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The Legal Proprium of the Economic Constitution

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Une Querelle Allemande?

Writing in early 2019, the rate of challenge to post-war liberal constitutional settlement is breathtaking. Within the nation state, as within the EU, all the complacency that the 2008 financial crisis has been overcome has been blown away as constitutional-democratic processes totter and teeter, assailed by authoritarian leaders and so-called 'populist' movements. Is it at all possible to respond adequately to such fast-paced developments? Our chapter seems to avoid the effort altogether, dealing, instead, with two master thinkers of post-war German jurisprudence. It will, nevertheless, become readily apparent why each of these authors deserves this attention, and why they deserve it now. Our prime concern in our twofold homage reaches far beyond academic laudation, taking, instead, a systematic approach to their work with, we hope, contemporary relevance. We will present the work of our two protagonists, each a member of the same post-war generation, and thus each duty-bound to redefine the proprium of law. The projects developed by Ernst-Joachim Mestmäcker and Rudolf Wiethölter concern the 'ordering' of the economy, or its fruitful placement within the constitutional framework. These perspectives represent two distinct German *Sonderwege* of legal thought. We are also engaged in this contest and are clearly partisan in our conceptual allegiance. Nevertheless, we also pursue a far broader agenda of our own, seeking to deploy both projects, first to shed 'light' on Europe's crisis-ridden post-democratic constellation, and then to explore the potential for the preservation of the legal proprium within a political economy of profound transformation.

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I The Economical and the Political

We take as our starting point the contributions made by Ernst-Joachim Mestmäcker and Rudolf Wiethölter to the *Festschrift*, '*Wirtschaftsordnung und Rechtsordnung*', which honoured Franz Böhm on his seventieth birthday in 1965.[1] Franz Böhm had been academic mentor to Mestmäcker for over a decade, and Mestmäcker was deeply indebted in his research to Böhm's seminal work on the 'economic constitution' (*Wirtschaftsverfassung*). Tellingly, in his contribution to the *Festschrift*,[2] he transferred the notion of the economic constitution to the European level, thereby elaborating on its latent supranational ambitions that reached far beyond individual EEC Member States. Wiethölter had received his first *Ruf* (professorial appointment) to Böhm's chair in Frankfurt. He submitted his 1964 inaugural lecture on the '*soziale Rechtsstaat*' (social [rule-of-law] state) to the Böhm *Festschrift*.[3] In his own working out of the social state concept, Wiethölter signalled his indebtedness to the legacy of Herman Heller and his commitment to the defence of the primacy of democratic legitimacy within economy and society. The divergence between these two *Sonderwege* seems so very obvious, yet is also far more complex. We will seek to decipher them by exploring, first, their methodological, and thereafter, their substantive, dimensions.

I.1 The Methodological Dimension

I.1.1 The Exercise of Freedom under General Rules

In a seminal 1972 lecture,[4] Mestmäcker elaborated on the methodological consequences of the constitutional premises that he had laid down in

[1] The idea of a theoretical comparison occurred to us in debate around a review by Christian Joerges of the most recent writings of Ernst-Joachim Mestmäcker (*Europäische Prüfsteine der Herrschaft und des Rechts. Beiträge zu Recht, Wirtschaft und Gesellschaft in der EU* (Baden-Baden: Nomos, 2018), and Christian Joerges, Review Essay, 'The Jurist as True Teacher of Law' (2019) 56 *Common Market Law Review*, 843–64).

[2] 'Offene Märkte im System unverfälschten Wettbewerbs in der EWG', in Helmut Coing, Heinrich Kronstein and Ernst-Joachim Mestmäcker (eds.), *Wirtschaftsordnung und Rechtsordnung. Festschrift zum 70. Geburtstag von Franz Böhm* (Karlsruhe: C.F. Müller, 1965), pp. 345–91.

[3] 'Die Position des Wirtschaftsrechts im sozialen Rechtsstaat', in: *Wirtschaftsordnung und Rechtsordnung*, n. 2 above, pp. 41–62.

[4] 'Macht, Recht, Wirtschaftsverfassung' (1973) 137 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*, 97–111; English translation: Mestmäcker, 'Power, Law and Economic Constitution' (1973) 11 *The German Economic Review*, 177–92.

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his contribution to the Böhm *Festschrift*, submitting that 'the issue is not merely to recognise the common problems of definition of jurisprudence and economics. It is just as important to develop economic policy solutions susceptible of being bound by legal and constitutional rules.'[5] Wiethölter observed a brief two years thereafter: 'there is little or no room left available for systematic legal logic (doctrine) when synchronisation between the operational techniques of lawyers and the creation of social theory that adequately reflects contemporary society is disturbed or destroyed'.[6]

Faux amis or ideational affinities? Both thinkers were clearly concerned that the law might have 'run out': Was there now a misfit between the logic of economics and the ability of law to order the economic within society? Their concerns were the same, their responses less so. For ordoliberal tradition, an inherent affinity between the legal and the economic had once been a core constitutive premise. In the words of a non-partisan observer, 'The juridical gives form to the economic, and the economic would not be what it is without the juridical.'[7] For Walter Eucken and Franz Böhm, the – somehow – prestabilised harmony between the legal and the economic could never be understood as an unconditional given, but instead required legal-constitutional underpinning for the simple reason that both the practice and the theory of law are moving targets. The conference that hosted Mestmäcker's cited lecture[8] questioned the legacy of Eugen von Böhm-Bawerk, a foundational figure within the Austrian School of Economics, who had argued that the logic of the economy would always – sooner or later – trump non-compliant political aspirations.[9]

[5] Mestmäcker, n. 4 above, p. 183. The German original is clearer: 'Die Wirtschaftspolitik müsse sich "verfassungsrechtlich binden" lassen und "nach justiziablen Kriterien richten", Macht-Recht-Wirtschaftsverfassung', *Schriften des Vereins für Socialpolitik*, NF Bd. 47/I, S. 183 [=(1973) 137 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 97–111].

[6] 'Privatrecht als Gesellschaftstheorie? Bemerkungen zur Logik der ordnungspolitischen Rechtslehre', in: Fritz Baur, Josef Esser, Friedrich Kübler and Ernst Steindorff (eds.), *Funktionswandel der Privatrechtsinstitutionen. Festschrift für Ludwig Raiser zum 70. Geburtstag* (Tübingen: Mohr/Siebeck, 1974), pp. 645–95.

[7] Michel Foucault, *The Birth of Biopolitcs. Lectures at the Collège de France 1978–79* (New York: Palgrave, 2014), p. 163.

[8] German Association of Economists (*Verein für Socialpolitik*), Annual Meeting 1972 in Bonn on 'Macht und ökonomisches Gesetz'.

[9] Eugen von Böhm-Bawerk, 'Control or Economic Law' (Macht oder ökonomisches Gesetz, 1914), Ludwig von Mises Institute: Auburn, Alabama, 2010. *Recht und ökonomisches Gesetz*, the title of an earlier collection of Mestmäcker's essays (Baden-Baden: Nomos, 1978), is his programmatic answer to Böhm-Bawerk.

Mestmäcker embraced this message that the 'rules' of the economy could not simply be assumed to achieve their own equilibrium. He did not, however, explicitly assign to the law any form of 'supportive' supremacy over the economic. On the contrary, his observations appear to us to be quite ambivalent within the established ordoliberal tradition. Although not explicitly disavowing the concretisation of economic policy within legal-constitutional prescription, Mestmäcker diverged to a degree from the views of the two founding ordoliberal fathers, Eucken and Böhm, observing that economic ordering cannot be directed to a given objective, for example, and vitally so, the idea of perfectly competitive markets.

Two reasons explain such caution. One was Mestmäcker's 'Hayekian turn'. Hayek's reconceptualisation of competition as a 'discovery procedure' was to reorient the ordoliberal school.[10] This was a reorientation of paradigmatic dimensions.[11] Competitive processes should only be guided, or limited, by 'abstract legal rules'; any substantive prescription was from now on to be perceived to be an 'anti-competitive' intervention within free market ordering. A further challenge was posed to inherited ordoliberal orthodoxy by the German turn to Keynesianism in the 1960s under the so-called 'super-minister', Karl Schiller. Under the '*Stabilitätsgesetz*' and the '*Konzertierte Aktion*' programmes, introduced in 1967, the political system was now expected to govern within a 'magic triangle' of (competing) goals of price stability, maintenance of the balance of payments, and economic growth. Mestmäcker's closest theoretical ally was among the strongest critics of this turn to economic managerialism.[12] Mestmäcker himself, however, was far more circumspect. His support for the practice of ruling by rules appeared defensive:

[10] Hayek's essay was published in English only in 2002 ((2002) 5 *The Quarterly Journal of Austrian Economics*, 9–23). The German original: '*Wettbewerb als Entdeckungsverfahren*' (Kiel: Institut für Weltwirtschaft, 1968); reprinted in Hayek, *Freiburger Studien* (Tübingen: Mohr Siebeck, 1969), pp. 249–65.

[11] Pierre Dardot und Christian Laval call this turnaround 'neo-ordoliberalism'; see their *The New Way of the World: On Neoliberal Society* (London: Verso Books, 2013), p. 194 et seq., 205 et seq. Dedicated defenders of the ordoliberal tradition tend to downplay the difference; see, recently, Peter Behrens, 'Laudatio', in: Reinhard Ellger and Heike Schweitzer (eds.), *Die Verfassung der europäischen Wirtschaft. Symposium zu Ehren von Ernst-Joachim Mestmäcker aus Anlass seines 90. Geburtstages* (Baden-Baden: Nomos, 2018), pp. 11–22.

[12] Erich Hoppmann (ed.), *Konzertierte Aktion. Kritische Beiträge zu einem Experiment* (Frankfurt aM: Athenäum, 1971); see, for a critical comment, Christian Joerges, 'Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts' (1979) 43 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 6–79, at 44 et seq.

'Up to the present, it has proved possible to administer general clauses by way of court rulings only where the structural similarity between private law and market economic process remains strong.'[13] What, however, of the situation where this structural similarity is distorted? Then, 'the judicial system cannot be wiser than contemporary economics in judging macroeconomic relationships'.[14] Is this merely a pragmatic concession to political power with a collateral impact upon the theoretical coherence of Mestmäcker's position? Or, does it represent something more? This query was never answered, losing its cogency in step with the rise of monetarism and neo-neoliberalism.[15] We will nevertheless necessarily return to this question in the course of our discussion of the present crisis (Part III).

I.1.2 Political Administration

Responding in his turn to this juridification wave, Wiethölter coined his own notion of 'political administration', a term which seeks to capture the specific characteristics of the *soziale Rechtsstaat* as home to:

> a form of law (once incorrectly called regulatory (*Maßnahmegesetze*)), which is distinguished from the classical rule of (substance) law that was derived from transcendental sources, by virtue of its planned and instrumental, or political purpose (goal) orientation. Such laws are neither frameworks, nor boundaries, nor moulds within which all manner of individual acts of legal disposition might be made; rather, they execute – directly or indirectly – a specific content-filled programme.

For Wiethölter, the foundational law of the ordoliberal economic constitution, namely, Ludwig Erhard's 1957 *Kartellgesetz*, as amended by the 1968 Act against Restraints of Competition, suggested itself as the exemplary case. This characterisation most surely has acted as a provocation to his ordoliberal colleagues, but was nevertheless wholly justified. The famed Antitrust Statute was indeed motivated by political objectives, debated in their time with great intensity in the quest for a new *leitmotif* for competition policy. An independent agency (the *Bundeskartellamt* in Berlin), staffed with an eye to necessary interdisciplinarity, with economists and lawyers, was charged with its implementation. The notion of 'political administration' captured these

[13] Mestmäcker (n. 4), 187.
[14] Ibid.; see, also, p. 190 et seq.
[15] See Peter A. Hall, 'Commentary. Brother, Can you Paradigm?' (2013) 26 *Governance: An International Journal of Policy, Administration and Institutions*, 189–92.

innovations well. For his part, rather than elaborate the technical, legal and interdisciplinary niceties, Wiethölter repeatedly refined his vision in thoughtful, brilliant, but also enormously complex, sketches,[16] which Jürgen Habermas has gently mocked: 'Thoughts are gathered meaningfully together like a maxim, only then in the next moment to mix explosively, detonating as ironic fireworks that project allegorical figures into the night sky, which are still in need of deciphering.'[17] But why was Wiethölter so idiosyncratically impatient? Why did he not engage, for example, with the debate on US experiences of the regulatory turn within the New Deal, on Ernst Forsthoff's post-democratic *Industriestaat*,[18] or on Hans Peter Ipsen's conceptualisation of the European Communities as '*Zweckverbände funktioneller Integration*' (special purpose association of functional integration).[19] Would that have made sense? In all of his pleadings for radical democratic innovation, Wiethölter always simultaneously identified the arguments that undermined his visions. The most telling example is a leading competition law case handed down in 1970 by the German Federal Court (*Bundesgerichtshof*).[20] Everything that Wiethölter had complained about in his critique of the premises and practices of German legal science (*Rechtswissenschaft*) became visible within the legalisation of the concerted oligopolistic behaviour of oligopolists: according to the Court, no anticompetitive '*Kartellvertrag*' had come into being (§1 GWB) since, as was the case under the Civil Code, contracts required offer and acceptance – our oligopolists, however, had not been so foolish as to coordinate their behaviour by means of formal contractual conclusion.

At this stage, we can sketch out a first summary: Mestmäcker sought to identify the conceptual conditions under which the market economy could be governed by law – but was forced to realise that these conditions had become fragile. Wiethölter identified the need for a paradigm shift in the coordination of politics and law – but realised that the law, as practised within the mainstream, operated as an insuperable barrier to innovative change. This methodological discrepancy is not easily

[16] See Rudolf Wiethölter, 'Privatrecht als Gesellschaftstheorie? Bemerkungen zur Logik der ordnungspolitischen Rechtslehre', in: Fritz Baur, Josef Esser, Friedrich Kübler and Ernst Steindorff (eds.), *Funktionswandel der Privatrechtsinstitutionen. Festschrift für Ludwig Raiser zum 70. Geburtstag* (Tübingen: Mohr/Siebeck, 1974), pp. 645–95.

[17] Jürgen Habermas, 'Der Philosoph als wahrer Rechtslehrer: Rudolf Wiethölter' (1989) 22 *Kritische Justiz*, 138–46.

[18] *Der Staat der Industriegesellschaft*, 2nd ed. (Munich: C.H. Beck, 1971).

[19] *Europäisches Gemeinschaftsrecht* (Tübingen: Mohr Siebeck, 1972), p. 176 et seq.

[20] BGHZ 53, 104 (=BGHSt 24,54) – '*Teerfarben*'.

categorised as being of a 'conservative' versus a 'progressive' disposition. It is, instead, rooted within more substantive concerns, leading us now to consider the material notion of *Wirtschaftsverfassun*g.

I.2 Governance through Competitive Markets or Political Ordering of the Economy

Three years prior to the Böhm *Festschrift*, to which both Mestmäcker and Wiethölter contributed, Jürgen Habermas published his legendary *Strukturwandel der Öffentlichkeit*.[21] In chapter 16 of this work, Habermas addressed the restructuring of the relationship between society and the state, famously arguing that the once so firmly established separation between the two spheres had succumbed, leaving both realms interwoven with one another. It is precisely this blurring of a traditional rule of law conception that proved so troublesome within the search of each of our protagonists for the contemporary proprium of law.[22]

I.2.1 Mestmäcker's *Wirtschaftsverfassung*: The Precondition and Guardian of a Free Society

'*Wirtschaftsordnung und Rechtsordnung*' – a more paradigmatic ordoliberal maxim is scarcely imaginable, and the aptness of this appellation is only confirmed by the difficulty which we face in identifying an adequate translation: 'the order of the economy and the order of the legal' is enigmatic to the point of incomprehensibility. Yet the maxim is more easily deciphered with the help of three core ordoliberal messages:

1. 'The legal' and 'the economic' represent interdependent (mutually dependent) orders.[23]
2. A lack of respect for this interdependence on the part of supporters of the *laissez-faire* tradition impacted negatively on the coherence of law and society, in particular because it favoured the rise of an

[21] Subtitled: *Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Neuwied-Berlin: Luchterhand, 1962) (*The Structural Transformation of the Public Sphere*) (Cambridge MA: The MIT Press, 1989).

[22] Close affinities with Duncan Kennedy's reconstructions are obvious; suffice it here to mention, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review*, 1349–57.

[23] Walter Eucken, *Grundsätze der Wirtschaftspolitik*, 1st ed., 1952, 7th ed., particularly pp. 332–7. The original text is even older: *Die Grundlagen der Nationalökonomie* (Jena: Fischer, 1940), 2nd ed., 1942); English translation by T.W. Hutchison, *The Foundations of Economics: History and Theory in the Analysis of Economic Reality* (London: William Hodge, 1950), reprint Berlin: Springer, 1992.

unaccountable economic power.[24] This was the reason why the invisible hand of the market had to be replaced by the visible hand of a legal system, which was perforce dedicated to protection of free competitive processes (i.e. the price mechanism) against its distortion by economic power.

3. It follows from the objectives of this type of law, that it must be administered by non-majoritarian institutions (courts and independent agencies); and it is inherent in this vocation that the establishment of this form of law is of constitutional importance.

This is a conceptual edifice of impressive coherence. One query, however, seems pressing: Where do politics come in? This is the query upon which Wiethölter insists in his essay, and which Mestmäcker discusses at greater length a decade later in a follow-up to the *Festschrift* for Böhm, this time entitled '*Wirtschaftsordnung und Staatsverfassung*'. Sharing its title with that of the volume, Mestmäcker's contribution[25] concludes after thirty-six pages:

> The academic school of thought which promotes the *Wirtschaftsverfassung* . . . is not committed to the elaboration of the political potency of the economic, in order to fall into the arms of the democratic regime, but rather seeks to place that regime in a position whereby it can independently and adequately perform its mandated rule of law and welfare tasks.

This is nevertheless a position which places Mestmäcker at odds with prevailing democratic practice, or the socialising aspirations of contemporary democratic societies. At the same time, it demonstrates blatant disregard for the social embeddedness of markets and the cultural dimensions of the economy.[26] In the first Böhm *Festschrift*,

[24] A tendency, which was lucidly diagnosed and criticised by the legal founding father of ordoliberalism, Franz Böhm in his seminal 'Das Reichsgericht und die Kartelle: eine wirtschaftsverfassungsrechtliche Kritik an dem Urteil des RG. vom 4. Febr. 1897, RGZ.38/155' (1948) 1 *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* (hereinafter *ORDO*), 197–213.

[25] 'Wirtschaftsordnung und Staatsverfassung' in Ernst-Joachim Mestmäcker and Heinz Sauermann (eds.), *Wirtschaftsordnung und Staatsverfassung. Festschrift für Franz Böhm zum 80. Geburtstag* (Tübingen: Mohr Siebeck, 1975), pp. 383–419; reprinted in: Mestmäcker and Sauermann, *Recht und ökonomisches Gesetz* (Baden-Baden: Nomos, 1978), pp. 29–64.

[26] The only discussion of the ordoliberal tradition in Polanyian perspective that we are aware of is David M. Woodruff, 'Ordoliberalism, Polanyi, and the Theodicy of Markets', in: Josef Hien and Christian Joerges (eds.), *Ordoliberalism, Law and the Rule of Economics* (Oxford: Hart Publishing, 2017), pp. 215–28.

Mestmäcker had defined the basis of his theory with greater clarity and less enigmatic mention of the political, under the title '*Offene Märkte im System unverfälschten Wettbewerbs in der EWG*',[27] whereby the institutional structures of the EEC were argued to operate as the visible hand for competitive ordering within the European system.[28] Transference of the *Wirtschaftverfassung* to European level had a strategic advantage, securing the (pre-political) theoretical core of the economic constitutionalist project. Mestmäcker continues to defend the doctrinal character of the integration project, which gains its normative potency from Kantian legal philosophy:[29] 'The fundamental, enforceable rights to freedom and the system of undistorted competition' are the constitution of the European community of law. This community derives its legitimacy, not from the 'continuing legitimation of member state legislatures . . . but rather . . . systematically . . . in the mode of a rule of law . . . by means of the justiciability of the freedoms guaranteed by the Treaty'.[30]

I.2.2 Wiethölter's Critique: *Wirtschaftsverfassung* as Stark Utopia and Democratic Failure

Wiethölter's inaugural address provides us with a comprehensive and concise account of the state of Germany's *Wirtschaftsrecht* debate.[31] His own position can be captured in two statements:[32]

[27] 'Offene Märkte im System unverfälschten Wettbewerbs in der EWG', n. 2 above.

[28] Friedrich von Hayek considered European federalisation as early as 1939(!). He assumed political differences between members would preclude the establishment of a European welfare state: 'The Economic Conditions of Interstate Federalism', in: Friedrich A. Hayek, *Individualism and Economic Order* (Chicago IL: University of Chicago Press, 1949), pp. 255–72 (reprinted from the *New Commonwealth Quarterly* V. 2, September 1939, 131–49).

[29] ' Kants Rechtsprinzip als Grundlage der europäischen Einigung', in: Götz Landwehr (ed.), *Freiheit, Gleichheit, Selbständigkeit. Zur Aktualität der Rechtsphilosophie Kants für die Gerechtigkeit in der modernen Gesellschaft* (Göttingen: Vandenhoeck & Ruprecht, 1999), pp. 61–72, cited from the reprint in Ernst-Joachim Mestmäcker, Wirtschaft und Verfassung in der Europäischen Union (Baden-Baden: Nomos, 2003), pp. 78–91.

[30] Ibid., p. 78 et seq.

[31] An important precursor was Horst Ehmke's, *Wirtschaft und Verfassung. Die Verfassungsrechtsprechung des Supreme Court zur Wirtschaftsregulkierung* (Karlsruhe: C.F. Müller, 1961), with a critical, often polemical, introductory chapter on the German debate (pp. 7–88).

[32] Repeated and elaborated two years later in his contribution on 'Recht', in: Gerd Kadelbach (ed.), *Wissenschaft und Gesellschaft* (Frankfurt aM: S. Fischer, 1977), pp. 213–75.

1. 'The overwhelming importance of the economy to the maintenance of political community, not only demands correspondingly-comprehensive legal intervention into spheres impacted by it, but also establishment of an economic law to act as the unifying parenthesis of the economic state.'[33]

Understood as a stark departure from the tradition of Germany's '*Bürgerliches Recht*',[34] Wiethölter's position was bound to encounter opposition both among mainstream academics and in the legal profession. Wiethölter had no illusions in this respect, but built confidently upon the transformative potential of Germany's post-war democracy. In the 1960s, democracy had indeed become a 'normative fact', a compound of sociological conditions, political life and reformist ideas, which motivated his second observation:

2. 'The modern democratic state is home to a broad and powerful demand for comprehensive social self-constitution … this social state [is not afraid] to solve *the* economic law problem of the 20th century, or to determine the relationship to be maintained between political and economic power.'[35]

The addressee of this message is the ordoliberal school, in all of its allegiance to the vocation and potential of *law* to tame economic power by means an economically informed '*Staatsverfassung*', which is restrictive in its reach and objectives, but nevertheless strong in its commitment to the preservation of competitive ordering by independent agencies and courts acting beyond the political system. The critique returns as a *leitmotif* throughout the entire lecture: the notion that law could, and should, implement a self-sustaining, pre-political order is an ideological denial of the legitimacy of democratic, political will-formation and direction. At its core, the very idea of *Wirtschaftsverfassung*, recognised, both then and now,[36] as being Franz Böhm's greatest accomplishment, is no

[33] 'Die Position des Wirtschaftsrechts', n. 3 above, p. 44.

[34] This argument inspired the volume entitled, *Wirtschaftsrecht als Kritik des Privatrechts. Beiträge zur Privat- und Wirtschaftsrechtstheorie*, a collection of essays by Heinz-Diether Assmann, Gert Brüggemeier, Dieter Hart and Christian Joerges (Königstein: Athenäum, 1980).

[35] 'Die Position des Wirtschaftsrechts', n. 3 above, p. 46.

[36] See, for example, Mathias Siems and Gerhard Schnyder, 'Ordoliberal Lessons for Economic Stability: Different Kinds of Regulation, Not More Regulation' (2014) 27 *Governance: An International Journal of Policy, Administration, and Institutions*, 377–96.

more than a functionalist instrumentalisation of individual economic freedoms in the service of a competitive structuring of economy and society. Wiethölter's progressive break with tradition, however, impacted not simply upon ordoliberalism, but rather upon German tradition in its entirety. Legitimating his approach with reference to his distillation of the primacy of the political out of the constitutional theory of Hermann Heller and his followers within the Federal Republic,[37] Wiethölter concretised his critique around the very notion of the *Wirtschaftsverfassung* as such, or around the very idea of a pre-political economic constitution. The logical implication of democratic legitimacy for the *soziale Rechtsstaat* is clearly that the ordoliberal construction of economic ordering can no longer be invoked as a prohibitive barrier to the reach and the design of democratic governance. Wiethölter's critique nevertheless reaches deeper into the structures of ordoliberal theorising. The idea that law could, and should, implement a self-sustaining pre-political order, he argues, is not only incompatible with the legitimacy of democratic, political will-formation, it also rests upon unwarranted assumptions about the logic of the economic. As noted, the *Wirtschaftsverfassung* is built upon the functionalist instrumentalisation of economic freedoms in the service of the competitive structuring of economy and society. This gives rise to a questionable coupling, or a core weakness of ordoliberal economic theorising, to wit, its dependence upon anti-democratic assumptions. Inherent in this critique is a defence of the autonomy of labour law with regard to the subjection of industrial relations to competitive demands,[38] a particular *bête noir* within the process of European integration, and, latterly, within Europe's crisis politics (Part III).

[37] Heller was the most important opponent of Carl Schmitt in the Weimar Republic and is remembered as a constitutional theorist (see Agustín José Menéndez, 'Hermann Heller NOW' (2015) 21 *European Law Journal*, 285–94). His importance for economic law was first underlined in the legendary *Habilitationsschrift* of Horst Ehmke, *Wirtschaft und Verfassung: Die Verfassungsrechtsprechung des Supreme Court zur Wirtschaftsregulierung* (Karlsruhe: C.F. Müller, 1961). Both Wiethölter ('Die Position des Wirtschaftsrechts', n. 3 above) and Mestmäcker were aware of Ehmke's path-breaking study (see Mestmäcker's book review in: *Die öffentliche Verwaltung*, 1964, p. 606 et seq. (reprinted in Mestmäcker, *Recht und ökonomisches Gesetz* (Baden-Baden: Nomos (1978)), pp. 65–81)).

[38] See the remarks in Rudolf Wiethölter, *Rechtswissenschaft* (Frankfurt aM: Fischer, 1968), p. 249, and 'Recht', in: Gerd Kadelbach (ed.), *Wissenschaft und Gesellschaft* (Frankfurt aM: Fischer, 1977), pp. 213–75 (Section III).

II Wirtschaftsverfassung versus Sozialer Rechtsstaat

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law ... [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[39]

In his famous dissenting opinion, placing clear distance between himself and the economic constitutionalism of his colleagues, Justice Holmes revealed the core methodological problem within *Wirtschaftsrecht*: where law meets 'the economic', it must either reflect, respect or transform its make-up. But how is the law, or its judges, to assess and manage conflict about the correct nature of the economy, or the constitutive form of the economic? Our two contributions to the Böhm *Festschrift* approach this problem in two very different ways – and variation has only increased over time. Mestmäcker took an encyclopaedic approach, nevertheless never allowing his elaboration of the *Wirtschaftsverfassung*[40] to fall victim to the legal trivialities so often inherent in pernickety legal specialisation. Without once deviating from his own theoretical model,[41] he proved himself to be a true teacher of the law. Wiethölter, by methodological contrast, preferred – on his own admission – to play offside,[42] elaborating his economic law theory following the

[39] Justice Oliver W. Holmes dissenting in *Lochner* v. *People of State of New York*, 198 U.S. 45 (1905).

[40] See www.mpipriv.de/files/pdf5/SV_Mestmaecker.pdf.

[41] Recently, in particular: 'Gesellschaft und Recht bei David Hume und Friedrich A. von Hayek' (2009) 60 *ORDO*, 87–100; see, also, Ernst-Joachim Mestmäcker, *A Legal Theory Without Law – Posner v. Hayek on Economic Analysis of Law*, Tübingen: Mohr/Siebeck, 2007, available at: https://ssrn.com/abstract=1168422.

[42] *Utinam* (n. 3 above), 641; see, also, Rudolf Wiethölter, 'L'essentiel est invisible pour les yeux', in: Christian Joerges and Peer Zumbansen (eds.), 'Politische Rechtstheorie Revisited: Rudolf Wiethölter zum 100. Semester', ZERP Diskussionspapier 1/2013, Bremen 2013, 183–94.

end of the reformist politics in 1974 in a series of methodological sketches,[43] theoretical analyses,[44] and exemplary studies.[45]

We can neither do justice here to the full breadth of Mestmäcker's work, nor follow Wiethölter through the highways and byways of his ever-more sophisticated theoretical reasoning. We will instead restrict our comparative analysis to the debate on *Mitbestimmung* (co-determination), once again, a typically Germanic example, albeit one that allows us further to elucidate our two German *Sonderwege*. *Mitbestimmung* entails the institutionalisation of worker representation within the supervisory boards of private corporations, and, as such, is a challenge both to liberal market economies in general, and to the ordoliberal *Wirtschaftsverfassung* in particular. The same holds true for the effort to conceptualise and to defend the institutional potential of *Mitbestimmung* within the democratic constitutional framework. The essay by Mestmäcker which forms the basis for our discussion here,[46] was published a few years prior to the Federal Constitutional Court's seminal *Mitbestimmung* Judgment (1979),[47] Wiethölter's analysis three years thereafter.[48] Mestmäcker was thus not concerned with the judgment *per se*, but nevertheless dealt with comparable material, considering the issue of co-determination and its fraught relationship with his *Wirtschaftsverfassung*. Wiethölter focused squarely upon the Court's reasoning, describing how it resonated within his own understanding of the legitimation of the process of (extra-legislative) law production by means of the proceduralisation of the category of law. The discrepancy between the two approaches is, we will submit, of fundamental

[43] For example, 'Thesen zum Wirtschaftsverfassungsrecht', in: Peter Römer (ed.), *Der Kampf um das Grundgesetz. Über die politische Bedeutung der Verfassungsinterpretation* (Frankfurt aM: Syndikat, 1977), pp. 158–69.

[44] 'Social Science Models in Economic Law', in: Terence Daintith and Gunther Teubner (eds.), *Contract and Organisation. Legal Analysis in the Light of Economic and Social Theory* (Berlin-New York: Walter de Gruyter, 1986), pp. 52–67. [German original: 'Sozialwissenschaftliche Modelle im Wirtschaftsrecht' (1985) 18 *Kritische Justiz*, 126–39, reprinted Gert Brüggemeier and Christian Joerges (eds.), 'Workshop zu Konzepten des postinterventionistischen Rechts'. Materialien des Zentrums für Europäische Rechtspolitik (ZERP) 4/1984, 2–24.]

[45] 'Entwicklung des Rechtsbegriffs (am Beispiel des BVG-Urteils zum Mitbestimmungsgesetz und – allgemeiner – an Beispielen des sog. Sonderprivatrechts)' (1982) 8 *Jahrbuch für Rechtssoziologie und Rechtstheorie*, 38–59.

[46] 'Durch Mitbestimmung zum neuen Laissez-faire' (1974/1976) cited from the reprint in Ernst-Joachim Mestmäcker, *Recht und ökonomisches Gesetz* (Baden-Baden, Nomos, 1978), pp. 155–64.

[47] BVerfG 50, 290.

[48] 'Entwicklung des Rechtsbegriffs', n. 45 above.

importance in elucidating the primary schism in post-war scholarship on the place of the economic within society.

II.1 Mestmäcker: Supremacy of the Wirtschaftsverfassung

II.1.1 Co-Determination as an Exemplary Case

The constitutive roles played by *Mitbestimmung* and the social market economy (*soziale Marktwirtschaft*) within the societally integrative 'German Social Model' are well known, and, even outside Germany, are often closely associated with the ordoliberal legacy. This association is perhaps understandable in terms of daily political battle and the strategic play for votes. Nevertheless, the notion of *Mitbestimmung* has no conceptual place whatsoever within the ordoliberal *Wirtschaftsverfassung*. No less a figure than Franz Böhm was particularly clear on this point. Böhm's famous *Privatrechtsgesellschaft* (private law society) is composed of actors who coordinate themselves by means of the '*plebiscite de tous les jours*' in the exercise of their freedom of choice.[49] Mestmäcker has endorsed this concept on many occasions,[50] drawing crystal clear consequences from this premise: 'Co-determination within the corporation encroaches . . . upon the freedom of the firm to plan in accordance with its commercial freedom and entrepreneurial assumption of risk. It is therefore incompatible with the fundamental conceptions of the market order.'[51]

This assertion strikes us as doctrinaire in its rigidity. The long history of co-determination, the experience that has been built up around it, its sociopolitical legitimacy, the economic costs and advantages associated with it – all count for nothing, are '*en quelque façon nul*'. For Böhm, the only relevant measure is that of preservation of the constitutively functional preconditions for private law society. One might expect a more subtle and elegant approach from Mestmäcker, and indeed, his brief essay, '*Durch Mitbestimmung zum neuen Laissez-faire*'[52] meets such expectations to a large degree. Here, we find a history within which co-

[49] Franz Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' (1966) 17 *ORDO*, 75–151, at 138.

[50] For example, 'Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts' (1991) 10 *Rechtshistorisches Journal*, 177–92.

[51] 'Franz Böhm und die Lehre von der Privatrechtsgesellschaft', in: Karl Riesenhuber (ed.), *Privatrechtsgesellschaft* (Tübingen: Mohr Siebeck, 2008), 35–50, cited from the reprint in Mestmäcker, *Prüfsteine*, n. 1 above, pp. 149–69, at 152.

[52] Note 45 above.

determination is given its place as a condition for, or challenge of, democratisation. Here, we also find reference to master and servant, tensions between capital and labour, as well as distributional conflicts. However, simultaneously, we find a framework which is *anything but* amenable to sociopolitical demands for change. The limits are set by the economic constitution itself, that is, by the economic and social preconditions for political freedoms, or for 'the functionality' of a decentrally steered and legally ordered market economy.[53] The approach once again owes itself wholly to Böhm. In the same volume, and alongside his essay on co-determination, Mestmäcker had, after all, penned his notable rebuttal of the critique that the economic constitution pre-empted constitutive democratic politics:

> The academic school of thought which promotes the *Wirtschaftsverfassung* . . . is not committed to the elaboration of the political potency of the economic, in order to fall into the arms of the democratic regime, but rather seeks to place that regime in a position whereby it can independently and adequately perform its mandated rule of law and welfare tasks.[54]

In short, a welfarist quality is imputed to the economic constitution that has, however, yet to be proven, and which remains the object of conflict.

II.1.2 Social Market Economy

To reiterate, the German social market economy is widely applauded as a significant achievement. Politics often cites its existence as proof of ordoliberal tolerance for welfarism. This assumption is nevertheless built on sand: even Alfred Müller-Armack, whose credentials as a 'true' ordoliberal are often doubted, in view of his expansive concepts of economic and social policy, never once sought to undermine the primacy of the economic. Social, labour and economic regulation should not be allowed to distort the working of the price mechanism.[55] Mestmäcker's position is better understood when we recall his Hayekian moment. Hayek made no secret of his disdain for

[53] Ibid., p. 158 et seq.

[54] 'Wirtschaftsordnung und Staasverfassung', n. 25 above.

[55] See, for example, Alfred Müller-Armack, 'Thesen zur Konjunkturpolitik' (1975) 24 *Wirtschaftspolitische Chronik*, 7–16; Müller-Armack, 'Die fünf großen Themen der künftigen Wirtschaftspolitik' (1978) 27 *Wirtschaftspolitische Chronik*, 9–34. In greater detail, Christian Joerges and Florian Rödl, '"Social Market Economy" as Europe's Social Model?', in: Lars Magnusson and Bo Stråth (eds.), *A European Social Citizenship? Preconditions for Future Policies in Historical Light. Preconditions for Future Policies from a Historical Perspective* (Brussels: Peter Lang, 2004), pp. 125–58.

'the social', a notion which he argued was no more than a 'weasel word', an exercise in 'the art of saying what you don't mean'.[56] It lacks any substantive content and is simply incompatible with liberal thinking.[57] This is not merely an observation on the use of the concept in different contexts, but rather a principled objection about the compatibility of social-policy ambitions with the rules that should govern political contestation in free societies. We return to this objection in the following section, contrasting Mestmäcker's reliance on the Hayekian discovery procedure with Wiethölter's law of collisions.

II.2 Wiethölter Reconstruction of the Mitbestimmungs-Urteil *and His Turn to Proceduralisation*

Beginning at the crux of the matter, Wiethölter tackles the same sociopolitical conflicts that he dealt with in his inaugural address, but sharpens the analysis to a point at which all paths out of the conundrum appear blocked. Where once the division made between labour and economic law seemed mundane, it now marked the explosive border between two incompatible sociopolitical aspirations: on the one hand, the demand for the application of an economic legal doctrine, according to which society should align itself to the functional preconditions of the economy; on the other, a democratising movement aiming at realisation of the self-determination demands of majoritarian social processes. Formal legal paradigms were the expression of one side, the concept of substantive justice the champion for the other. The conflict is immutable and cannot conceivably be overcome by means of compromise between formal and material notions of law: 'The fundamental transformation from legal guarantees [secured within formal law] to political guarantees for social positions [satisfying the demands of material justice] impacts upon the category of law at its very core.'[58]

From now on, each position would be called upon to place its faith within a process of 'proceduralisation', within which law would play its vital role, yet, for its part, would itself be driven by society-wide

[56] Friedrich A. von Hayek, *The Fatal Conceit: The Errors of Socialism*. The Collected Works of F.A. Hayek, edited by W.W. Bartley III (Chicago IL: University of Chicago Press, 1991), p. 114 et seq.

[57] F.A. von Hayek, 'The Political Order of a Free People', in: von Hayek, *Law, Legislation and Liberty*, Vol. 3 (London: Routledge, 1979; reprint, London: Routledge, 1982), pp. 40–50.

[58] Ibid., p. 42.

transformation processes.[59] Systematically detailing the proceduralisation paradigm on many occasions,[60] Wiethölter chose the Co-determination Judgment as the hook upon which he could hang his theoretical conceptions in order to test their operationalisability in a concrete juridical world.

In his essay on the development of the category of law ('*Entwicklung des Rechtsbegriffs*'), this effort ranges over a whole two and a half pages.[61] The Federal Constitutional Court had confronted a series of intractable issues with great bravura. Tricky issues, such as the appropriate approach to take towards legal conflict matter, the availability of prerogatives to deal with uncertainty, the existence of common law (experientially based) duties, and the suitable treatment of planning errors (political mistake), were all confronted explicitly; and, more laudably, were mastered without benefit of recourse to the more usual grandfathering (pre-emptive) rights secured within 'formal-liberal law', or to arbitrary application of the unlimited claims of material justice or 'substantive social law'. So, the Court decided, the democratically legitimated law-giver (legislature) could rightfully lay claim to a prognostic (planning) prerogative which might also be exercised lawfully 'in error'. By the same token, however, the legislature is then also subject to a duty to learn. The position of the private parties to the conflict was also clarified: a duty is laid upon them – 'loyally and fairly' – to tailor their forms of behaviour to the expectations found within legislative programmes. For Wiethölter, this subtle, careful, and procedural mode of dealing with the 'politics of law' creates the space for the development of a form of economic constitutionalism which can embrace and adjust both economic and labour law.

A further eighteen pages are dedicated, in characteristic argumentative density. to social-historical, legal-theoretical and socio-political developments and positions. Unlike Justice Holmes in our famous introductory citation, Wiethölter does not shy away from

[59] Ibid., p. 42 et seq.

[60] 'Materialisierungen und Prozeduralisierungen von Recht', in: Gert Brüggemeier and Christian Joerges (eds.), *Workshop zu Konzepten des postinterventionistischen Rechts*, Materialien des Zentrums für Europäische Rechtspolitik (ZERP) 4, Bremen 1984, 25–64 (= 'Materialization and Proceduralization in Modern Law', in: Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State* (Berlin-New York: Walter de Gruyter, 1986), pp. 221–49; Rudolf Wiethölter, 'Proceduralization of the Category of Law', in: Christian Joerges and David M. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (Baden-Baden: Nomos, 1989), pp. 501–10.

[61] Ibid., pp. 46–48.

the challenge of examining the potential of law. Quite on the contrary, the proceduralisation of the legal category is not in any manner commensurate with partisan adherence to the 'correct' social theory, but rather reflects the current 'state of legal and social science debate (touching less upon normative positions, and more upon procedural-functionalist processes of elimination within structured systems), or conceptual evolutions (in systematic scientific theories, steering and competition theories, decisional and game theory, evolutionary theories), which all have, as their theme, a connection between (each consequently delineated) investment opportunity and operational freedom (type: mutations–variations–selections)'.[62]

This may all appear to be too challenging. The difference in approach that each of our protagonists takes to the constitution of the economic is, however, clear enough. Just as Mestmäcker rejects all critique of his theoretical framework, and attempts, instead, to demonstrate the legal implications of his premises, he is subsequently and inevitably undone by insurmountable contradictions within the real world. Wiethölter, by contrast, ventures the *Wirtschaftsverfassung* as an incomplete task for the rule of law, the functional preconditions for which can be identified, but whose operationalisation cannot be programmatically predetermined. We conclude our comparative discussion of this contrast between pre-emptive theory and a competing faith in the powers of social development, moving on, instead, to interrogate the methodological conceptions adopted by our protagonists more closely.

III Competition as a Discovery Procedure versus a Law of Collisions as Constitutional Form

First a question: Does this section compare apples with pears? The answer depends on your particular perspective. We shall explore the commonalities between the two projects and the diversity of their ambitions. What the 'discovery procedure'[63] theorem and the notion of 'collisions as constitutional form'[64] share, however, is the conceptualisation of decision making as a creative activity. A categorical

[62] Ibid., at 55.

[63] Friedrich von Hayek, 'Competition as Discovery Procedure', n. 10 above.

[64] Rudolf Wiethölter, 'Begriffs- oder Interessenjurisprudenz:– falsche Fronten im IPR und Wirtschaftsverfassungsrecht. Bemerkungen zur selbstgerechten Kollisionsnorm', in: Alexander Lüderitz and Jochen Schröder (eds.), *Internationales Privatrecht und*

difference nevertheless arises, as each set of decision-making processes requires its own form of legitimation.

III.1 The Cognitive Demarcations of Hayek's Competitive Discovery Procedure

It would be reductionist to equate Mestmäcker's constitutionalism with that of Hayek's. It is nevertheless true that Mestmäcker's most important contribution to the ordoliberal tradition was his creative renewal of its methodological premises. This renewal impacted most evidently upon competition law and policy, but also reached out into the entire body of economic law and its constitutional design. This renewal was most closely informed by Hayek's notion of 'competition as a discovery procedure'; meanwhile, Mestmäcker's 'Hayekian turn' similarly reshaped the whole of his vision of economic constitutionalism and his work on economic law, both at national, and at European, level.

The promise that Hayekian thought holds out for Mestmäcker's economic constitutionalism is threefold in interdependent nature. First, comes his theory of the generation and use of knowledge, and of the functions of the rule of law. Since knowledge is dispersed throughout society in a form of such complexity and magnitude that it can never be properly accumulated and deployed by one mind, individuals instead use knowledge, complementing it and adjusting it by virtue of what they experience and learn. Following from this, the normativity at the core of Hayek's emphasis on the particular quality of these exchange and learning processes forms the basis of Mestmäcker's critique of Richard Posner's economic analysis of law: the Hayek-Mestmäcker discovery process can never be conceptualised as a rational act (logic of choice), or as an efficiency-driven activity; rather, market exchanges are cooperative activities with a productive potential, which creates a 'catallaxy', or spontaneous economy, to the degree that these operations respect the 'rule of law'. Last, but certainly not least, the catallaxy founded in unknown and unknowable exchange and learning processes stands as a bulwark, not simply to abuse of individual market power (in the manner of Böhm's price mechanism), but rather also to a more systemic 'scientism', or 'pretence of knowledge' which Hayek so convincingly critiqued in his 1974 Nobel lecture.

Rechtsvergleichung im Ausgang des 20. Jahrhunderts. Bewahrung oder Wende? Festschrift für Gerhard Kegel (Frankfurt aM: Metzner, 1977), pp. 213–63, at 226.

The catallaxy as a focus for creative cooperation, as a defensive bastion against all aggressive certainties, including those of arrogantly modelled economic theories, remains a conceptual achievement of no little import. Nevertheless, are its expectations ever actually met within a real world? The closer inspection of Mestmäcker's putative European Economic Constitution reveals expectations are rarely, if ever, met. It suffices here to mention only three concrete problems:

1. At both state and European level, the 'discovery procedure' is out of step with the multifaceted moralisation and politicisation of markets, which so often depends upon the integration of what might be argued to be an 'accepted certainty' of scientific expertise into their regulation.
2. EU legislative processes are, without doubt, imperfect. Yet, the suggestion that Europe should trust, instead, in 'regulatory competition', or 'methodological nationalism',[65] to discover the 'best' regulatory strategies leads only to a 'bad utopia', as notions of regulatory competition between states neglect processes of societal denationalisation that are particularly powerful within the EU.
3. A third objection is of particular relevance with regard to the, as yet unresolved, financial and sovereign debt crisis. The infamous no-bailout clause of Article 125 TFEU was bolstered by an underlying expectation that financial markets would discipline the financial policies of the Member States 'whose currency is the Euro'. Nevertheless, as convincingly argued by Lisa Herzog,[66] the knowledge communicated by markets is not available in the form that public authorities require in order to assess the performance of their economies.

III.2 Justifications of a Law of Society (Recht-Fertigungen eines Gesellschaften-Rechts)

'Be bold in Private International Law, give free rein to interpretation' – a play on Goethe's words[67] – this message was developed by Wiethölter

[65] See Michel Zürn, 'Globalization and Global Governance', in: Walter Carlnaes, Thomas Risse and Beth A; Simmons (eds.), *Handbook of International Relations* (Thousand Oaks CA-London: SAGE Publications, 2013), pp. 401–25, available at: www.wzb.eu/system/files/docs/ipl/gg/globalization_and_global_governance.pdf.

[66] 'Markt oder Profession? Die Politik zweier Wissenslogiken', Lecture at the Institute of Advanced Study Berlin of 18 January 2018 (on file with authors).

[67] 'Im Auslegen seid frisch und munter! Legt ihr's nicht aus, so legt was unter', Johann Wolfgang von Goethe, 'Zahme Xenien', in: Goethe, *Berliner Ausgabe. Poetische Werke*, Band 1, Berlin 1960 ff, pp. 671–87.

in his early writings and Frankfurt seminars on the *ordre public*. The thought is a direct forerunner of, but distanced by some time and by no little conceptual difficulty from his notion of law-(justification)-making processes within societal law and from his concept of law-(constituting)-law (*Rechtsverfassungsrecht*). We will eschew the task of academic reconstruction, however, and instead make use of the irritating suggestions made by Christian Joerges (as author and co-author) that a variety of legal principles and materials might usefully be re-construed as legal conflicts norms: to wit, the constitutional law of the combined European Treaties, the EU-internal conflict about nuclear energy, as well as WTO law. Can all of this legal material really be designated, even downgraded to the status of conflicts law, and what does this have to do with Rudolf Wiethölter anyway?

The assertion that Wiethölter inspired this approach is more than camouflage. Rather, the mouldering relic bequeathed to us by Private International Law is a one-sidedness, or blindness to the postnational, '*Kein Staat macht sich zum Büttel eines anderen Staates*' (No state will allow itself to become the overseer of another), or so intoned the leading German textbook as late as the year 2000.[68]

Thanks to Friedrich von Savigny, however, private law has always seen the world through very different lenses. The seeming symmetry deceives:

> The transactional conditions for all IPL provisions – conditions that guarantee the qualitative parity of legal orders and form the will for international co-operation between peoples – are the fruit of a pure private legal model that views private law as a pre-political product of *bourgeois* European society and therefore builds upon legal theories and social models rooted in a clear distinction between state and society; a distinction which is now obsolete.

Wiethölter had already riffed doctrinally and conceptually upon this argument in a report on the 'international *ordre public*': the entire realm of private and economic law was now reliant upon the creation of conflict norms whose operability was, above all, dependent upon similar endeavours in the internal world of states, wherein the conflict to be mediated was one formal law and material justice. The most forceful developmental reiteration was made in 1977 (*Festschrift für Kegel*, Wiethölter's academic mentor): 'Economic constitutional law', Wiethölter asserts from the outset, 'owes its character as a still surviving

[68] Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht*, 8. Aufl. (Munich: C.H. Beck, 2000), p. 1094.

corpus of law . . . to the legal principles and substantive institutions of conflicts law (of national and international character)'. Twenty-five pages later, Wiethölter similarly reaches the conclusion that the '*Wirtschaftsverfassungsrecht* of the 1970s (WVR II) has left that of the 1950s and 1960s far behind'. Now, economic constitutionalism was concerned far more with 'the fundamental re-constitutive conflicts of material constitutional theory as social theory, whereby legal reconstruction interlinks with processes of social development'. Clearly, it would be foolish to attempt to trace the contours of contemporary political-economic conflict constellations back to the early years of the Federal Republic, and even less so to the current struggles between monetarists and 'fiscalists' (Keynesians). Nevertheless, a relationship can be identified between these contemporary conflicts and a longer-standing battle around the social (material) nature of a modern rule of law. Moreover, Wiethölter similarly gives us further orientation, as his work also gradually clarified the sociological dependency of law-(justification)-making processes, or their exposure to socially impactful conflicts between competing theoretical orientations and practical-political ambitions, as well as the collision norms that are developed as a consequence.

'*Exempla trahunt*', affords us renewed comfort: the debate on co-determination furnishes us with the exemplary canvas upon which we can first sketch out our comparison between our protagonists and then paint our explanation of conflicts-law-economic-constitutionalism. Mestmäcker's approach to the *Mitbestimmung* problem reveals that, for him, the concept of the discovery process serves as due protection for his theory of economic constitutionalism against the applicability of all other competing theories. For Wiethölter, by contrast, the proceduralisation of the legal category urges that reform projects should be allowed, albeit with the retention of exit and revision options.

And what of the suggested affinity between economic constitutionalism and 'conflicts law constitutionalism'? A close relationship can be identified with Karl Polanyi's economic sociology, which presages various aspects of conflicts-law constitutionalism:

1. Just as Wiethölter identified the complicity of law within social relationships, we can 'read' his work as the successor to Karl Polanyi's thesis of the 'always socially-embedded economy', in particular, when these theorems are interpreted as a 'cultural political economy'.

2. The rivalries between social theories and policies found within Wiethölter's writings might be favourably compared with Polanyi's observations on movements und counter-movements.
3. Last, but not least, Polanyi's insights into the Varieties of Capitalism within the final chapter of the *Great Transformation* have much within them with which the conflicts approach can work:

> . . . with the disappearance of the automatic mechanism of the gold standard, governments will find it possible to . . . tolerate willingly that other nations shape their domestic institutions according to their inclinations, thus transcending the pernicious nineteenth century dogma of the necessary uniformity of domestic regimes within the orbit of world economy. Out of the ruins of the Old World, cornerstones of the New can be seen to emerge: economic collaboration of governments and the liberty to organize national life at will.[69]

If we take the political autonomy of democratic societies seriously, we are called upon to respect their integral economic and sociopolitical character. Similarly, knowledge of the cultural dimensions of the economic equates with an awareness of just how resistant economies are to efforts to enforce their harmonisation. The guiding theorems of conflicts-law constitutionalism build upon these insights, just as the theory reaches for postnational and post-particularist formulations: 'Integration' within conflicts-law-constitutionalism is driven not by distinctions between legal orders, but by the inter-dependencies between societies, and does not force harmonisation, but rather seeks cooperative problem solving. The conflicts-law approach plumps for 'horizontal' constitutionalism, which derives its legitimacy from the quality of cooperative relationships.

IV European Crisis: Is the Law Running Out?

Back to the beginning, or to the commitment of our protagonists to the proprium of 'law'. We have emphasised the centrality of Mestmäcker's seminal 1972 lecture, in which he insisted upon the primacy of the legal over the economic: 'It is important to develop economic policy solutions susceptible of being bound by legal and constitutional rules.'

Mestmäcker is clearly concerned here with the defence of the economic constitution 'through law'. By contrast, and from the very outset, Wiethölter doubted the theoretical and practical feasibility of such

[69] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston MA: Beacon Press, 2001), pp. 253–54.

a defence in the face of the mass of legal provisions generated within the *soziale Rechtsstaat*. In making this comparison, we are undoubtedly partisan, but do also concede the inherent tensions and difficulties within Wiethölter's *Rechtsverfassungsrecht*, and, above all, recognise the irritating disjunction between his critique of the anti-democratic tradition of German *bourgeois* law (*Bürgerliches Recht*) and a continuing acknowledgement of the pragmatic virtues of doctrine within his theorems.[70] After all, what else guides the judges in their procedural sifting of the conflicts and policies of social evolution? Yet, moving on – in mid-2019 – to discuss one of Europe's many emergencies, the financial and sovereign debt crisis, we find that the challenges faced by both projects have only increased exponentially. The concept of 'law' is now itself strained to breaking point.

The misery extends far and wide, but can be summarised briefly: the Economic and Monetary Union, as it was established by the Maastricht Treaty of 1992, was a *lex imperfecta* in both the formal sense and in its conceptual design. The so-called 'stability community' existed only on paper; it lacked any meaningful sanctions. This formal imperfection was not accidental. It was the price that had to be paid for substantive political-historical deficits. Conceptually speaking, EMU was a hybrid of German ordoliberalism and French '*planification*', with Germany prescribing substantive (non-majoritarian) commitments, and France determining the procedural (politicised) framing. The functioning of the new regime was dependent on good economic luck and constant political processes of muddling through. No single, identifiable authority was entrusted with the necessary powers to ensure that the policies pursued both at European and at national levels of governance would be effectively coordinated in compliance with the legal criteria laid down in the Treaty. To reiterate: deficiencies within the framework were neither wilful nor accidental. Instead, the economic and fiscal policies of the Member States are embedded within their own particular economic and social conditions. This multifaceted and multicausal heterogeneity could not simply be dissolved by a common currency. As a consequence, the application of a uniform European monetary policy only became evermore dysfunctional. Meanwhile, it is less than surprising that

[70] See, for example, 'Privatrecht als Gesellschaftstheorie? Bemerkungen zur Logik der ordnungspolitischen Rechtslehre', n. 6 above.

corrective recourse has been made to intergovernmental bargaining, soft supervision and tentative coordination.

Nevertheless, legally under-determined processes have likewise generated a very rigid mode of 'new economic governance'. Considered and explained in exhaustive detail by academia,[71] we restrict ourselves here to highlighting three aspects of this transformation, which recall the leading *leitmotifs* of our arguments.

1. The first concerns the contest between the market domain and the countervailing powers of labour law and social policy. In this respect, the outcome of the crisis-driven transformation is uncontested: the priority of the new regime is the strengthening of the competitiveness of national economies through so-called structural reforms, *i.e.*, the dismantling of labour law and social entitlements.[72]
2. The conclusion that an ordoliberal version of economic constitutionalism is now in place would nevertheless be erroneous. New economic governance is, instead, incompatible with all varieties of economic liberalism. It is an *illiberal* regime, governed at best in its commitment to 'competitiveness' by utilitarian economic commitments to welfare maximisation ('scientism'),[73] is established outside the rule of law, and is governed, upon a day-to-day basis, within authoritarian management structures.[74]
3. Finally, however, we also draw on the work of Fritz W. Scharpf with regard to the excessive imbalance procedure as adopted in the Six-pack and the Two-pack regulations,[75] to underline the methodological peculiarities of the crisis regime: it is within the very logic of these instruments that 'dictates that it [the system of economic governance]

[71] See, for example, Michelle Everson and Christian Joerges, 'Between Constitutional Command and Technocratic Rule: Post Crisis Governance and the Treaty on Stability, Coordination and Governance ("The Fiscal Compact")', in: Carol Harlow, Päivi leino and Giacinto della Cananea (eds.), *Research Handbook on EU Administrative Law* (Cheltenham: Edward Elgar Publishing, 2017), pp. 161–87, with many references.

[72] See Roland Erne, 'How to Analyse a Supranational Regime that Nationalises Social Conflict? The European Crisis, Labour Politics and Methodological Nationalism', in: Eva Nanopoulos and Fotis Vergis (eds.), *The Crisis behind the Euro-Crisis: The Euro-Crisis as Systemic Multi-Dimensional Crisis of the EU* (Cambridge: Cambridge University Press, 2019), 2019.

[73] See here the echoes of Mestmäcker's critique of the Law & Economics movement (see n. 41 above).

[74] Everson and Joerges, n. 71 above.

[75] For a summary of the pertinent documents by the Commission, see: http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm.

must operate without any pre-defined rule and that the Commission's *ad hoc* decisions must apply to individual Member States in unique circumstances rather than to EMU states in general. Regardless of the comparative quality of its economic expertise, the Commission lacks legitimate authority to impose highly intrusive policy choices on Member States.'[76]

Or, as Polanyi has observed, 'Laissez-faire was planned, planning was not'. Nobody planned the financial crisis of 2008 or the sovereign debt crisis that followed. Equally, although each and every phase of crisis was meticulously discussed and documented within European bureaucracy, national governments and expert circles,[77] neither the participants within these processes, not the general public at large believe that we are on our way to a 'final settlement'. Instead, be it in an optimistic Europeanist view,[78] or within a far more critical appraisal,[79] the talk is of an ongoing process of 'normalisation'.

But what of this normalisation? The architecture of 'new economic governance' is indeed impressive in its size and powerful in its impact. Nevertheless, this impact is so asymmetric in its effect that even the defenders of output legitimacy have difficulty subscribing to it. Granted, strong support for the normalisation thesis is to be found in the two landmark CJEU judgments on the crisis, yet at what price for the quality of law? In *Pringle*, for example, the CJEU held that the financial stability of the Eurozone (EU) as a whole, is the law's 'highest priority'. Similarly, in *Gauweiler*,[80] the Court added that the assessment of rescue measures undertaken by the ECB under its OMT programme is a matter for 'technical expertise', which, according to the TFEU is vested within the ECB.[81] The Court has likewise subjected

[76] Fritz W. Scharpf, 'Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability', in: Wolfgang Streeck and Armin Schäfer (eds.), *Politics in the Age of Austerity* (Cambridge: Polity Press, 2013), pp. 108–42, at 139.

[77] The most detailed reconstruction we are aware of is that of the historian Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (New York: Viking, 2018).

[78] See, for example, Thomas Beukers, Bruno de Witte and Claire Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law* (Cambridge: Cambridge University Press, 2017).

[79] Such as Christian Kreuder-Sonnen, *Emergency Powers of International Organization. Between Normalization and Containment* (Oxford: Oxford University Press, 2019), chapter 5.

[80] Case 370/12, *Pringle* v. *Ireland*, Judgment (Grand Chamber) of 27 November 2012, EU: C:2012:756. Pringle, para. 70.

[81] Case C-62/14 Peter Gauweiler EU:C:2015:400.Gauweiler, paras. 70 et seq.

the exercise of these powers to a proportionality test.[82] Nevertheless, this is but a very thin veneer of legal control without any corresponding legal bite.

This potential crisis within the rule of law also has an institutional dimension. The most important actor within the whole edifice of new economic governance is an actor with unprecedented autonomy, namely, the ECB, characterised memorably by Paul Tucker as an 'overmighty citizen',[83] and interrogated thoughtfully by the Princeton economist Ashoka Mody:[84]

> The legal and economic question of interest is whether the OMT tried to bypass the intent of the Treaty by creating a *de facto* fiscal union (a liability or transfer union in *Bundesbank* terminology). If so, without their explicit authorisation, countries had become fiscally responsible for the mistakes of other member countries.

To which he adds more pertinently, 'Can such a fiscal union be implicitly located in the ECB without the political willingness to transparently achieve that elusive goal?' The economist as true teacher of law?[85]

We do not and cannot know how stable this normalisation will be. We are not prepared to call it legitimate, let alone, democratic. We now wonder whether the new regime qualifies as 'law' at all. To the surprise of many, Mestmäcker was to observe, as late as in 2015, that 'law has proven to be the foundation for European integration in a manner that could not have been envisaged in 1962'.[86] In view of the new character of the new crisis regime and its 'macroeconomic relationships', this appellation is now particularly difficult to reconcile with Mestmäcker's quest 'to develop economic policy solutions susceptible of being bound

[82] Paras. 66 et seq.

[83] *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton NJ-Oxford: Princeton University Press, 2018).

[84] 'Did the German court do Europe a favor?', Bruegel Working Paper 2014/09, available at: http://aei.pitt.edu/52709/1/Did_the_German_court_do_Europe_a_favour%2D_ (English). pdf.

[85] Ibid., at 6, 4.

[86] 'In a manner not predictable back in 1962, the law proved to remain the foundation of European integration.' Ernst-Joachim Mestmäcker, 'Die EU als Rechtsgemeinschaft', in: Peter Behrens, Markus Kotzur and Konrad Lammers (eds.), *Sechs Dekaden europäischer Integration – Eine Standortbestimmung, Symposium anlässlich des 60-jährigen Bestehens der Stiftung Europa-Kolleg Hamburg* (Baden-Baden: Nomos, 2015), pp. 31–55, at 31.

by legal and constitutional rules'.[87] Indeed, somewhat paradoxically, the practices that we have sketched out in all their troublesome quality are not so categorically different from what Wiethölter has characterised as the rise of 'political administration' in the *Sozialstaat*. He might, if called upon, even be prepared to value the involvement of so many actors within policy making, as well as the degree of contestation between them. Yet, it seems to us to be impossible to give this form of crisis governance, or its practices and regime, any form of legitimacy as *Rechtsverfassungsrecht*.

The problem is perhaps twofold. First, like Wiethölter, we find ourselves embarrassed by our own residual demand for doctrine within our rule of law. Legality does matter. Liberal impulses retain their status as bulwark against the undue exercise of power, or, in the Hayekian twist, gain potency in repelling the more systemic imposition of scientism, and the empty utilitarian promises of certainty. The conclusion is difficult, placing terrible duties upon a law and its judges, which and who, in our examples, have largely – with some fine exceptions[88] – failed in their mission to secure the legal proprium. But secondly, in contrast to the coldness of all 'regimes', we are also forcefully reminded in the crisis of the core transformative potential of social politics which is so central to Wiethölter's vision: on 23 March 2019, some two million citizens from all over the UK and the rest of Europe participated in the 'Put it to the People' march from London's Hyde Park Corner to Westminster. They represented, as *The Guardian* put it the next day, 'a formidable sea of humanity and powerful strength of feeling'. This genuine desire for a social, pluralist, free European society, was accompanied by strong arguments against the Brexiters in the UK government, society and media. Such aspirations reach far beyond Mestmäcker's sober vision of a European private law society and seem instead to encapsulate Wiethölter's more inspirational visions – and, in truth, the future of Europe lies very much in the hands of a transformative social politics, which must now assert itself both against the moribund discourse of traditional politics and against the more dangerous political forces seeking to take advantage of this *malaise*. But how can law react within such deep crises while it awaits the pleasure of sociopolitical transformation? The question is far from

[87] Mestmäcker, n. 44 above, p. 183.

[88] Above all, Justice Lübbe-Wolf of the German Constitutional Court; see, Michelle Everson, 'An Exercise in Legal Honesty: Rewriting the Court of Justice and the *Bundesverfassungsgericht*' (2015) 21 *European Law Journal*, 474–99.

new, forming the basis both of the works of Eucken and Böhm, and of those of Heller. Each of our protagonists' work was born out crisis, and, imperfect as each might be, it is surely the job of legal theorising to raise awareness within the law of the need for constant and vigorous self-reflection.

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