The future of integration through law – in conflicts-law perspectives

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DRAFT

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Structuration

In my original suggestion to the organisers I had suggested to put a question mark behind "the future of the integration through law project"; by now I think it is less modest but more honest to answer the question, i.e. to submit a thesis, namely the assertion that European law should be reconceptualised in conflicts-law perspectives in order to overcome current impasses and crisis. for a re-conceptualisation of European law as conflicts law. I have done this often enough but cannot assume that there is widespread familiarity in this audience with the contents and aspirations of the 'conflicts-law approach'.[1] I will nonetheless not

[1] See, recently, Christian Joerges, 'Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form', in Christian Joerges (ed.), 'After Globalisation. New Patterns of Conflict and their

start with a restatement of its main theses. I will instead first detail and recall – albeit very briefly – the legacy of the integration through law project (I), and then critically examine the state of that project in the light of the founding precepts of Karl Polanyi's economic sociology (II). Only then, and in counterpoint to the not so fortunate state of the integration through law project will restate the idea of conflicts-law constitutionalism (III 1) and .substantiate how the approach might respond to European law's current difficulties (III 2).

I. The legacy of the 'Integration-through-Law' Project

'Integration through Law' has been the trademark of the European project since the early 80s. It denotes one of Europe's great accomplishments, namely the taming of the Weberian *Nationalstaat* – its commitment to the concentration of economic and political power within the nation – by means of the establishment of a supranational legal order und 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 EU, was not one of disempowerment of politics. In Joseph Weiler's famous conceptualisation of the European constellation, legal supranantionalism was complemented and accompanied by political bargaining processes.[2] As we read his argument, the relationship between law and politics is not one which is carved in the stone of a constitution, but is rather one which can more adequately be characterised as a 'precarious equilibrium'; that is, an equilibrium which lacks any form of stabilising mechanism, 'silent' or otherwise.

During the dynamic development of the integration project since the mid-80s the relation between 'Law' and 'the Political' was continuously re-defined and re-institutionalised. The tragedy within this process and the present state of the Union is the weakness of *Politics* in the Union; a weakness for which so many protagonists of the European project seek to compensate by means of an emphasis upon juridical techniques which tend to overburden the law and its legitimating potential. This misconceived reliance on law can be observed in the legalisation of monetary policy, in European responses to the quest for social justice and a 'European social model' and, most recently, in the new debates on nuclear energy in

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Sociological and Legal Reconstruction', RECON Report No. 15, Oslo 2011, 65-124, available at http://www.reconproject.eu/projectweb/portalproject/Report15_AfterGlobalisation.html, slightly revised version forthcoming in Andrea Greppi & Rainer Nickel (eds.),*The Changing Role of Law in the Age of Supra- and Transnational Governance*, (Baden-Baden: Nomos 2011), chapter 5; 'The Idea of a Three-dimensional Conflicts Law as Constitutional Form', RECON Online-WP 5/2010, available at http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html, ´now also in Christian Joerges & Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation,* Oxford: Hart Publishing, 2nd ed. 2011, 413-456

[2] Joseph H H Weiler, 'The Community system: the dual character of supranationalism', (1981) 1 *Yearbook of European Law*, 257–306.

which the European treaties are invoked as barriers against new energy politics. This threefold *problématique* will be discussed in the following section.

II. Europe's 'Socio-economic Malaise' and Karl Polanyi's Economic Sociology

Karl Polanyi's reconstruction of the core instability of industrial capitalism lays heavy emphasis on the role played within capitalist society by three 'fictitious commodities': money, labour and land. These three fictitious commodities denote 'goods' which nonetheless predate and transcend 'the market', and whose subsequent 'commodification' not only provokes crises within and around capitalism, but also proves to be an impetus for the development of counter-movements to the market.[3] In view of the by now chronic instability within European monetary and economic union, the steady erosion of national labour and/or social constitutions, as well as continuing 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', and to the question of what European law has experienced, is experiencing, and what it, itself, has precipitated.

1. 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 'without' or outside the law. From the early 1970s onwards and following its own post-ordoliberal 'Keynesian moment' – which was

[3] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston MA: Beacon Press, [1944] 2001; cited from the – poor -- German translation (*The Great Transformation. Politische und ökonomische Ursprünge von Gesellschaften und Wirtschaftssystemen* [1944], Frankfurt a.M.: Suhrkamp, 1978), p 107. English original and page sides to be provided. This essay is not aiming at any systematic account of Polanyi's work and does not pretend to fill the amazingly broad research gap with respect to the role of law in Polanyi's work. That gap is getting smaller, however; see recently Philipp Klages, *Wirtschaftliche Interessen und juristische Ideen. Die Entwicklung des Aktienrechts in Deutschland und den USA*, Frankfurt/New York: Campus 2010***;*** James Caporaso and Sydney Tarrow, 'Polanyi in Brussels: European Institutions and the Embedding of Markets in Society', (2008) RECON Online Working Paper 2008/01 [available online at: http://www.reconproject.eu***];*** Martin Höpner and Armin Schäfer***,*** 'Polanyi in Brussels: European Institutions and the Embedding of Markets in Society', MPIfG Discussion Paper 10/ 8, Cologne 2010). One of the rare attempts to capture the legal dimension in Polanyi's work is Marc Amstutz, 'Globalising Speenhamland: On the Transnational Metamorphosis of Corporate Social Responsibili***t***y', in Christian Joerges and Josef Falke (eds.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, Oxford: Hart Publishing, 2011, 359-393. Amstutz reads the Polanyian notion of 'countermovment' into Polanyi's analyses of protective legislation. That interpretation has been complemented (and revised) by Sabine Frerich's fascinating suggestion that law might be understood as another 'fictitious commodity'; see her 'Conflicting Laws? On the Legal Dimension of the Globalized Market Society', contribution to the workshop 'The Conflicts-Law Approach on Trial', Evangelische Akademie Loccum, 17-19 October 2011 (on file with author)

legally anchored within its 1967 stability law (*Stabilitätsgesetz*)[4] – Germany had pursued a monetarist programme encompassing an institutional constellation that was readily reproduced at European level: the primacy of fiscal policy and establishment of an economic policy dedicated to realisation of the 'magical quadrant' – price stability, high employment, balance of payments and appropriate economic growth – were to be secured by virtue of the guaranteed status of monetary policy and its anti-inflationary dedication to price stability. This vision was to be well served 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 the *Bundesrepublik* managed to cope with this re-arrangement.[6] We should also remember, however, that Great Britain, the evangelising force for economic change within Europe, followed far more radical programmes at home, but refused to dispense with Sterling.[7] What then led to the more general European commitment to monetary union? 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.[8] *Cum grano salis*, the same might also 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 set in motion.[9] 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.[10] The 'monetarist' Monetary Union, together with its accompanying Stability Pact[11] were to follow this model.

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[4] See Fritz W. Scharpf, 'Monetary Union, Fiscal Crisis, and the Pre-emption of Democracy', MPIfG Discussion Paper 11/11, MPIfG: Cologne 2011, 2 *et seq*.; on the missed moment at European level see Hagen Schulz-Forberg, 'Historical memory, historical oblivion, historical amnesia in European integration', contribution to the RECON workshop 'The European Rescue of the European Union: The socio-economic malaise of integration', Léon, 9-10 September 2011 (on file with author).

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

[6] Scharpf, 'Monetary Union', note 4, at 5.

[7] Maurice Glasman, *Unnecessary Suffering. Managing Market Utopia*, London-New York, Verso, 1996, 96 *et seq*.

[8] Polanyi (1978) (187 et seq.), see note 3.

[9] Glasman, *ibid.*

[10] Note that our notion of rationality is not that of autopoietic societal subsystems as in use in systems theory; terms and concepts are instead taken from, M. Rainer Lepsius, 'Institutionalisierung und Deinstitutionalisierung von Rationalitätskriterien', in Gerhard Göhler (ed.), *Institutionenwandel* (*Leviathan* Special Issue 16/1996), Opladen: Westdeutscher Verlag, 1997, 57 *et seq.*; for application to Europe, see Lepsius, 'Die Europäische Union als Herrschaftsverband eigener Prägung', in Christian Joerges, Yves Mény &

The law also availed itself of this new constellation: the institutional contours of the internal market were laid down with the aid of legal innovations[12] 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'.[13] Nonetheless, the later claim that this re-regulatory re-structuring by means of preparatory and accompanying jurisprudence encompassed a 'counter-movement' in the terms described by Polanyi[14] is clearly a false one.[15] 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*. However, it is also true that distinct 'counter-movements' were and are detectable, which, in the course of the 'perfecting' of the internal market, have sought to secure – 'through law' – arenas of social and political intervention; counter-movements to which we will return regardless of their somewhat unimpressive performance.[16]

My main concern here, however, is with the function of law within an economic and monetary union which was so often understood to be the crowning moment of internal market policy and just as often conceived of as the herald of federal conclusion of the European project.[17] That myth has lost its strength. Monetary Union, the disempowerment of the German Central Bank is more widely seen as a deliberate political move, motivated by anxieties, memory politics and carelessly executed. It is nevertheless adequate to characterise Monetary Union as a product of 'integration through law' and the type of 'constitutionalisation' this project has promoted. It is also important in particular in the light of German responses to the financial crisis to recall the position which our Constitutional Court has taken in its judgment on the Maastricht Treaty. In that judgment the Court has explained that within monetary union the material and institutional substitution of legal rules for politics, the independence of the new European Central Bank and its commitment

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Joseph H.H. Weiler (eds.), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*, EUI Florence, San Domenico di Fiesole, 2000, 203 *et seq*.

[11] Decision of the European Council on the Stability and Growth Pact, OJ C 236 of 2.8.1997 (Article 12); some details in Christian Joerges, 'What is left of the European Economic Constitution? A Melancholic Eulogy, (2005) 30 *European Law Review* 461-489, at 474 *et seq.* and Christian Joerges & Michelle Everson, 'Law, economics and politics in the constitutionalization of Europe', in Erik O. Eriksen, Johan E. Fossum and Agustin J. Menéndez (eds.), *Developing a Constitution for Europe*, (London-New York: Routledge 2004), 162-179. In the Treaty of Lisbon see Article 126 and Protocol No 12.

[12] Details in Christian Joerges *et al*., *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Nomos: Baden-Baden 1988), 305 *et seq*.; English version in (2010) 6 *Hanse Law Review*, available at www.hanselawreview.org.

[13] On this concept, Giandomenico Majone, 'The European Community as a Regulatory State', *Collected Courses of the Academy of European Law 1994-V/1*, Den Haag-Boston-London: Martinus Nijhof, 1996, 321 *et seq*.

[14] James Caporaso & Sydney Tarrow, 'Polanyi in Brussels', note 3 above.

[15] Martin Höpner & Armin Schäfer, 'Polanyi in Brussels?', note 3 above.

[16] See Section III 2 below.

[17] See, Giandomenico Majone, *The EU in Comparative Context: Regional Integration and Political Transaction Costs*, Cambridge, Cambridge University Press, 2011 (forthcoming), chapter 5 (Paradoxes of Monetary Union).

to the stability of the Euro In an extraordinary remain the *sine qua non* for German participation.[18]

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, so it was argued, endangered the future of *democratic statehood*. This de-democratisation argument was conceived of with specific regard to monetary policy. The Court nonetheless countered, arguing that law had endowed monetary union with a democratic political structure of its own. Insofar as they were compatible with legal structures, 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 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. This was without doubt a surprising conclusion: a greater degree of surprise, however, might have been caused by the fact that German public lawyers took little or no notice of the economic-political reasoning of their own Constitutional Court.[19]

The sustainability and acceptability of this legal construct was, however, to prove to be of short duration.[20] 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 all of this happen? Why would it all 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,[21]

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[18] On the following see early comments by Christian Joerges, 'States without a Market: Comments on the German Constitutional Court's Maastricht-Judgment and a Plea for Interdisciplinary Discourses', NISER Working Paper, Utrecht 1996 (available at http://eiop.or.at/eiop/texte/1997-020.htm).

[19] By contrast, critique focussed on the characterisation of the Union as an 'association of states' (*Staatenverbund*), its notification of its future refusal to enforce any legal acts of the Union made beyond the limits of its competences, and, above all, its definition of democracy as a means whereby a 'relatively homogeneous people' (*Staatsvolk*) might give expression to all those facets that bind it – 'emotionally, socially and politically' together. The tone for critique was largely given by Weiler, see Joseph H H Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', 1 (1995) *European Law Journal*, 219-258.

[20] For more detail on the following, see, Christian Joerges, 'What is left of the European Economic Constitution', (note 11 above), at 204 *et seq*.

[21] The German Constitutional Court deliberated on solidarity payment to Greece and the European solidarity funds on 9th June 2011 (*Griechenlandhilfe* & *Euro-Rettungsschirm*), and handed down its 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 Dietrich Murswiek on behalf of the plaintiff, Gauweiler, can be accessed at http://www.jura.uni-freiburg.de/institute/ioeffr3/forschung/gutachten; for a contrasting perspective,

a moment in which the ECB has been forced to disregard its own statutes,[22] a moment in which national parliaments have been required to schedule emergency sittings, and a moment in which Greece has been forced to learn that its sovereignty has now been limited? As yet, no explanatory academic reference has been made to Polanyi and his analysis of the 'good' of money:[23] nonetheless, it now seems more than appropriate to recall his classification of money as a 'fictitious commodity'[24], as well as his identification of the risks of destruction to the functional conditions for market economies that are to be found within a broader society. The legal constitution of monetary union within the EU 'Europeanised' ordoliberal-monetarist conceptions; the law, however, could not hope ever to substitute for the necessary historical evolution of equally Europeanised social preconditions for successful monetary operation. Majone bases his conclusion that the ECB is a 'constitutional monstrosity' on the fact that the Bank is required to pursue its prescribed aim of monetary stability within a political vacuum and might not make adjustments for socio-economic disparities within the Union.[25] As Scharpf adds, the institutionalised inability to do anything other than react to instability and imbalance with intensified austerity programmes, not only threatens the well-being of European citizens, but also endangers social acceptance for the Union.[26]

In a comment on an earlier version of this paper Fritz Scharpf has raised a further query: does our use of the notion 'de-legalisation' imply that we would advocate compliance with treaty commitments that are at the moment being quite obviously disregarded? Would such an approach be at all compatible with the critique of the institutional framework of Monetary Union? A very similar concern has been raised with regard to the Euratom Treaty and its obsolete technical and political assumptions.[27] In that case strict obedience with the law as it stands has been requested very explicitly by AG Jacobs and the CJEU.[28] But we can by no means follow suit with regard to monetary union. 'De-legalisation' is then all the more dramatic. It describes a constellation in which "the Law" is replaced by governmental activities and administrative operations outside any rule of law. Lawyers are trained to

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Christian Calliess, 'Perspektiven des Euro zwischen Solidarität und Recht – Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms' (2011) *ZEuS*, 213-281.

[22] Martin Seidel, 'Der Euro Schutzschild oder Falle?', ZEI Working Paper B01/2010, Bonn 2010.

[23] See, for example, Marc 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: Hart Publishing, 2011, 223-266, at 233.

[24] Geld 'ist nur ein Symbol für Kaufkraft, das in der Regel überhaupt nicht produziert, sondern durch den Mechanismus des Bankwesens oder der Staatsfinanzen in die Walt gesetzt wird', Polanyi (1978), p – (see note 3).

[25] See Majone, note 5 above and in more detail in note 17 above.

[26] Scharpf, note 4 above

[27] See section III 3 below

[28] See reference in section III 3 below note

argue both ways, to explain that governmental co-operation outside the framework of the Treaty is needed in difficult times;[29] they are able to produce arguments which turn the abolition of democratic institutions in an act of solidarity.[30] We are aware of the indeterminacy theories of the American CLS movement, but we do not understand them to favour the camouflaging of problems, intentions and events. We must instead become aware of and confront the establishment of a second layer of governance in the EU and the risk of its transformation into mechanisms of "non-transparent post-democratic domination".[31] 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 a pan-European form of neo-liberalism and the disregard for democratically-legitimated national institutions and their powers.

2. De-socialisation

'"Labour" is simply a word for a human occupation, which belongs to life as such…'.[32] Labour can only be exposed to the vicissitudes of the market, or the 'storms of this devilish mechanism', for short periods of time.[33] In Polayni's prognosis this would prompt the evolution of 'counter-movements', which he then found in the 19th Century in the 'entire web of measures and rules' with which society 'sought to protect itself against the inherent dangers of a self-regulatory market system'.[34] Following WWII, he identified counter-movements within the welfare state programmes which were also designed to prevent the return of the recent fascist past.[35] Certainly, during a period of 'embedded liberalism'[36], the European Economic Community and the national welfare/social state were at first to co-exist peaceably and this notwithstanding the fact that the EEC was conceived of as an exclusively economic project and the sphere of the 'social' was consequently considered to be a purely national matter. This situation was nonetheless not to be sustainable as Europe

[29] See Daniel Thym, 'Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsrechtliche Kontrolle', (2011) 25 *Europäische Zeitschrift für Wirtschaftsrecht*, 167-171; but see Bruno de Witte, 'The European Treaty Amendment for the Creation of a Financial Stability Mechanism', SIEPS Working Paper, June 2011, Stockholm 2011, available at www.sieps.se.

[30] Calliess, note 21 above.

[31] Jürgen Habermas, 'Democracy is at stake', *Le Monde*, 27 October 2011, English version available at http://www.presseurop.eu/en/content/article/1106741-juergen-habermas-democracy-stake.

[32] Polanyi (1978: 107); as Glasman, note 7 above, at 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'.

[33] Polanyi (1978, 109).

[34] Polanyi (1978, 112).

[35] Polanyi (1978, 297). For prominent confirmation, see, Tony Judt, *Postwar: A History of Europe since 1945* (New York: Penguin Press, 2005) 791 *et seq.* and now also his *Ill Fares the Land* (New York, Penguin Press, 2010), 127 *et seq*.

[36] Gerald S. Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', (1982) 36 *International Organization*, 375-415.

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.[37] Such 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 Delors – above all, in his roots within French socialism – and the subsequent hope was that the integration project would also develop a stronger 'social dimension' which would lay the foundation for a *European* social model.[38]

The eastern enlargement process, however, had such a fundamental impact upon the European constellation, that unstinting efforts to intensify the integration project in order to augment its legitimacy similarly proved to be counterproductive, merely reproducing the by now sclerotic European model. 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.[39] 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 even 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 – as ever – found its most powerful expression within the legal medium. The *Viking*, *Laval* and *Rüffert* judgments[40] are the most

[37] See Majone, note 5 above; Scharpf, note 4 above; Glasman, note 7 above.

[38] See, for more detail, Christian Joerges, 'Will the welfare state survive European integration? On the exhaustion of the legal conceptualisations of the integration project from the foundational period and the search for a new paradigm', (2011) 4 *European Journal of Social Law*, 4-19, at 10.

[39] See, Florian Rödl, 'On the problems of democratic and social union', contribution to the workshop 'The Conflicts-Law Approach on Trial', Evangelische Akademie Loccum, 17-19 October 2011 (on file with author).

[40] 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*, *Svenska*

characteristic and discussed legal elements of this strategy: '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 the common European labour law constitution.[41]

Is the CJEU 'allowed to' refashion the national labour law constitution? Why did this happen? The answer is simple: the Union has proved itself incapable of supplementing its market constitution with a labour and social 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.[42]

We do not, however, wish to be understood as being socially conservative defenders of 'domestic justice' with no sensitivity for the quest for transnational justice and solidarity. Nonetheless, and speaking legally, what appears to be wholly unacceptable is the 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

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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.

[41] Amongst a wealth of comment, the clearest formulation is to be found in Antoine Lyon-Caen, 'Droit communautaire du marché v.s. Europe sociale', in *Symposium des Bundesminsteriums für Arbeit und Soziales*, Berlin, 26.6.2008, www.cgsp-irw.be/fr/documentation/europe-sociale.html.

[42] Michelle Everson , 'From *Effet Utile* to *Effet Néolibéral*: Why is the ECJ Hazarding the Integrity of European Law?', in Christian Joerges and Tommi Ralli (eds.), *European Constitutionalism without Private Law -- Private Law without Democracy*, RECON Report 14/2011 Oslo, ARENA, 2011, 31-46.

pointed out in a recent essay: the chain of judgments cited started in December 2007, only a few weeks after the beginning of the financial crisis. There is, Deakin adds, certainly no direct link discernable either to that financial crisis or to the ECB constitution and the stability pact and its provisions. 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.[43] 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. This is what we mean by the notion of 'de-socialisation'.

3. Disenfranchisement

'Land, by the same token, is simply another word for the nature that is not produced by man'.[44] 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. We are aware of our very daring, if not misconceived reliance on the Polanyian notion of 'land'. And yet, there is a kernel of validity in our admittedly 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 accomplishments of the integration project. Yet, atomic energy is very deliberately excluded from this achievement. Disdaining titular use of the ugly term 'atomic energy', the Euratom Treaty of 1957[45] nonetheless emphasised in its preamble that 'nuclear energy is an indispensible 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, instead re-iterating 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 since, 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 then be argued to embody a structural deficit

[43] Simon Deakin, 'The Lisbon Treaty, the *Viking* and *Laval* Judgments, and the Financial Crisis: In Search of New Foundations for Europe's 'Social Market Economy', Ms. Cambridge, May 2011 (on file with author.

[44] Polanyi (note 6 above), 107.

[45] Consolidated version in OJ C 84, 1 of 30.3.2010.

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 for compensation, from its ability to bridge the gap between 'participation and impact'.[46] Nuclear energy perhaps represents one of the most critical areas with regard to compensatory functions: European law must surely not acquiesce to the structural democratic 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 'Land' (federal unit) of Upper Austria and the Czech Republic on the operation of the nuclear power station at Temelín.[47] The conflict had a long history, stretching back to 1985,[48] and clearly demonstrated tensions between legal-institutional competences and practical-political operational pressures. As late as 2001, AG Jacobs opined that 'according to Community law', member states must be understood as retaining exclusive (or, almost exclusive) competence in technological questions of nuclear safety.[49] 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 which satisfied the demands of the European Commission.[50]

Nonetheless, such arbitration was to fall on the deaf ears of Upper Austria, who reacted to Temelín with an *actio negatoria* designed to proscribe the potential for cross-border ionising

[46] The formula ('*zwischen Teilnahme und Betroffenheit*') is to be found in Jürgen Habermas, *Staatsbürgerschaft und nationale Identität. Überlegungen zur europäischen Zukunft* (Zürich, Erkner, 1991) at p 19 [the essay is included in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, as Annex II ('Citizenship and National Identity'), Polity Press, 1996), 491-516.]; more recently Habermas has defined the democracy problem of the global 'postnational constellation' in precisely the same way as we understand it: 'Nation-states [...] encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level [...].', thus Jürgen Habermas, 'Does the Contitutionalization of International Law Still Have a Chance?' (translated by Cirian Cronin), in Jürgen Habermas, *The Divided West* (Polity Press, 2007), 113-193, at 176.

[47] C-115/08, *Land Oberösterreich* v *ČEZ*, judgment of 27.10.2009, nyr.

[48] Waldemar Hummer, 'Temelín: Das Kernkraftwerk an der Grenze', in (2008) 63 *Zeitschrift für öffentliches Recht*, 501-557.

[49] AG Jacobs, 13th December 2001, C-29/99, *Commission* v *Council*

[50] Hummer (note 48 above), at 506.

radiation from the plant.[51] The Czech owners of the plant countered, pointing to the legal authorisation of the plant and to paragraph 364(a)(II) of the Austrian Civil Code, which makes enabling provision for monetary compensation for damage suffered following an official authorisation.[52] 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?[53]

This is a complex interest conflict: Austrian and Czech law contradict one another. Europe has no explicit competence which would allow 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 a long established legal terminology – and this in order to describe contextual alterations in the operational environment of the Euratom Treaty – a possible *lex cessante*: to what degree might the Euratom Treaty of 1957 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'.[54]

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 the opposition to this form of energy than it did from its users, since it imposed a form of 'toleration duty' 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 member remains attached to this form of energy. This conclusion immortalises the democratic deficit that is found within the structures nation state; a deficit, the compensation of which is the most noble of tasks performed by European law – a compensatory performance that also provides one of the strongest legitimating bases for European law. The new 'Citizens Initiative' laid down in Article 11(4) TFEU might be 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

[51] § 364(2), allows for neighbouring property owners to begin action to proscribe activities which have an unusual impact across property boundaries.

[52] § 364(a), limiting actions to claims for compensation only in the case of an official authorisation.

[53] Bundesverfassungsgesetz für ein atomfreies Österreich, BGBl. I Nr. 149/1999.

[54] Case C-115/08, para. 72.

Treaties.[55] 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 within primary European law, including the provisions of the Euratom Treaty? Not only the Commission, but also the Green Party within the European Parliament is of this opinion.[56] If citizens have been denied the right to demand legal changes, even to primary law and inclusive of the 1957 Euratom Treaty, then they have been disenfranchised.

III. Unfreezing the Law-Politics Relationship through Conflicts-Law Constitutionalism

What should be our response when we observe that the overburdening of law has so far not been sufficiently compensated for by institutional innovations? What alternatives do we have if it seems highly unlikely in view of Europe's political and socio-economic constellation that such steps will be taken in the foreseeable future? We cannot do, let alone accomplish, much in our ivory towers. Our only option is to submit ideas – and it simply seems irresponsible *not to consider* perspectives which do *not* entail some form of big bang. Our aim in the following is not one of considering the various paradigms of legal integration theory, and more particularly, their current exhaustion;[57] nor will we consider the normative merits of and political potential for federalist visions. We will instead restrict ourselves to a very brief re-statement of the conflicts-law approach, its theoretical ambitions and practical limits. We cannot hope to provide recipes for the threefold *problématique* discussed in the previous section. That would be pure hubris and far beyond the lawyer's – and the law's! – potential and vocation. The idea of 'conflicts-law constitutionalism' is not about the delivery of so-called 'solutions'. It is instead about a re-configuration of the law and politics relationship, which seeks to save the project of 'integration through law' and the idea of law-mediated legitimacy, albeit in an alternative, radical proceduralisation of the category of law.

1. 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 interdependent in very many ways and therefore depend upon co-operation. There is also no escape from the fact that their domestic policies can impact upon their neighbours or that the European legal discipline can

[55] The recent Regulation 211/2011 (OJ L 65, 1 of 11.3.2011) reproduces this formulation in Article 4(2).

[56] http://www.greens-efa.eu/fileadmin/dam/Documents/Publications/2011-03-15%20ECI%20Broschuere%20fin%20for%20internet.pdf; see also Markus Krajewski, 'Legal Framework of a European Citizens' Initiative for a European Right to Water', Bremen-Erlangen, 2010; Christian Joerges, 'The timeliness of direct democracy in the EU', conference contribution to 'The European Citizens' Initiative: How to get it started', Brussels, 29 June 2011 (The Greens/European Free Alliance in the EP); slightly revised version forthcoming in (2011) 2 *Beijing Law Journal* (http://www.scirp.org/Journal/blr); more recently, Sebastian Wolf, 'Euratom, the European Court of Justice, and the Limits of Nuclear Integration in Europe', (2011) 12:8 *German Law Journal*, 1637-1658.

[57] See Joerges, 'Will the welfare state survive European integration?, note 38 above.

even intensify this process. It seems furthermore safe to assume that this ever increasing co-operation, which is necessitated by multiple interdependency and external effects, will not lead to the establishment of socio-economic homogeneity and/or a strong federal entity in the foreseeable future. Instead, and in view of the histories of European democracies and their uneven potential for and/or willingness to pursue objectives of distributive justice, to respond to economic and financial instabilities, and to cope with environmental challenges, it is highly unlikely that the Europeans will converge in their political perspectives. At the same time, and in view of the enormous complexity of their social systems and the diversity of their entitlements, it is equally inconceivable that they will institutionalise a pan-European welfare system. The future of the European project seems to depend upon the 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 should refrain from conceptualising and portraying European law as an ever growing and ever more comprehensive body of rules and principles of progressively richer normative quality. What European law must instead learn, and especially so when it comes to Europe's social dimension, is to live with its diversity and to take the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty very seriously indeed. 'Unity in Diversity'[58] is Europe's true vocation and, so we suggest, it is one that can be realised through a new type of conflicts law understood as Europe's underlying constitutional framework. This suggestion has its technical complexities. Its core analytical assumptions and normative messages, however, are transparent: the idea of a European conflicts law departs from the sociological observations already alluded to and spells out their normative implications. Under the impact of Europeanisation and globalisation, 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. Increasingly, constitutional states are unable to guarantee the inclusion of all of those persons who are impacted upon by their policies and politics within their internal decision-making processes. The democratic notion of self-legislation, however, which postulates that the addressees of a law should be able to understand themselves as its authors, demands 'the inclusion of the other'. The conflicts-law approach builds upon these observations and arguments. As a consequence of their manifold degree of interdependence, the Member States of the European Union 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 the national democracies, may educe its legitimacy from this compensatory function. With this, European law can, at last, 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

[58] Article I-8 Draft European Constitutional Treaty (OJ. C 310,1, of 16.12.2004).

its own democracy deficit, we should detail and develop the potential of European law to compensate for the structural democracy deficits of the European nation states.[59]

2. '*Wo aber Gefahr ist, wächst – Das Rettende auch*'[60]

What difference does the conflicts-law approach make? This query requires and of course deserves more detailed answers than can be given here even in the substantively indirect – albeit methodologically demanding – perspectives of the conflicts-law approach. I will not shy away completely, however, from commenting briefly on all of the three problems addressed in our second section.

a) Money

The failures of the entire Monetary Union construction, which can no longer be ignored, have led to hectic activity, opaque bargaining and a degree of disregard for the rule of law which was once far beyond the powers of juridical imagination.[61] A first question here is one of why an otherwise enormously prolific constitutionalist academic community is suddenly so silent? One of the few commentators in Germany who does speak and seeks to provide justificatory arguments for hectic European activity is Christian Calliess.[62] He invokes a serious normative reason, namely, solidarity understood as a valid legal principle and duty within the EU – to justify the apparent readiness to treat the letter of the law very lightly indeed. There are political scientists, even economists and philosophers who share this concern.[63] Solidarity is an overriding principle and duty in the shadow of which the letter of the law can and must be disregarded. Solidarity among the Member States of the EU, or solidarity as it is actually practiced, may, however, have much more mundane roots and far less laudable effects.[64] What is clearly visible is that its legal implementation will come at a price: solidarity militates in favour of helping the other, but is to be exercised with a view to

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[59] See, in more detail, Christian Joerges, 'Integration through Conflicts Law: On the Defence of the European Project by means of alternative conceptualisation of legal constitutionalisation', in Rainer Nickel (ed.) *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification*, (Antwerp: Intersentia, 2010), 377-400; *id*., 'The Idea of a Three-dimensional Conflicts Law as Constitutional Form', (note 7 above); 'Unity in Diversity' (note 1 above).

[60] Friedrich Hölderlin, *Patmos. Dem Landgrafen von Homburg überreichte Handschrift* (1802).

[61] Article 122(2) TFEU was so far not a widely known provision and therefore deserves to be cited: '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, Portugal …

[62] Christian Calliess, 'Treue und Solidarität', *Frankfurter Allgemeine Zeitung*, 30 June 2011, p 6; *idem*, 'Perspektiven des Euro', note 21 above.

[63] For a critique with instructive references, see Glyn Morgan, 'Justice, Solidarity, and the Eurozone, paper presented at the RECON workshop on 'Transnational Social Justice in the European Union and its Implications for Global Justice", Amsterdam, 10-11 June 2011 (on file with author).

[64] Wolfgang Streeck, 'The Crisis in Context: Democratic Capitalism and Its Contradictions", Max Weber Lecture at the European University Institute, Florence, 20 April 2011.

effecting a cure for the other's failures; an 'other' who must, therefore, be subjected to the corrective economic governance regimes ('*nachholende Wirtschaftsregierung*') established by those who are offering their helping hand.[65] The risk underlying this approach is blindingly obvious: not only might Europe's extra-legal crisis management fail to achieve its objective thus provoking social unrest, primarily in southern Europe, but it might also discredit the democratic institutions of the EU and the member states.[66]

There are, however, some signals indicating a new awareness of the growing constitutional misery. The European Council concluded in its meeting on the 24th and 25th March 2011 that Article 136 TFEU should be amended by a new paragraph.[67] This is the first amendment to be made to the Treaty since the Lisbon Treaty came into force.[68] What this move at least documents is a willingness to establish a legal framework for the on-going crisis and for future crisis management.[69] This is nonetheless certainly not what Jürgen Habermas had in mind when he called, in his most recent manifesto, for an 'aggressive continuation of the quest for a democratically-legalised EU.'[70]

b) Labour

The recent jurisprudence of the CJEU[71] suggests itself as a less dramatic but nonetheless acid test for the viability of the conflicts-law approach. We have discussed this jurisprudence extensively elsewhere[72] and therefore restrict ourselves here to one seemingly technical (1) and another apparently conservative (2) remark.

(1) 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-

[65] Calliess, note 21 above. The term recalls quite loosely Jürgen Habermas, *Die nachholende Revolution*, Frankfurt a.M.: Suhrkamp , 1990).

[66] Scharpf, 'Monetary Union', note 4 above.

[67] 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

[68] In fact another amendment was agreed upon on 23 June 2010, which amended the transitional provisions concerning the composition of the European Parliament (numbers of MEPs of certain Member States). See Protocol amending the Protocol on Transitional Provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community, OJ 2010, C 263/1.

[69] See also Antonis Antoniadis, 'Debt Crisis as a Global Emergency: The European Economic Constitution and other Greek Fables', available at: http://ssrn.com/abstract=1699082

[70] 'Democracy is at stake', note 31 above

[71] See note 40 above.

[72] See , e.g., Christian Joerges & Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', (2009) 15 *European Law Journal*, 1-19; Everson, 'From Effet Utile to Effet Néolibéral', note 42 above.

Caen, in a comment on the ECJ's judgments, has lucidly accentuated the diversity of both bodies of law.

> '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 marchés'.[73]

It follows from this diversity that the economic freedoms cannot trump collective labour law. Both sets of norms, which are potentially applicable to the case in question, have their own specific legitimacy. But rather than pleading for the supremacy of the former and defending the latter as untouchable, we should ask how the two regimes can be co-ordinated. Such a co-ordinative effort is clearly visible in the Posting of Workers Directive;[74] 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. The reference of the Treaty to national orders should be understood as a principle of respect for labour law and a pragmatic implication of our core understanding of the enormous difficulties inherent to any attempt to overcome the diversity of national laws by means of imposition of a uniform European regime.

(2) Does all this mean that the established democracies of old Europe should be entitled to protect the interests of their labour force against the newcomers from the accession states? This question, though important, nonetheless does not adequately address the primary issue at stake here. We need to ask whether it is really 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 western and northern European neighbours; we need to 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 once again: 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'. It would be misleading to represent the social

[73] 'In West European societies labour law was constituted as an alternative to the law of the market. It developed terminological distinctions which one must not disregard: *liberté de commerce* here, freedom of trade there… To be sure, legislation relating to work had been in place prior to that emancipatory move, but pertinent rules were meant to control work in a way which was more or less akin to laws policing the market or markets in general' (translation by the author) – thus 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*, Berlin 26 June 2008, organised by the Federal Ministry of Labour and Social Affairs, available at: http://www.bmas.de/portal/27028/2008__07__16__symposium__eugh__lyon-caen.html.

[74] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L 18, 1.

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'.[75]

All this is not to suggest, however, that the law should or could immunise it self against the many transformative aspects in the field which in particular Ralf Dahrendorf and his followers have identified: The modern social conflict is categorically different from the form of class conflict which generated labour law in the past.[76] Being different, however, does not imply that the labour ceases to be a 'fictitious commodity' in the Polanyian sense. The form of social protest which can currently be observed is without doubt amorphous and is not yet in a position to constitute the political agenda of a 'countermovment'. The signs of political discontent are nevertheless clearly visible. What the conflicts-law approach can offer here is not a substantive recipe. However, this approach is at least open to change, ready to accept that labour and employment relationships need not be uniform in an ever diverse European Union, and critical of European law's reduction of the issue to the promotion of economic liberties; it can claim to be compatible with, and supportive of, a democratic structuring of labour markets and labour law.

c) 'Land'

With respect to the debate in Europe over atomic or nuclear energy we would like to underline in line with our previous comments[77] the need for political openness within European law. Atomic energy confronts us with fundamental difficulties. It took the Germans decades of political contestation before they concluded 'after Fukushima' that their *Ausstieg* would be politically opportune, as well as economically and technologically feasible. There are many reasons why other societies are not prepared simply to follow that example. But the choices to be made should not be delegated to expert circles, intergovernmental bargaining, outdated or renewed treaty provisions or to the European Court of Justice.[78] Energy policy needs to be embedded in legitimating political processes. Such processes are unlikely to end in European-wide 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; and, with the new citizens initiative, European law at last has a concrete means to further transnational communication and contestation.[79]

There are, we conclude, moves towards a reconfiguration of the law-politics relationship underway. How likely is it that they will remain alive? How likely is it that this at present

[75] *Ill Fares the Land*, note 35 above.

[76] Ralf Dahrendorf, 'Citizenship and Social Class', in *idem*, *The Modern Social conflict: the Politics of Liberty*, New Brunswick, NJ: Transaction Publishers, 2nd ed. 2008, 23-48.

[77] Section II 3.

[78] See my critique of the *Temelín* judgment, Case C-115/08, *Oberösterreich v. ČEZ as*, [ECR] 2009 I-10265 in 'Unity in Diversity' (note 1 above), 108 *et seq*.

[79] See Joerges, 'The timeliness of direct democracy' (note 56 above).

unsubstantiated quest can be transformed into a political agenda? These are queries beyond the law's and the lawyers' competences.

Is all this, then, another 'melancholic eulogy'[80] or one more 'irritated heckler'[81]? By no means. It is rather written 'flagranti cura', 'mit brennender Sorge'.[82]

[80] Above note 11.

[81] Christian Joerges, 'Integration through de-legislation? An irritated heckler' European Governance Papers (EUROGOV) No. N-07-03, available at: http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf.

[82] Acta Apostolica Sedis Commentarium officiale, Annus XXIX, Series II, Vol. IV, Roma 1937, p. 145, available at http://www.vatican.va/archive/aas/documents/AAS%2029%20[1937]%20-%20ocr.pdf.