaty they have been clearly disenfranchised.

Different laws for different conflicts: Dahrendorf’s sociological theory of conflict

Modern law must respond to modern conflicts. European Union is being accomplished within an increasingly globalised world, and one which has created its own distinct patterns of conflict to which new legal and political answers must be found. This is the firm message of the later works of Ralf Dahrendorf.⁴⁷ Dahrendorf is rightly famous for his theory of sociological conflicts.⁴⁸ Yet, his theses were firmly grounded in the class conflicts of the nation state. Drawing heavily on the work of T. H. Marshall,⁴⁹ Dahrendorf was predominantly concerned with the problem of class formation, conflict and the necessary institutions of conflict resolution. Within this problem constellation, law played a dual role: first, playing a founding role in the creation of class conflict through the securing of the post-feudal market (civic rights); and secondly, acting to mediate ensuing class conflict through the corrective provision of (voice-giving) political and (redistributive) social, rights. Dahrendorf must be distinguished from Polanyi in his insistence that the law and the economy were two distinct systems, whereby the products of markets – ‘economic provisions’ – were particular and limited by opportunity, while ‘legal entitlements’, or ‘apportioned rights’ were universally held within society. Lacking the radicalism of Polanyi or his assertion that ‘fictitious commodities’ that lie at the heart of market operations are only sustainable where they are embedded within society, Dahrendorf’s thesis still asserts a large measure of democratic legal control over

⁴⁵ The recent Regulation 211/2011 (*Official Journal of the European Union* L 65, 1 of 11 March 2011) reproduces this formulation in Article 4(2).

⁴⁶ S. Wolf, ‘Euratom, the European Court of Justice, and the Limits of Nuclear Integration in Europe’, (2011) 12:8 *German Law Journal*, 1637-58.

⁴⁷ R. Dahrendorf, ‘Citizenship and Social Class’, in *id.*, *The Modern Social conflict: The Politics of Liberty*, 2nd ed. (New Brunswick, NJ: Transaction Publishers 2008), 23-48.

⁴⁸ R. Dahrendorf, *Der moderne soziale Konflikt* (Stuttgart: Deutsche Verlagsanstalt 1992).

⁴⁹ T. H. Marshall *Citizenship and Social Class* (London: Pluto Press 1992 [1953]).

market operations. Although law is not antecedent to the market, it should act as a 'cautious' correcting mechanism upon it, apportioning legal entitlement in order to correct imbalances in economic provisions and to dissipate class conflict.

The modern problem for Dahrendorf, however, was one of the constraining of his institutions of conflict resolution within a paradigm of national citizenship: to the lawyer, Dahrendorf's legal mechanism for conflict resolution (rights) was nevertheless a procedurally *political* one, wholly bound up with the status of the individual as a citizen, and more particularly, a political citizen with the democratic power to adjust social entitlements. The legal entitlements of Dahrendorf's theory are universal, but are accordingly so only within a closed community of political citizens, or the democratic citizenry of the nation state. This necessary closure of the citizenship-based paradigm of legal entitlement accordingly led Dahrendorf to doubt his theoretical constructs: above all, in the advanced, post-industrial economies of the 21st Century, class conflict might be argued to have been superseded by processes of the assertion of the individual and collective identities, which social class had so often repressed. The politics of the present is a politics of race, gender, lifestyle and culture. In addition, however, economic globalisation, with its corollaries of political interdependency as well as mass migration, has ushered in and accentuated a period of re-adjustment in relations maintained between politics and economy, market and society. In the face of the varied internal and external challenges made to the closure of the citizenship paradigm, Dahrendorf recognised the need for new mechanisms of conflict resolution, at the same time re-iterating the uniqueness of notions of 'legal entitlement'; their separateness, or independence from market processes.⁵⁰

At heart, Dahrendorf's final appeal was for the maintenance of the social democratic sentiment that is embodied within legal entitlement at a time of unprecedented social dynamism. Within a real world of post-national, European and global law, however, the difficulties of maintenance of such sentiment have become ever more apparent. Revisiting the threefold challenges of 'de-legalisation', 'de-socialisation' and 'disenfranchisement' with a specific eye to legal entitlements, limits to legally-founded conflict resolution become readily apparent: law without politics is a denuded force.

Proper legalisation? The example of European citizenship

European law is not 'conservative' or hostile to the new conflict situations identified by Dahrendorf. On the contrary, European law can appear to be far more liberal than political sentiment; a progressive force for institutional change within a world of altered identities. A primary example is CJEU citizenship jurisprudence and its efforts to respond to the ever more complex contours of a global society through its decoupling of the legal vehicle of citizenship from nationality law.

Citizenship has a Janus-like character; a dual function as an instrument which confers not only rights but also status, and which thus ensures both the inclusion and the exclusion of the individual within a group. Citizenship is a particularist vehicle and must be distinguished from a universal scheme of human rights: the entitlements of citizenship are granted by a bounded community with the express intention of giving the individual status within that community, but with the implicit consequence that

⁵⁰ Dahrendorf, *supra* note 47.

included status gains in value because 'others' are excluded. In Hannah Arendt's analysis, where universal human rights are aporias, and what truly counts for the fate of the individual is a *political* or enabling relationship with a community founded within a protected geopolitical unit, the consequences of statelessness are catastrophic indeed.⁵¹ As recent European history teaches us, the price to pay for absence of citizenship can be annihilation. In modern national law, the duality of citizenship is concretised in the distinction that is drawn between nationality law and the laws apportioning citizenship rights. Nationality law governs the exclusionary facet of citizenship, delineating exactly who belongs to the community of citizens. Thereafter, the inclusion of individual citizens within the enabled community – or sovereign state – is paradigmatically assured by means of a threefold scheme of civic, political and social rights, which fulfils Ralf Dahrendorf's dictum that citizens themselves can only become sovereign within the state where guaranteed entitlements insure against the vagaries of life such that the citizen always has a voice that might be asserted against fate.⁵²

Citizenship is valuable but inexorably closed to the non-citizen with all the individual costs that that entails. Or is it? 'No', intones the CJEU: taking the unpromising material of the highly restricted and ancillary citizenship of the European Union introduced by the Maastricht Treaty (now, Article 20 TFEU), the eternally activist Court has famously fashioned its own citizenship, thereby seemingly overcoming Arendt's assertion that the individual is inexorably located in 'time and space'. The Court has weaved its activist jurisprudential spell, interlacing borrowed human rights doctrines together with its own proportionality principle, in order both to decouple the enjoyment of EU citizenship from the award of nationality and to prise open once closed national welfare settlements, so as to force them to provide social rights to the indigent stranger.

To the extent that the CJEU has overcome certain of the exclusionary facets of citizenship, has opened up the benefits of EU citizenship to non-member state nationals and has extended social citizenship across national borders to forge a very particular form of trans-European solidarity,⁵³ the Court can be argued to be responding creatively to a progressive *zeitgeist* within an increasingly globalised civil society. In this view, judicial avant-gardism is just as surely a mirror to post-modern rejections of constructed identity, or the cynically imposed social order that the introduction of a national norm of citizenship has so often implied: 'the historical 'trick' to the rise of a nation state will be to find a horizontal solidarity for the existing [class] stratification and a rationale that using a state apparatus to protect the nation makes sense'.⁵⁴ In a post-nationally individualised world, the CJEU is in the vanguard of movements that are chipping away at the false consciousness of constructed collectivism, and are at last forging forms of citizenship responsive to individual needs and the 'conflicts' of a post-industrial age.

⁵¹ For Arendt in the EU context, see H. Lindahl, 'Finding a Place for Freedom, Security and Justice', (2004) 29 *European Law Review*, 461-84.

⁵² Dahrendorf, *supra* note 48.

⁵³ A. Somek, 'Solidarity Decomposed: Being and Time in European Citizenship', (2007) 32 *European Law Review*, 787-818.

⁵⁴ A cynicism identified, for example, by Karl Deutsch, paraphrased and cited in N. Fligstein, *Euro-clash: The EU, European Identity and the Future of Europe* (Oxford: Oxford University Press 2008), 130.

Yet, criticism of the Court is telling. Above all, its quest for universal citizenship is founded, not in coherent legal method, but rather in an emotionally-founded *interpositio auctoritatis* – or situational assertion of legal meaning – which leaves the Court prey to its own arbitrary nature, or emotional particularism. In other words, the key to the wonder of a universal European citizenship is also its weakness. The nation and history of our traditional citizenship paradigms are discarded, not in a politically-constitutive moment, but are instead swept aside within the emotional response of European judges respond to individual circumstances and want. The decoupling of enjoyment of citizenship rights from nationality follows as the CJEU responds to a simple human happening, or to the birth of a child within the EU, allowing his mother and ‘primary carer’, a Chinese national, to travel freely across member state frontiers with Mistress Chen, such that she might in fact enjoy her newly won EU citizenship, granted by virtue of unlimited *ius soli* then operative within the Republic of Ireland (Case 200/02⁵⁵). The nation founded either in pre-communitarian bounds of belonging or in concordance with the ideals of the founding republican moment, is hostile to Mistress Chen and her Mother. The CJEU and its EU citizenship are not: the human right to a family life demands that Mrs Xhu must be allowed to travel with her daughter. National and historical indifference to the fate of the individual – the ‘the blind-side’ of exclusionary nationality law – must likewise cede to the compelling facts of personal need and to the legal contortions of an empathetic Court.

The cases are legion, and, importantly, have also begun to extend their empathetic reach to the regime governing third country nationals (TCNs). Here, for example, any arbitrary distinctions drawn by member states in order to delineate who might benefit from the right to family re-unification under Directive 2003/86 will also be reviewed by the Court in the light of the proportionality principle, or rather, in the light of circumstances and sympathy (C578-08 *Chakroun*⁵⁶). The language of the Court’s jurisprudence is a legal language; a formal language of human rights, equitable maintenance of protection and the principle of proportionality. But the grammar of the Court is a grammar of an emotion whose effects are electrifying: nation is shorn of hostile meaning and indifferent history is forgotten as the *ius Europaeum* furnishes ‘the right outcome’, or simply engages with the ‘real’ other far beyond imagined community. In a paraphrased Habermasian construction, the CJEU appears to be including the other in a simple ‘non-levelling and non-appropriating’ act of recognition.⁵⁷ Nevertheless, the ‘judge-kings’ of the CJEU are also only the sum total of their emotions and it is here that circumstance may challenge law as European Justices exhibit particular rather than universal sympathy and a budding cosmopolitan citizenship falls victim to the arbitrary nature of the Court’s empathic character. Failed Colombian asylum seekers in Belgium whose children become Belgian by virtue of their birth in that country are afforded the protection of the *ius Europaeum*: they are primary carers and cannot be removed from Belgium, because this would negate the ‘substance’ of their children’s EU citizenship (Case C-34/09 *Zambrano*⁵⁸). Mrs McCarthy, a UK national, whose Jamaican husband is denied leave to remain in the UK, is less fortunate: Mrs McCarthy it appears was not exercising her

⁵⁵ Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

⁵⁶ Case C-578/08 [2010] 3 C.M.L.R 5 (ECJ) (ECJ) 2nd Chamber.

⁵⁷ J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity Press 1998), 44.

⁵⁸ See also Case C-315/08 *Janko Rottman v Freistaat Bayern* [2010] Q.B. 761 (ECJ - Grand Chamber).

right of free movement under Directive 2004/38/EC, such that her husband could not benefit from her rights of EU citizenship (Case C-434/09⁵⁹).

What is there to distinguish these two cases beyond the Court's sympathy failure towards Mrs McCarthy and her spouse? If the right to a family life is to be enjoyed universally it should apply to all. Equally, however, the CJEU also suffers a similar sympathy failure when presented with collective (national) expressions of solidarity. Certainly, the Court has done much to recognise that the indigent stranger is also in need of financial succour, subjecting the 'closure' of national welfare settlement to review under proportionality principle, such that any European citizen may make a claim upon a host welfare system where they have sufficient connections with that state.⁶⁰ At a deeper level of political theory, however, the Court's proven hostility to the closed (national) solidarity collectives inevitably gives rise to its own contradictions and paradoxes: can collectively-established 'love' ever be tolerated?

As Alexander Somek has convincingly argued,⁶¹ one of the most telling cases in this regard is that of *Commission v Austria*.⁶² At one level, *Commission v Austria* is a simple non-discrimination case with no connection to Article 20 jurisprudence: the 'open-door' policy of university entry within Austria, guaranteeing university admission to all Austrians holding a high school diploma, regardless of grade, was held here to be indirectly discriminatory against non-Austrian EU-nationals who were required to qualify themselves for admission in-line with their own national practices. Nonetheless, the facts of the case do also encompass a measure of irrationality, or social love, a collective decision that 'everyone who has made it through school [should be] rewarded with a fresh start'; a measure of national empathy, with very real socially redistributive consequences, that closes the space of Austrian education to non-Austrians, just as it makes inclusive reparation for jointly-experienced memories of adolescent self-discovery and academic underachievement. By the same token, the CJEU's brutally rational, but 'unsolicited [...] advice' to Austria 'to establish 'entry examinations or the requirement of a minimal qualification to avoid the system's collapse',⁶³ would seem also to entail a lack of emotional solidarity with the underachieving teenager of all of our pasts.

Re-embedding the 'de-socialised' market citizen? Science and economic rationality versus politicised consumption

The Court's particularism is, above all, indicative of the difficulties that bedevil the acts of 'judge-kings' and all progressive law. Thus, for example, the adepts of the 'free law' methodologies of the early 19th Century (*Freirechtslehre*) were undoubtedly correct in departing from formal legal method in order to adapt their precepts to the new reality of mass industrialisation.⁶⁴ The movement nonetheless remained forever vulnerable to Max Weber's critique that this 'materialisation' of law would, by virtue

⁵⁹ Case C-434/09 *McCarthy v Secretary of State for the Home Department*, 5 May 2011 (ECJ) (Grand Chamber).

⁶⁰ C-184/99 *Grzelczyk v Centre Public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

⁶¹ Somek, *supra* note 53.

⁶² Case C-147/03 *Commission of the European Communities v Republic of Austria* [2005] ECR I-5969.

⁶³ Somek, *supra* note 53.

⁶⁴ See for details, M. Everson and J. Eisner, *The Making of the European Constitution: Judges and Law beyond Constitutive Power* (London: Routledge-Cavendish 2007).

of its inevitable lack of coherence or structured method, undermine the authority of the legal system as a whole. Equally, however, inconsistency and contradiction within Article 20 citizenship is also a reflection of the far more fundamental difficulties faced by law when trying to identify a universal concept of social justice that is not restricted by the bounded nature of (national) community.

At practical political level, the socially-democratic vehicle of citizenship entails a constant and difficult balancing act between the distinct but entwined entitlements of law and the provisions of the market: an entitlement that cannot be satisfied – perhaps because the market has been repressed by overeager interventionism – is no entitlement at all. By the same philosophical token, however, the redistributive element within citizenship still defies all assaults upon its exclusionary characteristics that derive from universalist impulses: leaving aside all ‘arbitrary’ closure founded in pre-political cultural ties, the act of redistribution nonetheless requires even the most republican of communities to identify the finite polity, or political *space*, within which the politics of the redistributive good can be fought out. The CJEU’s anti-collectivist strength consequently becomes its weakness as its universalism blinds it to the practical exercise of the balancing of provision against entitlement, and to the efforts to establish the common good of the *res publica*.

But does it? Casting a far wider net than pure citizenship jurisprudence and focusing instead upon the founding relationship established between the CJEU and the European consumer, we are rewarded with contrasting insights into the Court’s treatment of entitlements and provisions, and of its wider struggles to identify the European common good:

The Member States must not crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them.

(Case 178/84, German Beer)⁶⁵

The story of the creation of the ‘European consumer’ by the CJEU is well-documented⁶⁶ and again striking in terms of the ability of the judge-kings of the Court to mirror a *zeitgeist* which has rebelled against the ‘infantilising’ of consumers within restrictive regimes of hierarchical consumer protection. Within this narrative, the Court’s re-characterisation of the individual European as a ‘rational’, ‘confident’ and ‘informed’ consumer, as well as its championing of ‘active’ modes of European consumption, might be argued to reflect and reinforce an increasingly individualistic pattern of social organisation in which consumption is seen, not simply as an expression of self-gratification, but rather as a diffusely liberating political act.⁶⁷

⁶⁵ Case 178/84 *Commission v Germany* [1987] ECR 1227.

⁶⁶ S. Weatherhill, *EC Consumer Law and Policy* (London: Longman 1997); M. Everson, ‘Legal Constructions of the Consumer’, in F. Trentmann (ed.), *The Making of the Consumer Knowledge, Power and Identity in the Modern World* (Oxford and New York, NY: Berg 2006); M. Dani, ‘Assembling the Fractured European Consumer’, (2011) 36:3 *European Law Review*, 362-84.

⁶⁷ ‘Diffuse’ in the sense that disconnected individual action nonetheless secures social change, see F. Trentmann (ed.), *The Making of the Consumer Knowledge: Power and Identity in the Modern World* (Oxford and New York, NY: Berg 2006).

Beyond such immediate social intervention, however, the Court's relationship with the European consumer similarly gains importance within a study of the creation of 'new' legal conflict mechanisms within the European Union: firstly, since its jurisprudence has re-allocated economic provisions within a distinctly European market, unravelling national conceptions of the 'citizen-consumer', and creating a European space of economic self-expression; and secondly, at a far deeper level of legal semantic, because the universalist impulses of the CJEU are now reborn within an 'economic technology', or a 'scientification' of the European consumer and of the European common good.

Historically, a primary motif within the CJEU's treatment of the European consumer has been its 'de-socialisation' of the European consumer, or unravelling of the 1960s protecting (and protectionist) sentiment that was also apparent within early European Commission descriptors of the consumer as an integrated political personality or a 'citizen-consumer'.⁶⁸ Instead, the Court's efforts to dismantle national trade barriers of politicised consumer, effected by imposition of the proportionality principle – subjecting consumer protection regulation to forensic examination – was often welcomed as long overdue rationalisation of infantilising 'welfarist' regulation that merely protected entrenched industrial interests: additives in beer would not harm the health of German drinkers (Case 178/84, *German Beer*); much less would the addition of wholemeal to pasta undermine the welfare of Italian diners (Case 90/86 *Zoni*⁶⁹). At yet another level, however, the Court's rationalising *interpositio auctoritatis*, its efforts to prise the European consumer out of nationally-constructed consumption culture, also entailed a 'subjectification' of its own: the re-moulding of a European consumer as a confident and informed consumer, as an active and frontier-busting consumer who might forge the space of a specifically European market, and of Europe itself, through the atomistic act of consumption.⁷⁰

To the degree that such a characterisation of CJEU encounters with the European consumer is convincing, it can similarly be argued that the Court is often powered by an instrumentalist integrationist interest, wherein adjudication is less a matter of establishing legal entitlement and more a process of facilitation for unfettered market operation or for the establishment of economic provisions within a distinct European rather than national space. European citizens are subjectified and harnessed to the project of European market and nation-building. Unravelling established national regulatory complexes which balance provision against entitlement, the judge-kings of an activist CJEU might be suggested to have reversed the post-war socially-democratic settlement, reverting to an older instrumentalist conception in order to further the European integration project. Far more challengingly, the Court may also be argued to have impacted upon a conception of a European common good, again seeking universalism beyond the politics of finite communities; in this context, however, within a legal methodology of scientification and economic technology.

Adjudicating in matters of consumer protection and promoting a diffuse consumer interest, in which 'social-political expression' is atomised within a myriad of individual acts of self-gratification, the CJEU's judge-kings can thus be argued to have

⁶⁸ EEC Council Resolution on a 'Preliminary Programme for a Consumer Protection and Information Policy (*Official Journal of the European Union* 1975 C92/1)

⁶⁹ [1988] ECR I-4285.

⁷⁰ Dani, *supra* note 66.

been in structured pursuit of a conception of a European common good anchored within the putative universalism of market operation. Here, however, the *interpositio auctoritatis*, or moment of judicial decision is dominated not by emotion, but by rationality. In common with the early 20th Century adepts of free law methodologies, the Court looks beyond law to disciplines such as science and economics, which claim to reveal the objective truth of the world to law and which simultaneously preserve the coherence of legal method: '[T]he mechanism for the discovery of necessary legal change' was not one that might be 'discrete or casual'; instead, legal change, the adaptation of the abstract categories of law to social reality, should be 'organised and continuous in nature'.⁷¹ In the world of European consumption, organisation is accordingly furnished by hard science, continuity by modern, predominantly neo-liberal economics. Real rather than imagined dangers to the consumer can be identified by science, and an objective rather than constructed European common good can be found in economics: additives will not harm German or Italian consumers and all European – and, logically, non-European – citizens will benefit from 'limitless' consumer driven growth.

The conundrum of an exclusionary form of social welfare provision is solved: objective universal truths displace the constructed political values of the finite, closed, political community and open up the potential for wealth for all. Amen. Nonetheless, problems remain: the Court's jurisprudence is founded within a particular personification of the European subject, that of the rationally confident and consuming individual. But what of the very real persona of the 'anxious consumer',⁷² or the 'ethical consumer'; and what happens 'when the science runs out'?⁷³ The answers to these questions are to be found in European cases tackling the thorny issues of advanced modern agricultural methods, or the presence of genetically modified organisms (GMOs) or growth hormones within processes of agricultural production.⁷⁴ In these cases, however, the disturbing factor is not one that the Court departs from its organised and continuous method and responds to the concerns of anxious and ethical European consumers in order to confirm European bans on GMOs and hormones by means of retreat into a language of legal formalism;⁷⁵ but, rather that the Court has *no* language, *no* semantic within which it might directly engage with the concerns of the concrete, 'socialised' and often politically-motivated European citizen. The *interpositio auctoritatis* has been filled with science and law reborn as an economic technology,⁷⁶ which is deaf to the political, social and ethical values which cannot be integrated within its grammar of science and technology.

⁷¹ H. Laski, *A Grammar of Politics*, 4th ed. (London: Allen and Unwin 1958), 545.

⁷² Dani, *supra* note 66.

⁷³ M. Everson and E. Vos, *Uncertain Risks Regulated* (Oxford: Routledge 2008).

⁷⁴ See, for example, Case T-144/00 *Biret International SA v Council of the European Union* [2002] ECR II-17; Case T-13/99 *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-3305.

⁷⁵ For similar conclusions in relation to GMOs and hormones, see Dani, *supra* note 66.

⁷⁶ The term is distilled from Foucault's concept of political technology, see, in particular, M. Foucault, *Birth of Biopolitics: Lectures at the College de France, 1978-79*, (ed. M. Snellart), (London: Palgrave MacMillan 2008).

Good-bye to disenfranchisement? The redistributive effects of economic freedoms

European law's assault on the concept of legal entitlement, its remodelling of a bounded right into a universal opportunity is not simply born of neo-liberal sentiment, but is rather also a reflection of the challenges faced by law in adapting its operation to global social dynamism in the absence of strong institutions of political direction. Dahrendorf might protest that this technologized translation of his primary mechanism of conflict resolution undermines social integration; nonetheless, the Court may respond that it is still seeking a universal measure of justice, a means of securing welfare beyond closed community. The ambivalence within this 'legal adaptation process' to the new conflicts thrown up by unprecedented social dynamism has nonetheless, as noted, reached its peak in recent cases, which similarly unravel national labour constitutions. Seen from the purist, early Dahrendorf position, the cases of *Viking* (Case C-438/05), *Laval* (Case C-341/05) and *Rüffert* (Case C-346/06) are disturbing indeed. To the degree that important sociological analysis has demonstrated that an important industrial class still exists within Europe and has become increasingly isolated from national processes of political will formation,⁷⁷ the curtailment of national rights to strike represents a further 'bourgeois' curtailment of the strike-based political expression still afforded to a disadvantaged class of industrial workers;⁷⁸ a further undermining of the national institutions within which class conflicts were held in legal equilibrium. Nonetheless, from the CJEU viewpoint, the cases might similarly be argued to reflect its 'universal' socialising mission.

Eastern enlargement and the failure of Western Europe to afford a measure of democratically-legitimated redistributive justice to its recently-liberated eastern cousins is the backdrop against which the cases were decided, and it is also the backdrop against which the formalistically-flavoured *choice* of the Court to assert the hierarchical precedence of rights of establishment and service provision as well as competition law, above the constitutional traditions and democratic processes of the member states was taken. Piercing the veil of the Court's formalism, the CJEU's *interposito auctoritas* is revealed, mostly clearly in the terms deployed by its Advocate General Maduro, as a curious but disturbing melange of sentimentality and economic technology. For all his talk of the creation of a European social constitution, the measure of AG Maduro's notion of social justice in modern Europe is to be found in his promotion of social constitutionalism within a by now dominant European economic model of 'allocative efficiency'; an ill-timed, emotional and technological *auctoritas interposito*, which reacts to the clearly disadvantaged position of Eastern European workers with a notion of 'social justice' that sees them work for less than western workers, and western workers denied access to their own jobs, all in pursuit of a more efficient economy.

Herein lies the far wider problem within the CJEU's increasingly aspirational approach to its canon of economic rights. Convergence between these economic freedoms and the notion of 'genuine'⁷⁹ EU citizenship – in essence a matter of

⁷⁷ N. Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe* (Oxford: Oxford University Press 2008).

⁷⁸ M. Everson, 'A Very Cosmopolitan Citizenship; but Who Pays the Price?', in E. Spaventu, *European Citizenship* (Oxford: Hart Publishing forthcoming).

⁷⁹ Opinion of Advocate General Poiares Maduro in (Cases C-158 & 159/04) *Alfa Vita Vassilopoulos AE v Greece* [2006] ECR I-8135.

elevating economic rights to the same ‘immutable’ status as citizenship rights – both fundamentally alters our perceptions of entitlements and of provisions, and recalls the processes of subjectification to which European consumers have been exposed. The love of the CJEU for the individual European – the desire that all should be given opportunity – coincides happily with the frontier-busting universalism of neo-liberal precepts and is transformed into a legal semantic of economic technology, which isolates and atomises the individual as a *homo economicus*. Rights are no longer legal entitlements; but, are rather to be viewed as legal mechanisms which facilitate the ‘never-ending’ creation of provisions. The European citizen is reborn as a unit of economic production and is divorced from the social collectives in which values of ethics and solidarity might be politically established. Certainly, the wealthy might still buy themselves a measure of private welfare protection, but all classes are impacted upon by a sentimentality and economic technology, which strives for universalism, but which rejects all collective political efforts to humanise markets as retrograde manifestations of residual ‘risk aversion’ on the part of the populace.⁸⁰

The final message is simple: the European legal system has not only done much to create European Union, it has also done so with a keen eye to the need to create new mechanisms of legal conflict resolution suited to the social dynamism of a post-national world. Nonetheless, law has its own limits: in the absence of a strong and enabling relationship with political process, progressive law merely creates unstable paradigms of de-legislation, de-socialisation and disenfranchisement. A post-national law must re-establish itself as a procedural partner to political process.

Unfreezing the law-politics relationship through conflicts-law constitutionalism

How can we respond to this overburdening of law? What alternatives do we have when we must concede that Europe is unlikely to establish necessary political innovations in the foreseeable future? We cannot accomplish much in our ivory towers; but we can submit ideas, no matter how limited these might be. Our aim in the following is not one of investigating the various paradigms of legal integration theory, and more particularly, their current exhaustion; nor will we consider the normative merits of federalist visions. Instead, we restrict ourselves to a brief re-statement of the conflicts-law approach, its theoretical ambitions and practical limits. We cannot solve the problems described in the previous sections: the conflict-law approach is modest. Instead, conflicts-law constitutionalism’ demands an initial but vital re-configuration of the law and politics relationship. The ‘integration through law’ project – or law-mediated legitimacy in the EU – can only be secured through an alternative albeit radical proceduralisation of the category of law.

Conflicts-law constitutionalism

The premises of the approach can be summarised simply: the member states of the European Union are no longer autonomous. They are wholly interdependent and reliant on co-operation. There is also no escape from the fact that domestic policies still impact upon neighbours, or that European law may even intensify this process.

⁸⁰ Foucault, *supra* note 76.

By the same token, increased co-operation will not lead to establishment of socio-economic homogeneity or a strong federal entity in the foreseeable future. Instead, it is unlikely that Europeans will converge in their political perspectives: European democracies have divergent histories and uneven potential/willingness to pursue distributive objectives, respond to financial instability, or to meet environmental challenges. The institutionalisation of a pan-European welfare system will surely be defeated by complexity in social systems and diversity of entitlements. The future of the European project depends instead on construction and institutionalisation of a 'third way' between or beyond the defence of the nation state on the one hand, and federalist ambitions on the other.

If there is a kernel of truth in these premises, we must refrain from conceptualising European law as an ever more comprehensive body of rules and principles of progressively richer normative quality. European law must instead learn to live with its diversity and to take the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty very seriously indeed. 'Unity in Diversity'⁸¹ is Europe's true vocation and one, we suggest, that can be realised through a new type of conflicts law concretised within the EU's constitutional framework. This suggestion has its technical complexities. However, its core analytical and normative assumptions are transparent: Europeanisation and globalisation determine that contemporary societies are experiencing an ever greater gulf between decision-makers and those who are impacted upon by decision-making. This schism is a normative challenge to democratic orders. Constitutional states can no longer guarantee voice for all persons impacted upon by their internal decision-making processes. The democratic notion of self-legislation, which postulates that the addressees of a law are also its authors, nonetheless demands 'the inclusion of the other'. The conflicts-law approach builds upon this eternal observation: due to their interdependence, member states are no longer in a position to guarantee the democratic legitimacy of their policies. A European law that seeks to restrain such external effects and to compensate for the failings of national democracies derives its legitimacy from this compensatory function. With this, European law can finally free itself from the varied critiques of its legitimacy which have become ever more prescient in the last decades. Instead of demanding that the Union cure its own democracy deficit, we should detail and develop the potential of European law to compensate for the structural democracy deficits of European nation states.

'Wo aber Gefahr ist, wächst /das Rettende auch'⁸²

What difference does the conflicts-law approach make? This query deserves more detailed answers than can be given here. However, we will not completely shy away from commenting on the problems of fictitious commodities.

Money

Dysfunction in Monetary Union can no longer be ignored and has led to hectic activity, opaque bargaining and a degree of disregard for the rule of law which was

⁸¹ Article I-8 Draft European Constitutional Treaty (*Official Journal of the European Union* C 310,1 of 16 December 2004).

⁸² F. Hölderlin, *Patmos: Dem Landgrafen von Homburg überreichte Handschrift* (1802).

once far beyond the powers of juridical imagination.⁸³ A first question here is one of why an otherwise prolific constitutionalist academic community is suddenly so silent? One of very few German commentators who has sought to provide justificatory arguments for hectic European activity is Christian Calliess.⁸⁴ He invokes normative grounds – solidarity understood as a valid legal principle and duty within the EU – to justify departure from the letter of the rule of law. Solidarity is an overriding principle in the shadow of which law must cede its formal power. Solidarity as it is practiced among EU member states may, however, have far more mundane roots and less laudable effects.⁸⁵ What is apparent, however, is that its legal implementation will come at a price: solidarity demands aid for the other, but is also exercised with a view to correcting the other's 'failures'; a 'deficient' other who must therefore submit to the corrective economic governance regimes established by those who are offering their helping hand.⁸⁶ The danger underlying this approach is blindingly obvious: not only might Europe's extra-legal crisis management fail to achieve its objective, thus provoking social unrest, but it might also discredit the democratic institutions of the EU and the member states.⁸⁷ Jürgen Habermas has called in his most recent manifesto for an 'aggressive continuation of the quest for a democratically-legalised EU.'⁸⁸ The slow transition to a Fiscal Union, however, cannot be regarded as achieving this aim.

The recent jurisprudence of the CJEU suggests itself as a less dramatic but nonetheless acid test for the viability of the conflicts-law approach. The most basic of all operations in cases with international dimensions is called 'characterisation'. It is an operation which corresponds to the issue of competences in European law. The conflict with which we are confronted in cases such as *Viking* concerns economic freedoms on the one hand, and collective labour law on the other. Antoine Lyon-Caen, in a comment on the judgments, has lucidly accentuated the diversity of both bodies of law:

Labour law was constituted in western European societies as an alternative to the law of the market. It developed terminological distinctions, which must never be disregarded: commercial freedom here, freedom of trade there [...] To be sure, labour legislation was in place prior to this emancipatory move, but the new rules were designed to control work in a manner more or less independent from the rules of the market.⁸⁹

It follows from this diversity that EU economic freedoms cannot trump collective labour law. Both sets of norms are potentially applicable; but each possesses their

⁸³ Article 122(2) TFEU: 'Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken'. The financial crisis not qualified as 'natural disaster' but an 'exceptional occurrence' beyond the control of Greece, Ireland and Portugal.

⁸⁴ Calliess, *supra* note 15.

⁸⁵ W. Streeck, 'The Crisis of Democratic Capitalism', (2011) 71 *New Left Review*, 5-29.

⁸⁶ Calliess, *supra* note 24.

⁸⁷ Scharpf, *supra* note 6.

⁸⁸ Habermas, *supra* note 24.

⁸⁹ Translated by the authors. See Lyon-Caen, *supra* note 33.

own specific legitimacy. Rather than pleading for the supremacy of the former and defending the latter as inviolate, we should ask how the two regimes can be coordinated. Such an effort is clearly visible in the Posting of Workers Directive;⁹⁰ it also seems obvious that Article 153(5) TFEU (ex-Article 137(5)), which stipulates that 'the provisions of this Article shall not apply to pay, the right of association, the right to strike and the right to impose lock-outs', can, and indeed should be read in this light. Treaty references to national orders should be understood as a principle of respect for labour law and a pragmatic legal expression of our understanding for the enormous difficulties inherent to any attempt to overcome diverse national laws by means of imposition of a uniform European regime.

Does all this mean that the established democracies of old Europe should be entitled to protect the interests of their labour force against newcomers from accession states? This question, though important, nonetheless does not adequately address the primary issue at stake. We must ask whether it is in the long-term interests of the new member states to send cheap labour to old Europe and to destroy the welfarist traditions of their European neighbours; we must consider the implications of such moves for the long-term competitiveness of the accession states and their potential for a similar welfarist evolution. To cite Tony Judt: why should we rush

to tear down the dikes laboriously set in place by our predecessors? Are we so sure that there are no floods to come? [...] To abandon the labours of a century is to betray those who came before us as well as generations yet to come.⁹¹

It would be misleading to represent the social democratic *acquis* as an ideal world or an ideal past. 'But among the options available to us in the present, it is better than anything else to hand.'⁹²

All this is not to suggest that the law should or could immunise itself against the transformative aspects of modernity: the modern social conflict is categorically different from the form of class conflict which generated historic labour law.⁹³ Nonetheless, 'different' labour is still a 'fictitious commodity' in the Polanyian sense. The form of social protest which can currently be observed is amorphous and not yet in a position to constitute the political agenda of a 'countermovement'. Political discontent is nevertheless clearly visible. The conflicts-law approach does not offer substantive recipes here. But, this approach is open to change, ready to accept that labour and employment relationships need not be uniform in a forever diverse European Union, and critical of European law's reduction of social justice to promotion of economic liberties; it can claim to be compatible with, and supportive of, a democratic structuring of labour markets and labour law.

'Land'

European law must similarly be made open to political debate in Europe on atomic energy. Atomic energy confronts us with fundamental difficulties. It took Germany

⁹⁰ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. *Official Journal of the European Union* 1996, L 18, 1.

⁹¹ *Supra* note 33.

⁹² *Ibid.*

⁹³ Dahrendorf, *supra* note 53, 23-48.

decades of political contestation before it concluded 'after Fukushima' that *Ausstieg* would be politically opportune, as well as economically and technologically feasible. There are many reasons why other societies are not prepared to follow this example. But the choices to be made should not be delegated to expert circles, intergovernmental bargaining, outdated treaty provisions, or to CJEU.⁹⁴ Energy policy must be embedded in legitimating political processes. Such processes are unlikely to end in European uniformity. They may, however, promote mutual understanding and a readiness to take the concerns of neighbouring societies seriously. How can this be accomplished? The formation of public opinion is under way. With the new citizens initiative, European law at last found a concrete means to enhance transnational communication and contestation.⁹⁵

There are, we conclude, visible moves towards a reconfiguration of the law-politics relationship. How likely is it that they will survive? How likely is it that this currently amorphous quest can be transformed into a political agenda? These are queries beyond the law's and the lawyers' competences.

⁹⁴ See Joerges, *supra* note 1, section VI.

⁹⁵ See C. Joerges, 'The Timeliness of Direct Democracy', (2011) 2 *Beijing Law Journal*. Available at: <<http://www.scirp.org/Journal/blr>>.

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