SPECIAL ISSUE: THE LAW OF THE NETWORK SOCIETY
A TRIBUTE TO KARL-HEINZ LADEUR

Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation

By Christian Joerges[*]

"*Sozialstaatlichkeit*" is a collection of essays dedicated to the author of *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation*?[1] Reflections on the survival of welfarism in the postnational constellations after his analyses of globalisation[2] and Europeanisation?[3] Affirmative references to the Discourse Theory of Law and Habermasian notions of Proceduralisation at all levels of governance against "Proceduralisation and its use in a post-modern legal policy?"[4] "Are you trying to deliver something like an Anti-Ladeur." No, neither Sisyphus nor Hercules, let alone Friedrich Engels, has inspired this essay. Its argument should rather be observed in the spirit of conflict-of-laws, *i.e.* of a discipline which accepts as a normative fact that different academic projects may be worthwhile despite of, or even because of, the differences of their premises and of the logics of their development, which may be inspired by complementary perceptions of a common *problématque.*

We will develop our argument in three steps. The first will recall the German *Sozialstaats* controversy and its links with the theoretical and methodological debates of the seventies and eighties (I). We will proceed with a reconstruction of the social deficit of the European integration project and a critique of the efforts to compensate it through various

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[1] KARL-HEINZ LADEUR, NEGATIVE FREIHEITSRECHTE UND GESELLSCHAFTLICHE SELBSTORGANISATION, 252 (2000); See also, more recently, KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT (2006).

[2] KARL-HEINZ LADEUR, GLOBALISATION AND THE CONVERSION OF DEMOCRACY TO POLYCENTRIC NETWORKS: CAN DEMOCRACY SURVIVE THE END OF THE NATION STATE? (2003).

[3] Karl-Heinz Ladeur, '*We, the European People . . .'—Relâche?* –, 14 EUROPEAN LAW JOURNAL*,* 147 (2008); see previously, *Towards a Legal Theory of Supranationality – The Viability of the Network Concept*, 3 European Law Journal 33 (1997).

[4] KARL-HEINZ LADEUR, POSTMODERNE RECHTSTHEORIE. SELBSTREFERENZ - SELBSTORGANISATION - PROZEDURALISIERUNG 2nd ed, (1995);*Proceduralisation and its use in a post-modern legal policy*, in GOVERNANCE IN THE EUROPEAN UNION, 53 (Olivier De Schutter, Notis Lebessis & John Paterson, eds., 2001).

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techniques promoting social Europe (II). In a third step we will present the conflict of law alternative to the many suggestions to build on the model of the nation state in the constitutionalisation of Europe (III). The final sections will deal with the implications of that approach for Europe's social deficit (IV) and, albeit very briefly, for the constitutionalisation process (V).

A. The Legacy of the *Sozialstaat*

The tensions between social justice and the formal rationality have been a core issue of legal theory ever since their discovery by Max Weber.[5] They were taken up in the first great constitutional debate in the newly constituted Federal Republic of Germany. The two opponents of this debate were Ernst Forsthoff,[6] one of the most respected disciples of Carl Schmitt, on the one hand, and Wolfgang Abendroth, defending the legacy of Hermann Ignaz Heller, on the other.[7] The argument was about Article 20(2) of the German Basic Law which states: "The Federal Republic of Germany is a democratic and social federal state". According to Forsthoff's interpretation, that social state clause was to be understood as a programmatic commitment outside constitutional law because any striving for social justice would have to resort to techniques that were incompatible with the formal structure of the rule of law. Abendroth, in his counter argument, restated what Herman Heller had argued in his reading of Germany's first democratic constitution, the Weimar *Reichsverfassung*, namely that the promise of social justice is inherent in the very idea of democratic rule.[8] The debate attracted much attention also beyond the German borders,[9] and it developed further. Suffice it here to mention the re-conceptualisation of Abendroth's position by his most famous "*Habilitand*". According to Habermas, the rule of

[5] See, MAX WEBER ECONOMY AND SOCIETY 873-874 (1978).

[6] Ernst Forsthoff, *Begriff und Wesen des sozialen Rechtstaates*, *in* VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER, 8, 12 (1954).

[7] In the prestigious *Veröffentlichungen*, Abendroth was present only with a short comment (*Id*., 85-92). He published his argument instead in the *Festschrift* for political scientist Bergsträssser: *Zum Begriff des demokratischen und sozialen Rechtstaates im Grundgesetz der Bundesrepublik Deutschland*, FESTSCHRIFT LUDWIG BERGSTRÄSSER, 279 (1954).

[8] See Hermann I. Heller, *Rechtsstaat oder Diktatur?* (199129), reprinted in GESAMMELTE SCHRIFTEN, Vol. 2, 451 (1971). See Michael Stolleis, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, BAND 3: STAATS- UND VERWALTUNGSRECHTSWISSENSCHAFT IN REPUBLIK UND DIKTATUR 1914-1945, 183-186; Wolfgang SCHLUCHTER, ENTSCHEIDUNG FÜR DEN SOZIALEN RECHTSSTAAT: HERRMANN HELLER UND DIE STAATSTHEORETISCHE DISKUSSION IN DER WEIMARER REPUBLIK, 2ND ED. (1983); D. DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERRMANN HELLER IN WEIMAR (1997).

[9] See, Peter C. Caldwell, *Is a 'Social Rechtsstaat' Possible? The Weimar Roots of a Bonn Controversy*, in FROM LIBERAL DEMOCRACY TO FASCISM: LEGAL AND POLITICAL THOUGHT IN THE WEIMAR REPUBLIC, 136-153, (P. C. Caldwell & W.E. Scheuerman, eds., 2000). See the Special Issue on Social Democracy of the 17 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE ON SOCIAL DEMOCRACY (C. Harvey ed. 2004).

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law and democracy have to be understood as intrinsic and interdependent elements of the constitutional nation state. Constitutional democracies assign co-original validity to private autonomy and political rights – and this is their potential to realize social justice.[10]

The importance of the debate in the controversies over Germany's anti-liberal traditions of legal thought can hardly be over-estimated. It goes without saying that exponents of the academic left such as Helmut Ridder[11] and Rudolf Wiethölter[12] identified themselves with Heller's legacy. It was equally unavoidable that the proper understanding of *Sozialstaatlichkeit* became an object of heated debates throughout the seventies and the early eighties. At least in hindsight it seems obvious that these debates were more than just memory politics fought out in the shadow of Germany's past. These debates responded more or less explicitly to new internal and external challenges to the legacy of *Sozialstaatlichkeit.* The academic torchbearers of the day were the "proceduralisation" of the category of law on the one hand,[13] and the concept of "reflexive" law on the other. [14] Karl-Heinz Ladeur was a very active, albeit less glamorous and more subversive, contributor to these debates.[15] He had long started to develop an original reconstruction of legal formalisms and post-formalist transformations of law and legal methodology which he has kept on elaborating ever since.

The second challenge was Europeanisation. When European law and politics started to make themselves felt beyond the established professional political and academic circles

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[10] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 82 *(*1996).

[11] HELMUT RIDDER*,* DIE SOZIALE ORDNUNG DES GRUNDGESETZES (1975).

[12] Rudolf Wiethölter, *Die Position des Wirtschaftsrechts im sozialen Rechtsstaat*, in WIRTSCHAFTSORDNUNG UND RECHTSORDNUNG: FESTSCHRIFT ZUM 70. GEBURTSTAG VON FRANZ BÖHM (Helmut Coing, Heinrich Kronstein & Ernst-Joachim Mestmäcker eds., 1965).

[13] The first to proclaim the turn to proceduralisation was R. Wiethölter in his analysis of the Constitutional court's judgment in the co-determination litigation; see his article, *Entwicklung des Rechtsbegriffs (am Beispiel des BVG-Urteils zum Mitbestimmungsgesetz und – allgemeiner – an Beispielen des sog. Sonderprivatrechts),* in RECHTSFORMEN DER VERFLECHTUNG VON STAAT UND WIRTSCHAFT, 38-59 (V. Gessner & G. Winter eds., 1982), and later *Proceduralisation of the Category of Law*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE, 501-510 (Christian Joerges & D.M. Trubek, eds., 1989). Habermas has elaborated his position in BETWEEN FACTS AND NORMS (note 10), 388.

[14] Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW AND SOCIETY REVIEW 239-285 (1983).

[15] See his *Flexibilisierungsstrategie, -- Alternativen zum ‚Steuerungsstaat'—"Reflexives Ewchr" – 'Prozedeuralisierung' – 'Ökologisches Recht'*, in WORKSHOP ZU KONZEPTEN DES POSTINTERVENTIONISTISCHEN RECHTS, 311-335 (G. Brüggemeier & Christian Joerges eds. 1984); *From Universalistic Law to the Law of Uncertainty: On the Decay of the Legal Order's 'Totalizing Teleology' as Treated in the Methodological Discussion and its Critique from the Left*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE, 567-590 (Christian Joerges & D.M. Trubek eds., 1989).

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during the seventies, this process was perceived primarily as a liberating move, a chance for modernisation.[16] It was at the same time obvious that the integration project entailed risks[17] – and in view of the paradigmatic importance of the *Sozialstaats* controversy, the resurfacing of this debate at European level was only a matter of time.

B. Europe's Social Deficit: A Reconstruction of the Institutionalisation of the Integration Project

During the first decades of European integration, the "decoupling" of "the economic" and "the social" did not matter much. Only since the mid-eighties with the new dynamics of integration process this peaceful co-existence eroded. "Social Europe" then became a real nightmare for the proponents of European integration rather than a noble complement of the project of a European constitution with the French referendum of 2005. The perceived dismantling of the welfare state accomplishments had been of decisive importance for a significant portion of French voters,[18] and remained important in later campaigns, even the recent one in Ireland. This importance was a discomforting experience even for the proponents of a European social model. They found themselves in very irritating alliances with populist movements, which presented precisely the kind of irrationalism which first Max Weber[19] and later Friedrich August von Hayek[20] had been concerned about. The old tensions between the rule of law and the *Sozialstaat* have again come to the forefront – and they seem to exhibit the same kind of destructive potential that has characterised their history. History, however, does not repeat itself. It is important to understand the impact of Europe's postnational constellation on the patterns of the controversies which all European societies have experienced – particularly because Europe is in such troubled waters. We will start our analysis with a brief historical account. This analysis will not attempt to explain "what really happened in the past". It will instead reconstruct the institutional *locus* of "the social" in the various stages of the integration project.[21]

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[16] See the pertinent publications of Norbert Reich in the early 80s, e.g. his *The Regulatory Crisis: American Approaches in the Light of European Experiences*, AMERICAN BAR ASSOCIATION JOURNAL 693-704 (1983).

[17] J. GALTUNG, THE EUROPEAN COMMUNITY: A SUPERPOWER IN THE MAKING (1973).

[18] For references see further, Christian Joerges, *On the Disregard for History in the Convention Process*, 12 EUROPEAN LAW JOURNAL 2–5 (2006).

[19] See *supra* note 5. For a controversial renewal of this argument see GÖTZ ALY, HITLER'S VOLKSSTAAT. RAUB, RASSEMKRIEG UND NATIONALER SOZIALISMUS (2005); The Nazis cared about the welfare of their *Volksgenossen* and underlines uncomfortable continuities in social policies up to the present.

[20] FRIEDRICH AUGUST VON HAYEK, THE ROAD TO SERFDOM (1944).

[21] On the following see further, Christian Joerges & F. Rödl, *The 'Social Market Economy' as Europe's Social Model?,* EUI Working Paper Law No. 2004/8, in A EUROPEAN SOCIAL CITIZENSHIP? PRECONDITIONS FOR FUTURE POLICIES IN HISTORICAL LIGHT, 125 (Lars Magnusson & Bo Stråth eds., 2005); Christian Joerges, *What is left of the European Economic Constitution? A Melancholic Eulogy*, 30 EUROPEAN LAW REVIEW 461 (2005). For a recent modification

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I. The "Decoupling" of the Social from the Economic Constitution in the Formative Period

The project of European integration was launched not as an experiment in supranational democracy. This observation by no means downplays its historical importance and dignity. The apparent political modesty of the economic objective documented a break with the previous nationalist strive for power. After the "bitter experiences" of the Second World War and its devastating effects the prospect of economic integration was intended as a means of ensuring lasting peace and economic well-being. The primarily economic and technocratic design of the project appeared at the same time to its architects to be a precautionary shield in a political constellation which was still unsettled. It was a choice for what seemed possible and reasonable. With hindsight, however, the implications of this choice, which were hardly foreseeable and certainly not a salient issue half a century ago, become apparent.

The choice for "economic Europe" implied a renunciation of a "European social model" which would have addressed the tensions between the rule of law and social justice. This choice has been coined by Fritz W. Scharpf as a decoupling of the social sphere from the economic sphere.[22] This is an analytical observation, not a normative statement on the *finalité* of the European project. The normative evaluation is of course controversial. The exclusion of the social sphere from the integration project has the potential for failure which is of constitutional significance for those who assume that the citizens of constitutional democracies are entitled to determine in what kind of social order they prefer to live. This is a political right of such fundamental constitutional significance. This is supported by the fact that in the course of the negotiations, France had tried to consolidate the competences of the Community in the field of social policy.[23] Are we to interpret its failure and the neglect of "the social" in the formative era as a definite decision on a constitutional issue of utmost political sensitivity and practical importance? "Social Europe" was not yet on the agenda and there was simply no need to engage in pertinent debates.[24] Only in the course of the intensifying impact of the Europeanisation process was Europe's "social deficit" to become apparent.

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which focuses on the deconstruction of the German variety of capitalism, see M. Höpner & A. Schäfer, *Eine neue Phase der europäischen Integration: Legitimitätsdefizite europäischer Liberalisierungspolitik*, in DIE POLITISCHE ÖKONOMIE DER EUROPÄISCHEN INTEGRATION 129 (M. Höpner & A. Schäfer eds., 2008).

[22] F.W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40 JOURNAL OF COMMON MARKET STUDIES 645 (2002).

[23] *Id.*, 645.

[24] S. Leibfried & M. Zürn, *The National Configuration of the State in the Golden Age*, in TRANSFORMATIONS OF THE STATE, 93 (St. Leibfried & M. Zürn eds., 2005) and J. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INTERNATIONAL ORGANIZATION 379 (1982).

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Contemporary theories of legal integration, however, had to conceptualise the European Community as it was institutionalized. Two such efforts stand out and remain of lasting importance: Germany's ordo-liberalism and Joseph Weiler's theory of supranationalism.

Ordo-liberalism is not only an important theoretical tradition in Germany, but also a powerful contributor to German ideational politics. The ordo-liberal school[25] reconstructed the legal essence of the European project as an "economic constitution", which was not in need of democratic legitimacy. The freedoms guaranteed in the EEC Treaty, the opening up of national economies and anti-discrimination rules, and the commitment to a system of undistorted competition were interpreted as a quasi-Schmittian "decision" that supported an economic constitution, and which also conformed with the ordo-liberal conceptions of the framework conditions for a market economic system. The fact that Europe had started out on its integrationist path as a mere economic community lent plausibility to ordo-liberal arguments – and even required them: in the ordo-liberal account, the Community acquired a legitimacy of its own by interpreting its pertinent provisions as prescribing a law-based order committed to guaranteeing economic freedoms and protecting competition at the supranational level. This legitimacy was independent of the State's democratic constitutional institutions. By the same token, it imposed limits upon the Community: thus, discretionary economic policies seemed illegitimate and unlawful. The ordo-liberal European polity consists of a twofold structure: at the supranational level, it is committed to economic rationales and a system of undistorted competition, while, at national level, re-distributive (social) policies may be pursued and developed further.[26]

"Integration through law" is the legal paradigm commonly associated with the formative era of the European Community outside the German borders.[27] It is not by chance that

[25] European integration was, in its early years, by no means, an uncontested project among the protagonists of ordo-liberalism. See MILÈNE WEGMANN, FRÜHER NEOLIBERALISMUS UND EUROPÄISCHE INTEGRATION: INTERDEPENDENZ DER NATIONALEN, SUPRANATIONALEN UND INTERNATIONALEN ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT (1932-1965) 297, 351(2002). Her analysis accords with the enquiry into the politics of competition policy in preparation of the EC-treaty by Y. Karagiannis, *Preference Heterogeneity and Equilibrium Institutions: The Case of European Competition Policy*, PhD Thesis EUI Florence 2007, Ch. 7.

[26] The importance of the ordo-liberal school in Germany's private and economic law academia qand all of germany's important advisory institutions contrast markedly with its neglect by Germany's *Staatsrechtslehre* (public and constitutional law) and in the social sciences (for notable exceptions see Ph. Manow, *Modell Deutschland as an interdenominational compromise*, Working Paper 003/2001, Minda De Gunzburg Centre for European Studies.; A. Ebner, *The intellectual foundations of the social market economy. Theory, policy, and implications for European integration*, 33 JOURNAL OF ECONOMIC STUDIES 206 (2006). Publications in English are rare. All the more important is M. FOUCAULT, NAISSANCE DE LA BIOPOLITIQUE. COURS AU COLLÈGE DE FRANCE, (2004), in particular the lectures of 7 February (at 105-134) and of 14 February 1979 (at 135-164). See also the references in Christian Joerges, *What is left of the European Economic Constitution? – A Melancholic Eulogy*, 30 EUROPEAN LAW REVIEW 461, 465 (2005).

[27] See, path breaking, J.H.H. Weiler, *The Community System: the Dual Character of Supranationalism*, 1 YEARBOOK OF EUROPEAN LAW 257 (1981).

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generations of scholars have built upon it or tried to decipher its sociological basis.[28] The strength of the paradigm may well rest (in part) on assumptions that become apparent only when social and economic policies are viewed through its lenses. Then, we become aware of a *Wahlverwandtschaft* with German ordo-liberalism, in that only the European market-building project was juridified through supranational law, whereas social policy at European level could, at best, be said to have been handled through intergovernmental bargaining processes. This vicinity has its limits, however. It was not intended that Joseph Weiler's legal supranationalism would overrule and outlaw "the political" in the same way as ordo-liberalism. It is nevertheless true that in Weiler's analysis "social Europe" was an unlikely option, simply because its advent was dependent on unanimous intergovernmental voting.

To summarise: Europe was conceived according to principles of a dual polity. Its "economic constitution" was non-political in the sense that it was not subject to political interventions. This was its constitutional-supranational *raison d'être*. Social policy was treated as a categorically-distinct subject. It belonged to the domain of political legislation, and, as such, had to remain national. Fritz Scharpf's decoupling thesis captures this constellation well, without, however, providing a basis for a definite normative theory on the constitutionalisation of Europe. It is nevertheless possible to interpret his thesis as a theory with normative implications. Scharpf's analysis rests upon the assumption that the social integration of capitalist societies will require a balance between social and economic rationality. This is not only a sociological theory,[29] but also an assumption that summarises a political preference rooted in the histories of European societies.[30] It seems hence unsurprising that it should become imperative for European politics to address the social dimensions and implications of the integration project,[31] and it seems adequate to interpret the "decoupling" of the social from the economic order not as a kind of Schmittian decision against a European social model but as a contingent temporary compromise.

II. The Completion of the Internal Market, the Erosion of the Economic Constitution and the Advent of Social Europe

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[28] Most recently, A. Vauchet, '*Integration-through-Law'. Contribution to a Socio-history of EU Political Common sense*, EUI Working Paper RSCAS 2008/10.

[29] See among the classical studies by Jürgen Habermas his *Towards a Reconstruction of Historical Materialism,* in JÜRGEN HABERMAS ON SOCIETY AND POLITICS, 114 (S. Seidman ed., 1989).

[30] Thus, TONY JUDT, POSTWAR. A HISTORY OF EUROPE SINCE 1945 777 (2005).

[31] Interestingly enough, German ordo-liberalism was well accustomed to this *problématique*. Its early proponents conceptualised it as the interdependence[31] of societal and economic "orders" (See, most famously, WALTER EUCKEN, GRUNDZÜGE DER WIRTSCHAFTSPOLITIK, 180 (1990); out of the rich literature on the interdependence theorem, see M. Wegmann (note 25), in particular 369.

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What seemed originally like a sustainable equilibrium was not, however, to remain stable. One important reason for its instability was the progress of the integration project. The Delors Commission's 1985 *White Paper on Completion of the Internal Market*[32] is widely perceived not only as a turning point, but also a breakthrough in the integration process. Jacques Delors' initiative provided the hope of overcoming a long phase of stagnation; the means to this end was the strengthening of Europe's competitiveness. Economic rationality, rather than "law", was, from now on, to be understood as Europe's orienting maxim, its first commitment and its regulative idea. In this sense, it seems justified to characterise Delors' programme as a deliberate move towards an institutionalisation of economic rationality. This seems even more plausible when we consider two complementary institutional innovations accomplished through, and subsequent to, the Maastricht Treaty, namely, the Monetary Union and the Stability Pact. Europe resembled a market-embedded polity governed by an economic constitution, rather than by political rule.

This characterisation, however, proved to be too simplistic.[33] What had started out as an effort to strengthen Europe's competitiveness and to accomplish this objective through new (de-regulatory) strategies, soon led to the entanglement of the EU in ever increasing policy fields and the development of sophisticated regulatory machinery. It was, in particular, the concern of European legislation and the Commission with "social regulation" (the health and safety of consumers and workers, and environmental protection) which served as irrefutable proof of this. The weight and dynamics of these policy fields had been thoroughly under-estimated by the proponents of the "economic constitution." Equally important and equally unsurprising was the fact that the integration process intensified with the completion of the Internal Market and affected ever increasing policy fields. This was significant not so much in terms of its factual weight, but in view of Europe's "social deficit," in terms of the new efforts to strengthen Europe's presence in the spheres of labour and social policy.

These tendencies became truly significant during the bargaining over the Maastricht Treaty, which was adopted in 1992. This is why this Amendment of the Treaty, officially presented as both an intensification and a consolidation of the integration project, met with fierce criticism. The most outspoken critique came not from the political left, but from the proponents of the new economic philosophy, and, in particular, from Germany's ordo-liberals.[34] Following the explicit recognition and strengthening of new policy competences,

[32] Commission of the EC, *Commission White Paper to the European Council on Completion of the Internal Market*, COM (85) 310 final of 14 June 1985.

[33] See, on the following in more detail, Christian Joerges, *Economic Law, the Nation-State and the Maastricht Treaty*, in EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION?, 29 (R. Dehousse ed., 1994).

[34] See M. Streit & W. Mussler, *The Economic Constitution of the European Community. From 'Rome' to 'Maastricht'*, 1 EUROPEAN LAW JOURNAL, 5 (1995) and previously M. Streit, *Soziale Marktwirtschaft im europäischen Integrationsprozeß: Befund und Perspektiven*, *in* 50 JAHRE SOZIALE MARKTWIRTSCHAFT, 177 (B. Cassel ed., 1998).

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which was accomplished in Maastricht, it seemed simply no longer plausible to assign a constitutive function and normative dominance to the "system of undistorted competition" because this competition policy had now been downgraded to one among many commitments. In addition, the expansion of competences in labour law by the Social Protocol and Agreement on Social Policy of the Treaty blurred the formerly distinct/clear lines between Europe's (apolitical) economic constitution and the political responsibility assumed by Member States in relation to social and labour policies.

III. The Three Pillars of Social Europe and their Fragility

The quest for social Europe has gained ever increasing momentum.[35] Three events nurtured the hope that progress, if slow, would become irresistible sooner or later. One was the invention of the Open Method of Coordination at the Lisbon Council of 2000.[36] This Council had primarily been dedicated to knowledge, society issues and to setting very ambitious goals for Europe in pertinent industries. However, the Council felt that the agenda of "social Europe" should simultaneously be renewed. That was a daring exercise and promise. What, until then, had been perceived as an obstacle to the strengthening of Europe's social dimension, namely, the lack of genuine European competences and the unavailability of the traditional "Community method" was now presented as a normative virtue with some regulatory potential.[37]

The second event was the inclusion of Social Europe in the deliberations of the European Convention. This was by not envisaged at the outset of the proceedings. "Social Europe", was not part of the original Convention agenda. With hindsight, that proved to be an untenable, even incomprehensible design in a project aiming at a "Constitution for Europe". The Working Group on "Economic Governance" was hence complemented by an additional Working Group on "Social Europe".

Social Europe is once again and without any significant changes present in the Treaty on the Functioning of the European Union, signed at Lisbon on 13 December 2007. We observe hence a remarkable continuity in the discussion on the three constitutive

[35] As an indicator of a new confidence see B. Bercusson. S. Deakin, P. Kotsitinen, Y. Kravaritou, U. Mückenberger. A. Supiot & B. Veneziani, *A Manifesto for Social Europe*, 3 *EUROPEAN LAW JOURNAL* 189 (1997) claiming that the Charter of the Fundamental social Rights of Workers be combined with Maastricht Protocol on Social policy so as to "lay the legal foundations for a dynamic European social constitution."

[36] Available at http://europa.eu.int/council/off/conclu/mar2000/index.htm, last accessed 14 February 2009.

[37] See G. de Burca & J. Scott eds), LAW AND NEW *GOVERNANCE IN THE EU AND THE US,* (2006). Continental lawyers tend to be more sceptical. See the references in Christian Joerges, *Integration Through De-Legalisation?,* 33 EUROPEAN LAW REVIEW 219, 311 notes 9 and 11 (2008); more recently see Ch. Möllers, *Die Governance-Konstellation: Transnationale Beobachtung durch öffentliches Recht, in* GOVERNANCE IN EINER SICH WANDELNDEN WELT, PVS-SONDERHEFT, 238, 254 (G.F. Schuppert & M.Zürn eds., 2008).

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elements of "Social Europe". All of the three elements can be understood as resulting from long-term developments. Their validity and impact would be strengthened by an adoption of the Lisbon Treaty, but would not be dependent on what is now an unlikely event.

In view of its generality and status in both the *Draft Constitutional Treaty* and the *Lisbon Treaty*, the commitment to a "competitive social market economy" is the first element to be mentioned here.[38] The formula owes its quasi-constitutional dignity to an initiative by the then Foreign Ministers Joschka Fischer and Dominique Villepin in the deliberations of the European Convention. It was then understood as a political signal and has retained this status. The positive connotations of its signal certainly stem from its historical origin.[39] The notion of the "social market economy" was coined in the early Federal Republic. It represented a social model that was distinct from Hermann Heller's "social *Rechtstaat"*, but nevertheless symbolised a "third way" between *laisser-faire* capitalism on the one hand and socialism on the other. That third way was quite a well-defined programmatic which Alfred Müller-Armack had developed in numerous publications.[40] This programmatic envisaged redistributive policies through taxation and subsidies, minimum wages, welfare aid, tenant subsidies, investments in higher education, the objective of a high rate of employment. "The social" was hence relying on a host of competences which are not available at European level. For that simple reason, "the competitive social market economy" cannot be equated with its historical model.[41] As a former judge of the German

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[38] See Article 3 (3), DCT. Art 3.3 LT: 3. Draft treaty establishing a constitution for Europe submitted to the European Council meeting in Thessaloniki, 20 June 2003 European Convention. Luxembourg : OOPEC, 2003. Also published in the Official Journal, C169, 18 July 2003 online (105 pages) at http://europa.eu.int/eur-lex/en/archive/2003/c_16920030718en.html, last accessed 14 February 2009.

.[39] On the following see further, Ph. Manow, *Modell Deutschland as an interdenominational compromise*, Working Paper 003/2001, Minda De Gunzburg Centre for European Studies.; A. Ebner, *The intellectual foundations of the social market economy. Theory, policy, and impolications for European Integration*, 33 JOURNAL OF ECONOMIC STUDIES 206 (2006) ; Christian Joerges & F. Rödl, *The 'Social Market Economy' as Europe's Social Model?,* in A EUROPEAN SOCIAL CITIZENSHIP? PRECONDITIONS FOR FUTURE POLICIES IN HISTORICAL LIGHT, 125 (L. Magnusson & B. Stråth eds., 2005).

[40] See his article, *The principles of the social market economy*, 3 THE GERMAN ECONOMIC REVIEW 89 (1998); *Soziale Marktwirtschaft*, in HANDWÖRTERBUCH DER SOZIALWISSENSCHAFTEN*,* 390-392 (Gustav Fischer, J.C.B. Mohr, Vandenhoeck & Ruprecht eds., 1956) and the analysis of A. Ebner, *The intellectual foundations of the social market economy. Theory, policy, and implications for European integration*, 33 JOURNAL OF ECONOMIC STUDIES 206 (2006).

[41] Its inclusion among the objectives of the Union is all the more remarkable, however, in the light of a seminal judgment of the German Constitutional Court of 1954 (BVerfGE 4, 7 ff.) which held that the constitution leaves the decision on the order of the economy to (the) Parliament. That holding was in line with opinion prevailing among the great majority of German Constitutional lawyers who all insisted upon the primacy of the legislature elected in accordance with majoritarian democratic values, even in instances where its policies have appeared opportunistic and unprincipled. Germany's post-war constitutionalism was in that respect closer to Hermann Heller's than to the visions of Ordo-liberalism.

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Constitutional Court Ernst-Wolfgang Böckenförde,[42] commented more than a decade ago: "European law cannot but realize a pure market economy because it does not have the means of establishing a social market economy". Böckenförde referred to the law as it stood in 1979 – but so it stands today.

The recognition of "social rights" (138 ECT; 151 LT) encounters similar problems. Here one has to differentiate. Collective rights, such as the right to strike, do not have a fixed prescriptive content, but are an empowerment to promote social objectives.[43] Social rights which grant entitlements, have to cope with a twofold difficulty. Such rights need to be substantiated by special legislation and supported by financial means.[44] This is in many cases a serious obstacle to their recognition at European level. To point to this problem is by no means to be understood as a principled objection. As Jürgen Habermas underlines,[45] it is the political quality of social rights which requires an engagement of the various branches of the political system.[46] At European level, however, the judiciary will have to assume all of these functions.

The third pillar of social Europe, namely the new "soft law" mechanisms for the co-ordination of social and labour market policies,[47] is the most delicate of all three. Many proponents of this mode of governance propose its legitimation in view of its potentially beneficial effects. Others underline and seek to promote procedural qualities. This complex debate cannot be taken up in the present context in any detail. Suffice it to note that in my own view, both defences of the "open method of co-ordination" fail to take the very idea of constitutionalism, namely, the idea of law mediated, and rule-of-law bound governance seriously enough.[48]

Can Social Europe be established on those three pillars? The answer seems obvious if Social Europe is expected to provide a supranational functional equivalent for the national

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[42] ERNST-WOLFGANG BÖCKENFÖRDE, WELCHEN WEG GEHT EUROPA? 23 (1979).

[43] For a thorough review of the state of the debate see further, G. Orlandini, *Right to Strike, Transnational Collective Action and European Law: Time to Move On?,* Jean-Monnet Working paper 08/072007. On the recent jurisprudence of the ECJ see Section IV below.

[44] See, *e.g.*, E.-W. Böckenförde, *Die sozialen Grundrechte im Verfassungsgefüge*, in STAAT, VERFASSUNG, DEMOKRATIE. STUDIEN ZUR VERFASSUNGSTHEORIE UND ZUM VERFASSUNGSRECH*t*, 146 (Frankfurt a.M.: Suhrkamp ed., 1991).

[45] Habermas, *supra* note 10, 77.

[46] Böckenförde, *supra* note 44, 152.

[47] See, especially, Article I-14 (4) DCT; the assignment of a competence 'to promote and co-ordinate the economic and employment policies of the Member States' has been repealed. Article I-11 (3) as amended on 22 June 2004.

[48] Christian Joerges, *Integration through de-legislation?*, E.L.REV. 291, 310 (2008), available at: http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf, last accessed 14 February 2009

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welfare state traditions. This is a finding of devastating proportions for all those who seek to uphold the Heller-Abendroth tradition. It cannot, however, be read as a mandate to establish a neo-liberal Union. While European governments have not managed to come to a robust agreement on a constitutional treaty, European citizens outside Spain have rejected constitutional ambitions in each and every referendum submitted to them not the least because of the neo-liberal messages which were attributed to the constitutional project. The state of the Union has not been improved by a series of judgments of the European Court of Justice, in which the Court has strengthened the economic liberties guaranteed in the Treaty with such rigidity that neither hard law nor soft law steps towards a correction of Europe's social deficit seem conceivable in the foreseeable future.[49] How will, how should European constitutionalism respond? So far, few commentators outside the specialised circles of labour lawyers and political scientists with a background in political economy seem truly irritated. It is of course true that normative defences of a "European social model" and the pleas for a correction of Europe's democracy deficit cannot be falsified by a misbehaviour of politicians and/or voters. The present discrepancy between facts and norms has, however, reached such proportions that the readiness to reconsider the premises of European constitutionalism should grow.

C. Conflict of Laws as Europe's Constitutional Form

The European integration project was from its inception identified with notions of harmony and unity which have never captured adequately Europe's integration process and its accomplishments. "Harmonization" was usually preceded by the bargaining over different positions and after half a century of integration Europe remains characterised by diversity rather than unity. After the various rounds of enlargement and, in particular, the accession of the Eastern European nations, the awareness of this diversity seems to be growing. The idea of re-conceptualising European law as a new type of conflict of laws should therefore appear realistic rather than idiosyncratic. The objectives of those suggestions are, however, much more ambitious. They seek to initiate a reconsideration of the legitimacy problematic of European governance and to base that reconsideration on more realistic conceptual premises.

The legitimacy problematic of European governance has been discussed *ad nauseam* in terms of the Union's democracy deficit. That debate is unlikely to come to any conclusive end. It is repetitive in that it continues to design Europe as a parliamentary democracy, to

[49] Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union* v. *Viking Line ABP, OÜ Viking Line Eesti*, judgment of 11 December 2007; Case C-341/05, *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, judgment of 18 December 2007; Case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert* v. *Land Niedersachsen*, judgment of 3 April 2008; Case C-319/06, *Commission* v. *Luxembourg*, judgment of 19 June 2008. Die vier Urteile und DeJoe/Roedl und Trubek?

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recommend the completion of its *Staatlichkeit*, to discover democratic qualities in its really existing political life, or, alternatively, to conceptualise Europe's transnational *Herrschaftssystem* either in a neo-liberal or technocratic terms. The built-in deficiency of these efforts, it is submitted here, stems from the focus on the European rather than the national level of governance. We suggest to turn the legitimacy debate from the head to the feet: European constitutionalism should not be fixated on curing the democracy deficits of the European Union. The law of the European Union should instead be understood as a potential cure for the democratic failure of its Member States and should derive its legitimacy out of that function.

This turn can be understood as an indispensable move because it responds to structural transformations of nation state governance, namely the steadily increasing interdependence of once largely autonomous ("sovereign") units. Because of this interdependence, nation states impose by all of their decisions of some weight, extra-territorial effects on other states and on their citizens. It may come as a surprise to Karl-Heinz Ladeur, but it was in fact Jürgen Habermas who addressed this issue more than 15 years ago in an essay on "citizenship and national identity"[50] which was published a year before the publication of his grand oeuvre on the constitutional nation state and reprinted therein.[51] And Habermas did at that occasion not shy away from using Luhmannian categories: "For the citizen, this (the growing importance of Europe) translates into an ever greater gap between being passively affected and actively participating.[52] An increasing number of measures decided at a supranational level affect the lives of more and more citizens to an ever greater extent."[53] What Habermas observed in the vertical relation between the Union and its citizens is equally valid in horizontal relations between constitutional nation states, as he expressly stated some years later.[54]

An elaboration of these premises cannot content itself with the type of jurisdiction selection rules which dominated the tradition of Anglo-Saxon conflict of laws and continental private international law. The European polity is a multilevel system of governance and it is relying in ever more fields on the integration of non-governmental actors into its governance arrangements. This complexity, it is submitted, requires a three-

[50] JÜRGEN HABERMAS, STAATSBÜRGERSCHAFT UND NATIONALE IDENTITÄT (1991).

[51] JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG (1992).

[52] Jürgen Habermas, *Betroffensein und Teilnahme*,, FAKTIZITÄT UND GELTUNG, 503 (1992), at 646 – the allusion to Luhmann is more visible).

[53] *Id*., 503.

[54] Jürgen Habermas, *Europskepsis, Markteuropa oder Europa der (Welt-)Bürger*, *in* ZEIT DER ÜBERGÄNGE, 85 (2001).

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dimensional conflict of laws, with "dimensions" signifying distinct problem constellations and function of law.[55]

I. First Order Conflict of Laws – The Legitimacy of European Supranationalism

Back in 1997, Jürgen Neyer and I presented the first explicit argument under the heading of "deliberative supranationalism".[56] The primary objective of our essay was to explain the surprisingly sensible operation of the comitology system,[57] but the normative basis of our argument concerned the democracy failure of nation states: "The legitimacy of governance within constitutional states is flawed insofar as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies pre-suppose and represent collective identities, they have very few mechanisms [through which] to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes."[58]

If the legitimacy of supranational institutions can be designed to cure these deficiencies – as a correction of "nation-state failures", as it were – they may then derive their legitimacy from this compensatory function. To quote my recent restatement:

> "We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires."[59]

This, of course, is not the way in which the supranational validity of European law was originally understood and justified. Fortunately enough, however, the methodologically and theoretically bold and practically successful ECJ decision in favour of a European legal

[55] On the following see Christian Joerges & F. Rödl, *Zum Funktionswandel des Kollisionsrechts II. Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation*, in Soziologische Jurisprudenz, (A. Fischer-Lescano *et al*., eds., 2009) (forthcoming) with many references to the gradual development of the approach.

[56] Christian Joerges & J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes* (note 34).

[57] See, *supra*, Section B.II (1).

[58] *Id.*, 293.

[59] Christian Joerges "*Deliberative Political Processes" Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making*, 44 JOURNAL OF COMMON MARKET STUDIES 779, 790 (2006).

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constitution[60] can be rationalised in this way. The European "federation" thus found a legal constitution that did not have to aim at Europe's becoming a state, but was able to derive its legitimacy from the fact that it compensates for the democratic deficits of the nation states. This is precisely the point of Deliberative Supranationalism. Existing European law had, we argued, validated principles and rules that meet with and deserve supranational recognition because they constitute a palpable community project. All one has to do is look: Community members cannot implement their interests or laws without restraint, but are obliged to respect the European freedoms; they are not allowed to discriminate and can pursue only legitimate regulatory policies which have been blessed by the Community; they must, in relation to the objectives that they wish to pursue through regulation, harmonise with each other, and they must shape their national systems in the most community-friendly way possible. Why should this type of law be called a new type of conflict of law? Conflict of laws in all its sub-disciplines – private international law and public international law – has traditionally denied the application of foreign "public" law; each state unilaterally determines the international scope of public law. Traditional international administrative law is a paradigm example of "methodological nationalism."[61]

But conflict of laws thinking has a further potential: it is helpful wherever legal principles differing in content and objectives come up against each other. It needs to guide the search for responses to conflicting claims where no higher law is available for decision-makers to refer to. In the European case: to give voice to "foreign" concerns means, first of all, that Member States mutually "recognise" their laws (that they are prepared to "apply" foreign law), that they tolerate legal differences and refrain from insisting on their *lex fori* and domestic interests. This is the principle. The discipline imposed on a Member State's political autonomy must be limited. The principle and its limitations can be discovered and best studied in the jurisprudence of the ECJ pertaining to Article 28 [ex 30]. This jurisprudence has repeatedly documented how mediation between differences in regulatory policies and the diverse interests of the concerned jurisdictions can be accomplished. These examples, we submit,[62] represent a truly European law of conflict of laws. It is 'deliberative' in that it does not content itself with appealing to the supremacy of European law; it is "European" because it seeks to identify principles and rules that make different laws within the EU compatible with one another.

Once it is recognised and acknowledged that legal responses to conflicting claims of democratically legitimised legal systems need to be conceptualised as conflict of laws

[60] Case 26/62, [1963] ECR 1 *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen*.

[61] Michael Zürn, *The State in the Post-national Constellation – Societal Denationalization and Multi-Level Governance*, ARENA Working Paper No. 35/1999.

[62] See references in notes 44, 47, and Christian Joerges, *Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws, in* DEBATING THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION, 311 (B. Kohler-Koch & B. Rittberger eds., 2007).

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problems, the methodological dimension and implication of this insight should become equally clear: European conflict of laws requires a proceduralisation of the category of law. It has to be understood as a "law of law-making,"[63] a *Rechtfertigungs-Recht*.[64] This conflict of laws viewpoint retains the supranationality of European law, but gives it a different meaning. It takes away from European law those practical and legitimate expectations that it cannot reasonably hope to fulfil. At the same time, it opens a window on the manifold vertical, horizontal, and diagonal[65] conflict situations in the European multilevel system. It promotes the insight that the Europeanisation process should seek flexible, varied solutions to conflicts, rather than striving to perfect an ever more comprehensive body of law.[66]

II. Juridifying Transnational Governance

Transnational governance cannot rely exclusively on the law's dichotomies. The legal system needs to complement its dedication to the protection of "normative" expectations by an opening to cognitive processes. Niklas Luhmann's diagnosis and plea[67] has achieved the status of an undisputable insight since the eightiess, even though its reception in law is far from uniform. The reading on which I rely is sociological. It contrasts the "learning" practices which modern societies need and develop with the mechanisms Friedrich A. von Hayek praised as the "discovery procedure of competition".[68] Our societies, it is submitted, resort to co-ordinated forms of problem-solving, to a "discovery procedure of practice" [69] in which political and societal actors accommodate their interests and balance conflicting policy goals. This type of "learning" comprises both the integration of expertise and the

[63] F.I. MICHELMAN, BRENNAN AND DEMOCRACY 34 (1999).

[64] Rudolf Wiethölter**,** *Just-ifications of a Law of Society*, in PARADOXES AND INCONSISTENCIES IN THE LAW, 65 (O. Perez & G. Teubner eds., 2005), available at: www.jura.uni-frankfurt.de/ifawz1/teubner/RW.html, last accessed 14 February 2009

[65] These conflicts arise out of the allocation of powers needed for problem-solving and therefore objectively connected to different levels of government. It follows from the principle of limited individual empowerment that the primacy rule can find no application here.

[66] This is readily compatible with the existence of European secondary law and does not in any way in principle call its legitimacy into question. There are important problem areas in which "second order" law of conflict is insufficient and the "federation" has to develop supranational substantive law. This question cannot be dealt with systematically here.

[67] See N. LUHMANN, THE DIFFERENTIATION OF SOCIETY 229 (1982).

[68] F.A. von Hayek, *Wettbewerb als Entdeckungsverfahren* , in IDEM, FREIBURGER STUDIEN. GESAMMELTE AUFSÄTZE, 249 (1969).

[69] CHRISTIAN JOERGES, VERBRAUCHERSCHUTZ ALS RECHTSPROBLEM 111-115(1981)*, Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples*, in CONTRACT AND ORGANIZATION, 142 (T.C. Daintith and G. Teubner eds., 1986).

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contest over the political dimensions of decentralised problem-solving. Is it at all conceivable that law remains the yardstick to which these processes owe in the last instance their legitimacy? Is it conceivable, so one can rephrase this query, to "constitutionalise" this type of decentralised societal decision making?

These are challenges not just for national legal systems. Europeanization and globalisation processes have brought them to transnational levels. We suggest that they require the development of a "second order" and a "third order" conflict of laws. Both dimensions have their *fundamentum in re.* We content ourselves here with explanations of exemplary importance.

III. "Second Order Conflict of Laws": the Exemplary Importance of Comitology

Comitology procedures have accompanied the European integration process from very early on. They developed where complex European governance incorporating national actors first became indispensable, namely in agricultural policy.[70] They spread out into other policy fuels in the course of the completion of the internal market. Their function then was primarily to keep the internal market project compatible with concerns of social regulation (safety at work, consumer and environmental protection*, etc*.). The framework regulations to be implemented here typically employ general clause type formulae which do not seek to programme this co-ordination in detail, but leave the elaboration of individual solutions to the implementation process. Typically, the problem situations concerned are ones in which expert knowledge has to be taken into account. It is the involvement of the Member States – through their representatives on the regulatory committees combined with discussion by a plural expert community – that should guarantee both political legitimacy and the objective viability of the regulations developed. Safeguard clause procedures employed when new knowledge is acquired or a regulation proves to be insufficient serve to strengthen their normative and procedural qualities. A conflict of laws interpretation of this form of governance may seem far-fetched, but suggests itself because the co-ordination effort aims to achieve a solution that is acceptable to a Union of relatively autonomous states that have to manage without any hierarchically ordered, or, at least, any uniformly structured, administrative apparatus. Admittedly, a "constitutionalisation" of this machinery, then has to find answers to a series of further questions, such as: the appointment and function of the experts to be included in the decision-making process; the ties with parliamentary bodies on the one hand, and with civil society on the other; and the reversibility of decisions taken in the light of new knowledge or changes in social preferences. What needs to be understood is the status of these efforts. The constitutionalisation of European governance arrangements is no direct

[70] J. Falke, *Komitologie – Entwicklung, Rechtsgrundlagen und erste empirische Annäherung,* in DAS AUSSCHUßWESEN DER EUROPÄISCHEN UNION. PRAXIS DER RISIKOREGULIERUNG IM BINNENMARKT UND IHRE RECHTLICHE VERFASSUNG, 43 (Christian Joerges & J. Falke eds., 2000).

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substitute for democratic rule; its objective, rather, is to define the procedures through which democratic polities organise their responses to common problems under conditions of mutual interdependence.

The basis of these visions were the findings which Jürgen Neyer and the present author[71] summarised on the basis of an interdisciplinary research project which had embarked upon an expedition into an at the time fully unknown territory, namely the Europeanisation of foodstuffs regulation.[72] We had observed debates between competing schools of thought, serious discussions of public interests and strategies of risk management. We concluded that it was advisable to develop a legal framework that would stabilise these practices and correct the Kafkaesque features of comitology as a "mode of governance" with the potential of combining innovatively and successfully judicial and problem-solving functions. Since then, much has happened. What we had envisaged as a "constitutionalisation of comitology" has not been accomplished. Quite recently, in July 2006, a Council Decision was adopted[73] which ushered in a reform. It strengthens Parliament's rights in areas which are subject to the co-decision procedure (Art. 251 EC):[74] To that extent – but only to that extent – it removes one stumbling block in the regulatory Committee procedure, namely the Commission's powers, the so-called *contre-filet* procedure. A comprehensive reform would have required a reconsideration of what the Commission, Council and Parliament perceive as their institutional interests and an institutional design which would strengthen the exit options of the member states and the rights of concerned actors to request a reconsideration of policies and adopted standards.

1. Third Order of Conflict of Laws: the Exemplary Importance of Standardisation

The most successful mode of reconciling market-building objectives and regulatory concerns is still the New Approach to technical harmonisation and standards.[75] Born out of the necessity to overcome the impasses of legal harmonisation under the unanimity rule of the old Article 100, Europe learned to establish a new equilibrium between normative expectations which were protected as legally binding "essential safety requirements" and cognitive elements which were presented as pure "concretisation" of the law with the help of the expertise of the standardisation community. Interestingly enough, this new

[71] See, *supra,* note 34.

[72] See for the design of the project Christian Joerges, *Die Beurteilung der Sicherheit technischer Konsumgüter und der Gesundheitsrisiken von Lebensmitteln in der Praxis des europäischen Ausschußwesens ('Komitologie')*, ZERP-Diskussions papier 1/95 and for first findings, Christian Joerges & J. Falke (note 70).

[73] Council Resolution 2006/512/EC 17 July.2006, O.J. L 200/2006, 11; consolidated version in O.J. C 255/2006, 4.

[74] Article 5a ("Regulatory Committee Procedure with Scrutiny").

[75] On its history and reconstruction see H. SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE. PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS 37 (2005).

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technique had strong and quite ancient national roots. It relied on well established national practices before it was adopted at European level. A plausible explanation for the broad support of this "private transnationalism" (Harm Schepel) is the synergetic effects of the cooperative links which the new approach established between national and European, non-governmental and governmental actors. Widely applied procedures, which combine legal principles, professional standards with opportunities to participate proved to ensure consensual solutions. Significantly, European standardisation has taken on many of the features of comitology. Its non-unitary network structure ensures that national delegations each contribute their own views, and thus may initiate learning processes. The whole machinery operates according to its own logic. However, administrations and courts are sometimes actually and always latently present in standardisation. "Private transnationalism" has been severed from national law, but is not delegalised. It feeds on expert knowledge but does not operate purely technocratically. How could this happen?

> "The paradox is, of course, that the mechanism through which this is achieved is, politics. Due process, transparency, openness, and balanced interest representation are norms for structuring meaningful social deliberation. They are not obviously the appropriate vehicles for revealing scientific 'truth' or for allowing room for the invisible hand."[76]

One is tempted to interpret this species of "private transnationalism" as a fortunate hybrid creature. Its "law-making" takes account of the fact that the modern economy and its markets simply are not executing some economic *Gesetz* but need to address politically sensitive issues. It deserves recognition for two complementary reasons. One is the procedural discipline it has imposed on itself. The second is its visibility and the potential of publicly accountable bodies to interne through a refusal to accept its operation. A parallel with the committee system suggests itself: where comitology operates reasonably well, it owes its quality to both the principles and rules it follows, and to the shadow of democratically legitimated institutions and their law. Similarly, the legitimacy that Schepel attributes to standardisation is based on the compatibility of its institutionalisation with the legal institutions that surround it, which are able to appreciate that they, on their own, cannot replace the performance of the standardisation process. Is all this still accessible to the conflict of laws patterns of thought? The step to be taken is not too difficult. Conflict of laws deals with the acceptability of laws of "foreign" jurisdictions. Once we recognize that our statal law cannot operate autonomously but is dependent upon the norm generation in non-state spheres, we need to define the criteria for their recognition.[77] These criteria will primarily concern norm-generation processes and their implementation will require

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[76] *Id.,* 223.

[77] E. Schanze, *International Standards - Functions and Links to Law in* INTERNATIONAL STANDARDS AND THE LAW, 90 (P Nobel ed., 2005).

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the involvement of various legal areas such as antitrust and tort law.[78] There are avenues towards a legitimate juridification of transnational governance arrangements even though the distances we have to cover make the task appear even more daunting.[79]

"Deliberative Supranationalism" is in all (by now: three) dimensions in many ways indebted to the discourse theory of law and democracy, which Jürgen Habermas has elaborated in *Between Facts and Norms*. In view of this background, Karl-Heinz Ladeur's critique of deliberative supranationalism sounds surprisingly mild. His perception of comitology deserves to be cited at some length:

> " …[T]he variety of the cognitive processes must also be seen as an expression of a distributed experimentation of self-organised 'practical communities' and/or the state administration, and, thus, as an element of the dynamic and of the productive comparison over national borders, be valued and practically harnessed. Whether one can describe the discursive, confrontational, standardising and conforming processes, structured through comitology as 'supranational deliberation', might, due to the smoothing with the respective national practice and its functionally leaning selectivity (also therefore the exclusion of other possibilities), seem doubtful. The cognitive rules do not derive their legitimacy from the force of the 'arguments' used in their particular field, rather from the 'preservation' in practice, which can (and should) only partially be understood or reflected upon 'discursively.' Precisely as to the peculiar rationality of the 'preservation' in practice and the comparison of different logics of generation and stabilisation of trade-related knowledge, operating with a mixture of know-how and uncertainty allows for the organisation of a productive competition between institutions. Not least, this occurs in comitology; therefore it must be considered a thoroughly successful element of European 'governance' beyond the nation state and the supranational level."[80]

The mechanisms he describes concern both the "national" level of governance characterised above as "discovery procedures as practice"[81] *and* the transnational level in

[78] Schepel, *supra* note 75, 85, 335.

[79] J.P. McCormick and Jürgen Habermas, *Supranational Democracy and the European Constitution*, EUROPEAN CONSTITUTIONAL LAW REVIEW 415 (2006).

[80] Karl-Heinz Ladeur, *Globalisation and the conversion of democracy to polycentric networks: Can democracy survive the end of the nation state?, supra,* note 2, text following note 29 (footnotes omitted); for one of his much stronger rejections of the of deliberative democracy theory see*, e.g.*, '*Deliberative Demokratie' und 'Dritter Weg' – eine neue Sackgasse? Transformation des 'alten' Sozialstaats in den aktivierende' Staat?*, 41 DER STAAT 3 (2002).

[81] JOERGES, *supra*, note 69, references.

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which I assert the emergence of a second and a third order of conflict of laws. “Network” is Ladeur’s key concept for both levels.

The parties to “private networks….have to include more general interests in contract-making, they have to broaden the horizon of decision-making and, at the same time, they have to change relationships continuously. …The evolution of spontaneously generated patterns of behaviour and co-ordination has to be monitored, evaluated, varied, and renewed, because state law is not flexible enough to adapt to the new requirements of a globalized and, above all, dynamic economy.”[82] Very similarly, “it is an important characteristic of the globalization process that it produces more spontaneously self-generating flexible ways of co-ordination and co-operation….The new forms of co-ordination are generated in a bottom-up, instead of a top-down, approach; they create self-stabilising networks of inter-relationships from which expectations which help orient participants to develop trust can emerge - a version of trust in the continuity of the network itself, not just in the personal reliability of the partners about which one could collect personal experience…”.[83]

One may wonder, to paraphrase Richard M. Buxbaum’s perplexity,[84] how these observations can ever become operational. The conflict-of-laws approach advocated here with its reliance on islands of constitutionally legitimated law. its insistence on hard, albeit proceduralised, law, and its search for complementary second and third orders looks old-fashioned in post-modernist perceptions. What we seem to share, however, are speculative elements in our conceptualisations. The power of deliberative processes is obviously and admittedly limited -- at all levels of governance. Is there much more realism in the expectation that the networks will in fact foster stable cooperation and produce synergetic effects in the back of their participants? “The evolution of spontaneously generated patterns of behaviour and co-ordination has to be monitored, evaluated, varied, and renewed”[85] – a task hardly easier than that assigned here to the third order of conflict of laws. Differences of this kind cannot be usefully discussed *en passent*. It may be more productive to illustrate them further. The recent conflicts over the compatibility of national labour law regimes with European law lend themselves to such a demonstration.

D. *Sozialstaatlichkeit* in Conflict-of-Laws Perspectives

[82] Introduction, Section 4 (footnotes omitted).

[83] *Id.,* Section 3 (footnotes omitted).

[84] Richard M. Buxbaum, Is *Network a legal concept?*, 149 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (JITE), 698 (1994).

[85] *Id.*, Section 4.

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Historians[86], sociologists,[87] political scientists[88] tend to agree with the leading specialist in the study of the western welfare states[89] and Jacques Delors's prudence. *Sozialstaatlichkeit* is a legacy which European democracies have in common. In that very general sense there is a "European social model", which distinguishes Europe from the US. It is also common knowledge, however, that European welfare traditions differ markedly to such a degree that it is simply impossible to "harmonise" pertinent legal frameworks and policies. It is hence unsurprising that the institutionalisation of the integration project decouple the social constitutions of the member states from the European "economic constitution" and that the Constitutional Treaty of 2003 and the Lisbon Treaty of 2007 failed to cure Europe's social deficit. This failure has left the integration project in a critical situation. A new political initiative with new responses to the social deficit is not in sight and the academic debate continues to comment on the three pillars mentioned above.[90] Is this critical moment the hour of the law? What we can indeed observe is the ECJ handing down a series of judgements[91] in the light of which further political efforts seem superfluous and the ongoing debates on the three pillars of social Europe purely academic. According to these judgments, the EU is committed not to a social but a neo-liberal market economy. In the Court's view, the exercise of "social rights," in particular the collective rights of trade unions, has to respect the economic freedoms guaranteed by the Treaty and the soft law method of coordination needs to operate in the shadow of the hard law of negative integration.

I. Orthodox Supremacy in Action: The CCJ Decisions in Viking *and* Laval

The attention which this jurisprudence has attracted among Europe's constitutionalists is so far quite limited. The new jurisprudence has, however, met with a so far unheard of strong and broad political opposition and nearly unanimous critique by European labour lawyers. I refrain summarising this debate[92] and will instead focus in my discussion on the doctrinal core of this jurisprudence. That core is the supremacy doctrine. The doctrine is

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[86] *E.g.* T. JUDT, POSTWAR. A HISTORY OF EUROPE SINCE 1945, 360 (2005).

[87] C. Offe, *The European model of 'social' capitalism. Can it survive European integration?*, 11 JOURNAL OF POLITICAL PHILOSOPHY 437 (2003).

[88] Scharpf, *supra,* note 22.

[89] GOSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM(1990); H. Obinger & St. Leibfried, *Beipässe für ein 'soziales Europa': Lehren aus der Geschichte des westlichen Föderalismus*, 44 DER STAAT 505 (2005).

[90] Section II.

[91] See, *supra,* note 49.

[92] See for a critical voice Christian Joerges & F. Rödl, *On the 'Social Deficit' of the European Integration Project and its Perpetuation through the ECJ-Judgments in* Viking *and Laval*, RECON WP 2008/6, available at http://www.reconproject.eu/main.php/RECON_wp_0806.pdf, last accessed 14 February 2009.

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widely known not just among lawyers but equally among social scientists. Very few commentators realise, that "supremacy" is a conflicts-of-laws rule, namely a response to the diversity between national law and European law. An awareness of that nature is useful because it directs more attention to the need to justify the rule and by the same token strengthens the sensitivity for the often very cautious handling of the doctrine by the ECJ.[93] In the present line of cases, both of these concerns deserve to be taken seriously.

´The reasoning of the ECJ in both *Viking* and *Laval,*[94] the ground braking first two of the four cases, relies on the direct effect of the economic freedoms. In *Viking* the freedom of establishment of the complaining Finnish shipping company as guaranteed by Article 43 was in the Court's view threatened by the collective actions prepared by the Finnish seafarers union in order to stop Viking from reflagging its vessel Rosella. Two issues need to be discussed. Concern the characterization of the legal issues. Economic liberties and collective labour rights cannot be equated. As the doyen of French labour law has put it in a commentary on the two cases:

> "Dans les sociétés d'Europe de l'Ouest, le droit du travail s'est constitué par émancipation du droit du marché, dénommé moyennant les variations terminologiques qu'il importe de ne pas oublier : liberté du commerce ici, freedom of trade ailleurs… Ce n'est pas que des règles sur le travail n'existaient pas avant cette émancipation, mais elles relevaient d'avantage d'une police du travail, partie plus ou moins autonome d'une police du ou des marches"[95].

The conflict is of course also present at a national level. It also a matter of course that the constitutions of democracies recognise both, the economic liberties of undertakings and the rights of trade unions to defend the interests of their members. Why should that be different in a multi-level system which has decupled the economic from the social constitution. The conflict constellation at hand is structurally similar to all those "diagonal conflicts" arising where the solution of a problem requires the resort to competences

[93] A corollary of supremacy is the pre-emption doctrine: The "direct effect" of Community law leading to its supremacy *vis-à-vis* national legal systems, must also mean that Community law has the effect of pre-empting Member States from taking legislative action: if and when a policy-area has become occupied by the Community, then Member States loose the right to act unilaterally. The delicacy of that claim is obvious – and the court has handled this doctrine with wise restraint. See ANDREAS FURRER, DIE SPERRWIRKUNG DES SEKUNDÄREN GEMEINSCHAFTSRECHTS AUF DIE NATIONALEN RECHTSORDNUNGEN (1994).

[94] See, *supra*, note 49.

[95] Antoine Lyon-Caen, *Droit communautaire du marché v.s. Europe sociale*, Contribution to the Symposium on "The Impact of the Case Law of the ECJ upon the Labour Law of the Member States", organised by the Federal Ministry of Labour and Social Affairs, Berlin 26 June 2008 (on file with author).

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which are allocated partly to the European, and partly to the national level of government.[96] It simply follows from the principle of limited individual empowerment that the primacy rule can find no application here.[97]

In *Laval* and, subsequently, in *Rüffert*[98] the Court brought the supremacy doctrine to bear in its reading of the Posted Workers Directive.[99] The legislative history of this Directive is certainly complex,[100] but clearly enough documents a substantive compromise mitigating between the conflicting interests which follow from an opening of national markets. According to Recital 22 of the Directive, the Community legislator did not aim at a harmonization of the substantial legal provisions concerning the employment of posted workers. The Member States were instead asked to ensure that the working conditions of those workers posted to their territory would, in a number of essential working conditions (Article 3(1)), comply with their own legal and minimum wage requirements.[101] The ECJ assigned a much more fundamental meaning to the Directive. In its understanding, the objective of the Directive was not the restriction of wage costs competition, but the imposition of constraints of the right to strike in Member States and banned all union activity beyond those essential working conditions enumerated in Article 3(1).[102]

II. Reasons for and Failures of "Authoritarian Liberalism"

The shortcomings of the ECJ's reasoning seem as obvious and their discrepancy with countless sensitive judgments on the prerogative of European law are bound to provoke speculations about the ECJ's real reasons. As Brian Bercusson observed in an extensive analysis of *Viking* and *Laval*: "It is a bracing reminder to EU lawyers of the power of

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[96] See more systematically, Christian Joerges, *Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws*, in DEBATING THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION, 311 (B. Kohler Koch & B. Rittberger eds., 2007).

[97] The Court did of course underline that the "right to take collective action, including the right to strike … forms an integral part of the general principles of Community" (*Viking*, para. 44). However, this right was then eroded by the request that its exercise must comply with Community law. The delicacy of this request stems from the qualitative difference between economic and labour law – and from the fact that the Community has no competence to regulate national industrial relations.

[98] See, *supra,* note 49.

[99] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L18/1.

[100] See W. Eichhorst, *European social Policy between National and Supranational Regulation: Posted Workers in the Framework of Liberalized Services Provision*, MPIfG Discussion Paper 98/6.

[101] For a more systematic reconstruction of the directive in a conflict of law perspective, see F. Rödl, *Weltbürgerliches Kollisionsrecht*, PhD Thesis EUI Florence 2008, Part 2, B II.2.

[102] *Id.*, para. 99, see also para. 70.

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political and economic context to influence legal doctrine that the new Member States making submissions were unanimous on one side of the arguments on issues of fundamental legal doctrine (horizontal direct effect, discrimination, proportionality) and the old Member States virtually unanimous on the other."[103]

Bercusson's observation may be plausible but is nevertheless unsatisfactory. Even if the Court has taken a "political" decision we cannot refrain from analysing their reasonableness. Does it make sense to insist on an understanding of European law which seeks to impose a uniform regime of industrial relations on the whole of the European Union? The normative responses of the conflict-of-laws approach and the analyses of Karl-Heinz Ladeur converge in an interesting way. The former argues European law is not legitimated to replace the various traditions of international relations in the Member States by a neo-liberal European "economic constitution". The latter argues:

> "The traditional conception of a homogenous collective order which can be described and governed from the hierarchical level of state power has come under pressure in the nation state. This is not a problem of size: The role of space as such has changed completely: on the one hand, we can observe the evolution of strong regional cores of economic development in Member States; on the other hand, they are operating in a flexible mode in loosely coupled global dynamic networks which do not wait to be assembled in a bigger state but need support from new public institutions beyond the traditional forms of the nation state and territoriality."[104]

According to the former an imposition of a neo-liberal economic constitution regardless of the democratic legitimacy of the various traditions of *Sozialstaatlichkeit* in the European Union amounts to the insertion of what Hermann Heller had characterised as "authoritarian liberalism."[105] The latter is not prepared to understand *Sozialstaatlichkeit* as an inherent quality of constitutional democracies.[106] However, the argument just cited continues: "This evolution finds its repercussion in the increasing heterogeneity among Member States: we have, on the one hand, a group of smaller states (Denmark, Sweden, Finland, the Netherlands, Ireland) which try to meet the challenge of globalisation proactively, we have the British exception of a functioning liberal system, we have a group of bigger states (France, Germany, Italy) which are facing decline and adapt to the new

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[103] Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13 EUROPEAN LAW JOURNAL 279 (2007).

[104] Ladeur, *supra,* note 3, 161.

[105] Hermann I. Heller, *Autoritärer Liberalismus*, 44 DIE NEUE RUNDSCHAU 289 (1933).

[106] See, *supra,* note 1.

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world order only reluctantly and in a haphazard way. And we have the politically and economically weak states in Eastern Europe. This political setting determines the institutional background which has to be regarded as the frame of reference for the transformation of the constitutional document into a living constitution."[107]

Sozialstaatlichkeit cannot be accomplished via a European constitution. It is nevertheless a model which is quite successfully established in some Member States of the Union – and should remain an option for them and for others.

E. Concluding Remarks

The critique of the project of a constitution for Europe prescribing one specific social model for the whole Union is simply incompatible with both the conflict-of-laws approach and its vision of Europe as a *unitas in pluralitate*[108] and Karl-Heinz Ladeur's insistence on the heterogeneity of the Union have in common also leads to a similar difficulty, which has been already alluded to[109] and which needs to be underlined again both in analytical and more normative terms. I cannot see any invisible hand which would ensure the efficacy of the learning processes to which Europe is, according to Karl-Heinz Ladeur, exposed at all levels of governance. I also readily admit that the conflict-of-laws approach has to rely on the ingenuity of the processes of conflict resolution, on the readiness of its actors to engage in problem-solving argumentation and the weak force of law to impose the disciple which such practices require. Are these merely utopian hopes? What is often not so visible, is the surprising reliability of the European machinery, the innumerable, small and not so small, indicators of good European governance. Europeanization still is an instigator of countless innovative projects. Directly behind or lying in the shadow of grand designs, there is another Europe at work. The "law of the Europeanization process" which comes to the fore in the confrontation with ever new challenge is an exercise in transformation, and modernization. Law is a product guided by reasoning and orienting the striving for Europeanisation. In such perspectives, "constitutionalization" can be conceived not as merely being the writing of a text and its formal acceptance by those who govern us and/or us the people. Again: Can we expect "constitutionalization as process" not only to ensure the compatibility of open markets with regulatory concerns and preserve the social dimension of private law, but also to overcome Europe's social deficit? This seems not unconceivable. "Constitutionalisation as process" is no ready made recipe, but a response to the state of the integration project and it's challenges.

[107] Heller, *supra,* note 105.

[108] "Unity in diversity" (*unitas in pluralitate*), was the motto of the Union according to Article IV-1 of the *Draft Constitutional Treaty.*

[109] At the end of Section III.

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