"Brother, can you paradigm?"

Christian Joerges**


1. The context

"To-day, it is easy enough to see past mistakes. But it is much less easy to undo their consequences."

This sentence could be the motto of the monograph under review. But it is from the preface to a collection of essays entitled Europe To-Day, published in English in 1937, written in German some years earlier by a journalist and lawyer then working in Vienna. The book deals with the years 1919–1933; the author is Karl Polanyi, who became a classic through his analysis of The Political and Economic Origins of our Time, published exactly 70 years ago.2

History does not repeat itself. Today’s crisis management and the kind of debate to which the Tuoris contribute—notwithstanding all political uncertainties and animosities, social cruelties, academic contestation, and even the new presence of Europe’s “bitter experiences”—still signal the survival of commitments to the European project. The Eurozone Crisis is an important book. It covers and analyzes in great detail the unfortunate state of the Union and the search for ways out of the crisis, and offers theoretical guidance on fundamental issues. The disciplinary background and profile of the authors is a key to this accomplishment. Kaarlo Tuori has directed for over half a decade the Centre of Excellence in the Foundations of European Law and Polity Research at the University of Helsinki.3

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2 Polanyi, supra note 1; Karl Polanyi, The Great Transformation: The Political and Economic Origins of our Time (1957) [1944].

decades of broad jurisprudential scholarship. “Law” has been famously characterized as the “object and agent” of European integration, but the substance of this project is “the economic.” Klaus Tuori’s work on constitutional law builds upon his training as an economist and his experience as a monetary-policy economist at the European Central Bank (ECB). This is a basis which enables the disciplines to do what Louis Henkin famously requested from the students of international law and of international relations: namely, “at least [to] hear each other.”

This reviewer is not trying to compete with the qualifications of the authors in jurisprudence, economics and monetary policy. I will also refrain from a comprehensive evaluation of their analyses and instead focus on just two of their concerns which are intrinsically intertwined. The Tuoris take the constitutional dimension of the economy seriously; they seek to understand and to evaluate upon this basis the transformation of Europe’s constitutional condition under the impact of the current crisis. My comments on their argument in both of these realms—first on the constitutional dimensions of the economy, second on the transformation of Europe’s constitutional constellation—will be critical. But this critique is in no way meant to call the merits of their work into question.

2. “The Economic” as the poor relation of European constitutionalism and the Pyrrhic victory of Germany’s Ordoliberalism

Die Wirtschaft ist das Schicksal (the economy is our destiny)—this insight of Walter Rathenau, politician and industrialist, the bright hope of the young Weimar Republic, murdered in 1922, is of disquieting topicality. It is unfortunately fair to underline that, even after the Maastricht Treaty and the establishment of the Economic and Monetary Union (EMU), mainstream European constitutionalism, which sought to pave the way for an ever closer democratic Union, treated the constitutional dimensions of “the economic” with benign neglect. There are exceptions, however, and by

4 Of obvious importance in the present context, see Kaarlo Tuori, The Many Constitutions of Europe, in THE MANY CONSTITUTIONS OF EUROPE 5 (Kaarlo Tuori & Suivi Sankari eds., 2011), and the recent SUMMA, Kaarlo Tuori, TRANSNATIONAL LAW: ON LEGAL HYBRIDS AND LEGAL POSITIVISM, in TRANSNATIONAL LAW: RETHINKING EUROPEAN LAW AND LEGAL THINKING 11 (Miguel Maduro, Kaarlo Tuori & Suivi Sankari eds., 2014).


6 His request was cautious and seems all the more noteworthy: “The student of law and the student of politics... purport to be looking at the same world from the vantage point of important disciplines. It seems unfortunate, indeed destructive, that they should not, at the least, hear each other.” (LOUIS HENKEN, HOW NATIONS BEHAVE. LAW AND FOREIGN POLICY 4 (2nd ed. 1979).

now a new sensitivity seems to be gaining ground.\textsuperscript{8} The authors of the \textit{Constitutional Analysis of the Eurozone Crisis} build upon the most notable and, by the same token, also the most praiseworthy exception to the longstanding rule, namely, German Ordoliberalism. This reference is at present not accidental in view of the German role in Europe’s crisis management and the tendency among both Germany’s Christian Democrats as well as German leading newspapers to resort to the vocabulary of the Ordoliberal \textit{Ordnungspolitik}. But references like this often fail to take the original messages of Ordoliberalism seriously into account, and misunderstand and trivialize its theory and creed. The same is, unfortunately, also true of more critical accounts of Ordoliberalism both within and outside Germany.\textsuperscript{9} A detailed conceptual history of the impact of Ordoliberalism on the European integration project is beyond the scope of this review, but it is important—and hopefully instructive—to reconstruct and distinguish between three stages of this development: (1) the so-called formative phase of the integration project in which Ordoliberalism entered into an alliance with the “integration through law” project; (2) the establishment of EMU, which was widely perceived as a consummation of the Ordoliberal project but was, in fact, a Pyrrhic victory at best; and (3) the destruction of the Ordoliberal legacy through the crisis management orchestrated in Germany.

\textbf{2.1. Integration through law}

The European Economic Community has been famously characterized by Walter Hallstein, the first President of the Commission, with an explicit commitment to Ordoliberalism right after the war,\textsuperscript{10} as “Schöpfung des Rechts, Rechtsquelle, und Rechtsordnung” (a creature of the law, the source of law, and the legal order).\textsuperscript{11} This legal order was destined to become a constitutionally validated economic order. As \textit{The Eurozone Crisis} notes in the context of a very valuable reconstruction of the Ordoliberal tradition and its advent in Europe,\textsuperscript{12} the notion of an “economic constitution” was certainly anything but a commonly known, let alone shared, European concept. Nor was the core message of economic constitutionalism, namely, the claim that a specific order of the economy was a legal prescription with constitutional status. Even within the young Federal Republic, this claim was always controversial and explicitly rejected by the German Constitutional Court.\textsuperscript{13} The basis of this rejection was


\textsuperscript{9} I am polite enough not to cite. But it is worth mentioning Michel Foucault, \textit{The Birth of Biopolitics. Lectures at the Collège de France} 1978–79 (Graham Burchell trans., 2008), Lectures 6, 7 and 9 (at 129–158; 159–184: 239–266). These lectures clarify succinctly the differences between the Freiburg Ordoliberalism, Hayek’s economic philosophy and Chicago liberalism, which the Tuoris do not take seriously enough as I will argue below in Section 2.2.

\textsuperscript{10} See Walter Hallstein, \textit{Wiederherstellung des Privatrechts, Süddeutsche Juristenzeitung} 1 (1946).

\textsuperscript{11} Walter Hallstein, \textit{Die Europäische Gemeinschaft} 33 (5th ed. 1979); see the comments in Tuori & Tuori, supra note 8, at 242–243.

\textsuperscript{12} See in the Preface, in Tuori & Tuori, supra note 8, at xi et seq., and in particular ch. 2, at 13 et seq.

\textsuperscript{13} See the famous \textit{Investitionshilfe} judgment of July 20, 1954, BVerfGE 4. 7 and the later seminal \textit{Mitbestimmungs-Urteil} of Mar. 1, 1979, BVerfGE 50, 290, both cited in Tuori & Tuori, supra note 8, 17 n. 7.
the primacy of democratically legitimated politics over the economy. In the European Economic Community (EEC), such resistance was unavailable. And yet it was precisely this lack of a political constitution that seemed to give credence to the Ordoliberal vision. The core institutional elements were readily available: the economic freedoms, the commitment to open borders, and a "system of undistorted competition" in which law provided responses to the self-destructive tendencies inherent in unconstrained laissez-faire economics. Did anybody outside Germany realize, that, for Ordoliberalism, the Treaty of Rome constituted a great opportunity, nothing less than a constitutional moment? Walter Hallstein certainly did; but the ECJ and the proponents of the “integration through law” project certainly did not. Nevertheless, a powerful alliance was established. Provisions concerning the organization of the economy were to become extraordinarily important in the development of the common market. What the so-called constitutionalization of European law achieved in the formative phase of the integration project, through the doctrines of “direct effect,” “supremacy,” and “pre-emption”, and, most notably, through the conceptualization of economic freedoms as basic rights which Europe’s market citizens could invoke against their nation states meant, in substance, that constitutional validity was ascribed to the core institutions of an Ordoliberal economic constitution.

2.2. EMU as a Pyrrhic victory of the Ordoliberal school

The Maastricht Treaty, signed in 1992, is a turning point in the development of the integration project. It was perceived at the time as both a continuation and an extension of what had been accomplished at that time, a move towards “an ever closer union,” marked by an opening of new policy fields and crowning the completion of the internal market by creating a monetary union. The Tuoris seek to capture the new constellation through their distinction between the microeconomic and the macroeconomic constitution established as the EMU with a new exclusive competence for European monetary policy, its anti-inflationary dedication to price stability, and the establishment of an independent central bank far removed from all political influence and placed firmly outside the institutional structures of the Union. This micro–macro distinction between the “two layers” of the economic constitution is of fundamental importance to the whole argument of the book—although, in this respect, I remained disappointed in the end. After a very instructive discussion of the macroeconomic framework and its functioning, the distinction between the justiciable operation of

14 See Hallstein, supra note 11.

15 It is not justified, so Majone argues, to ascribe a neo-liberal bias to the EEC (see Giandomenico Majone, Rethinking the Union of Europe Post-Crisis. Has Integration Gone Too Far? 154 et seq. (2014). Majone is right. The EEC was not meant to invert the turn of post-war Europe (including the UK) to the establishment of welfare states. The Treaty, including its commitment to open borders was expected to co-exist peacefully with the political autonomy of the Member States in the realms of social and industrial relations policy, an expectation that proved to be valid throughout the golden age of “embedded liberalism”; see Florian Rödl, Labour Constitution, in Principles of European Constitutional Law 623, 630–632 (Armin von Bogdandy & Jürgen Bast eds., 2nd ed. 2010).

16 See, for an early and still valuable collection of pertinent analyses, Europe After Maastricht, supra note 7.
the microeconomic constitution, and the specifics of macroeconomic decision-making, one is eager to understand the links or tensions between the two constitutions. We learn that they both have their “peculiarities,” but they are “interdependent” and should be “examined as a constitutional whole” (at 34). What kind of a whole might that be? Has the Maastricht Treaty exposed us to “fatal asymmetries” between Europeanized monetary policy and national fiscal policy (at 51)? Why did the “architects” of the new macroeconomic edifice gloss over the objection that the economies of the Eurozone states would neither then nor in the foreseeable future form an “Optimal Currency Area” (at 53)? Readers familiar with Kaarlo Tuori’s work will wonder whether his constitutional pluralism might provide us with a theoretical key to such queries. Pluralists are ready to acknowledge the coexistence of different types of law, not only as an empirical phenomenon, but also as a normative challenge. Paul Schiff Berman, one of the most prominent proponents of the normative virtues of pluralism, has designed procedural principles that should have the potential to create spaces for productive interactions through which the tensions between overlapping legal regimes become manageable. Kaarlo Tuori refers to Berman’s work in his recent work quite extensively and approvingly. In *The Eurozone Crisis*, allusions to normative legal pluralism of this kind are few and far between. I can only speculate here. It seems to me that the indebtedness of their argument to the Ordoliberal tradition has outweighed their readiness to embark upon a voyage in such uncharted waters. But this caution comes at a price.

I have three objections. First, on closer inspection, it is inadequate to call the Maastricht arrangement a constitution of any kind. Leading representatives of the second generation of the Ordoliberal school have expressed their deep concern about the whole Treaty. How can one continue to assign a constitutive function to the “system of undistorted competition” when the promotion of this system is only one among many competing objectives, and its relative weight has to be determined in the last instance through political processes? How can one reconcile the assumed function of “competition as discovery procedure” in economic affairs with the acknowledgement of industrial policy as a constitutionally legitimated concern? There is no mention of Monetary Union in this critique. But the EMU could not save the Ordoliberal project. Quite to the contrary: the EMU, as complemented by the Growth and Stability Pact, was at odds with the creed of the Ordoliberal school. As Ernst-Joachim Mestmäcker, the intellectual mastermind of the second generation of the Freiburg School, has reminded us throughout his academic life, to deserve the

17 See, in particular, KAARLO TUORI, THE MANY CONSTITUTIONS and most recently Tuori, Transnational Law, supra note 4.
19 See in his Tuori, Transnational Law, supra note 4, n.19 and 42 et seq.
21 Friedrich August von Hayek, Competition as Discovery Procedure, 5 Q. J. Austrian Econ. 9 (2002).
22 Not Ernst-Wolfgang as THE EUROZONE CRISIS has it throughout the volume.
name of an economic constitution, a framework must provide legal guidance in the form of rules “aligned with justiciable criteria.” When judged by such criteria, the EMU was a clear failure. But one need not be an Ordoliberal to refrain from the use of the notion constitution. The Growth and Stability Pact provided for political bargaining. As the Tuoris put it, “the Maastricht macroeconomic constitution granted the law but a minor role” (at 243). This is an all too euphemistic account. The “economic constitution” had indeed been politicized, but this was unavoidable. The problem is camouflaging this move by “soft law” and resorting to politics outside democratic control and accountability.

The second objection: what Maastricht established in lieu of an economic constitution through the separation of Europeanized monetary policy from national fiscal and economic policy can be best characterized as a conflict. This notion requires an explanatory remark. Monetary policy has become an exclusive competence of the Union (Article 3(1)(c) of the Treaty on the Functioning of the European Union (TFEU)). With this provision, the Union claims supremacy in the policy area conferred to it—a conferral that did not include economic and fiscal policies. The exercise of these policies can have external effects and lead to “diagonal” conflicts. As experienced so drastically after 1992, monetary policy and the national policies can still come into conflict. This is, however, not a vertical conflict for which supremacy would provide a response. It is a “diagonal conflict”: both the Union and the member states are certainly interested in the functioning of their economies, but the powers required to accomplish this objective are attributed to two distinct levels of governance. The type of conflict resolution foreseen in Article 119 TFEU is “the adoption of an economic policy which is based on the close coordination of Member States’ economic policies” as substantiated in Article 121 TFEU.

The third complaint: The Eurozone Crisis is sadly akin to the Ordoliberal propensity to establish and defend fictitious constructs. Throughout the history of the Federal Republic of Germany, we have witnessed tensions between officious statements underlining the commitments to Ordoliberal ideas and opportunistic political practice. The schism between Ordoliberal Ordnungstheorie and political praxis is unsurprising, to some degree unavoidable, and, in the last instance, inconclusive: no theoretical concept is ever taken literally when it comes to its implementation. These tensions between theoretical orientations and political pragmatism and opportunism should

23 Ernst-Joachim Mestmäcker, Macht—Recht—Wirtschaftsverfassung, 137 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 97 (1972), English translation in Ernst-Joachim Mestmäcker, Power, Law and Economic Constitution, 11 German Econ. Rev. 177 (1973). Mestmäcker’s most recent worried interventions mirror his commitments to this tradition: see Ernst-Joachim Mestmäcker, Der Schamfleck ist die Geldverachtung [The Shaming Flaw is the Disdainfulness of Money], Frankfurter Allgemeine Zeitung (Nov. 18, 2011), at 33; and Ernst-Joachim Mestmäcker, Ordnungspolitische Grundlagen einer politischen Union [Foundational Principles for the Ordering of a Political Union], Frankfurter Allgemeine Zeitung (Nov. 12, 2012), at 12.

24 For a more general discussion, see Gunther Teubner, Constitutional Fragments: Societal Constitutionalism in Globalization 158 et seq. (2012).

be considered in the analysis and evaluation of the Ordoliberal success story. This is in particular true for Germany’s famous “social market economy.” The characteristic features of that concept were theoretical ambivalences and political compromises. As Lord Glasman succinctly put it: “No one ‘designed’ post-war Germany, it was hewn out of far more durable and sophisticated moral and ethical materials than those provided by economic theory or any other social science methodology.”

2.3. Brunner v. European Union

The Maastricht judgment of the German Constitutional Court of 12 October 1993 opened the way to the ratification of the Maastricht Treaty in Germany. It was nevertheless much more controversial than the Treaty itself. Tellingly enough, and confirming my introductory remarks on the benign and unfortunate neglect of the economy in European constitutional scholarship, critics found that the court has misstated the views of Hermann Heller. They were also irritated by the characterization of the Union as a Verbund, rather than a Gemeinschaft, and even found a touch of Schmittianism in the judicial reasoning. What the court had to say about the economy seemed less interesting, but was, indeed, exciting. In the pertinent passages on Monetary Union, the court explained that an economic constitution which, through its substantive rules and institutional design, seeks to replace politics and policies with legal rules, constituted a sine qua non for German participation within Monetary Union. This assertion was the court’s response to the argument that the European Union was about to acquire such wide-ranging competences that nation states could no longer act as the masters of their “democratic statehood.” Economic integration, the court replied, was an autonomous and apolitical process, which might, and indeed must, take place beyond the reach of the member states’ political 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 were diverted. To rephrase the argument slightly: yes, the Treaty is compatible with the Basic Law. But this is true only because it is inspired by Germany’s stability philosophy and only as long as this stability pact is actually respected.

The court had been warned, for example, by the President of the Bundesbank, “that a currency union, especially between States which are oriented towards an active economic and social policy, can ultimately only be realized in common with a political union (embracing all essential economic functions) and cannot be realized independently thereof or as a mere preliminary stage on the way to it.” The court could not be so naïve as to believe in the autonomy and sustainability of the “stability

29 On the intense controversies in Germany over the common currency at the time of its introduction, see, recently, Friedrich Heinemann, Zwischen “Kernschmelze” und “Fass ohne Boden”—zum Dissens deutscher Ökonomen in der Schuldenkrise, 60 ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 207 (2013).
community.” And indeed, Ernst-Wolfgang Böckenförde, one of the renowned judges of the deciding Second Senate, has recently underlined that the judges were, indeed, fully aware of the fragility of the Stabilitätsgemeinschaft (stability community) which they defended as a constitutional command:

The decision to agree on a monetary union and put it into operation without a simultaneous or immediately subsequent political union is a political one, for which the institutions with competence on the matter must take political responsibility.\(^30\)

One remains perplexed. The judges knew very well that it would be simply inconceivable to correct politically the deal to which they had given their legal blessing. And they decided accordingly when they were confronted with the request to prevent the Monetary Union from entering the third stage.\(^31\) The dynamics which had been set in motion became irresistible. The common currency had created financial interdependencies in an ever more socio-economically heterogeneous Union that had gone out of control. The new exclusive European competence for monetary policy was too weak an instrument to govern the European economic sphere, but strong enough to deprive the member states of crucially important governmental powers. Europe continued to be a “market without a state,” while the former “masters of the treaties” had become “states without markets.”\(^32\)

3. Politicization without democratization:\(^33\) Europe’s turn to new modes of authoritarian economic governance

What is the surplus of the characterization of the EMU as an institutionalized “diagonal conflict”? The benefits can be illustrated by way of a comparison with the more conventional ways in which these constellations are understood in The Eurozone Crisis. One is a resort to the somewhat forgotten category of “pre-emption,” another one the appeal to the above-mentioned cooperative duties as substantiated in Article 121 TFEU.\(^34\) The Tuoris discuss both alternatives (at 240 et seq.) without delivering analytically or normatively conclusive results. The surplus of the notion of “diagonal conflict” is threefold. One is analytical. The notion of diagonal conflict characterizes a specific

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\(^34\) What kind of power this “co-ordination” mandate confers has been most thoroughly discussed by Beate Braams, Koordinierung als Kompetenzkategorie, Tübingen: Mohr Siebeck, 2013. As she argues at 228 et seq., even the soft powers of recommendations and co-ordination are subject to the rule of law and their exercise must be legalized by an amendment of the TFEU.
conflict constellation in the European multi-level system of governance, which has to be distinguished from vertical conflicts between the EU and its member states, on the one hand, and horizontal conflicts between member states, on the other. The notion also helps us understand why ready-made rules for the solution of such conflicts are simply unavailable. Such solutions must instead be elaborated, and law cannot do more than provide procedures and principles which foster constructive cooperation.\(^{35}\)

The second benefit follows from the insight into the need for a “law of law-production” (a Recht-Fertigungsrecht).\(^{36}\) Inherent in such law production is a political dimension—and a reconceptualization of the law–politics relationship. In its formative phase, European law has established a primacy of law in the structuring of the integration project. This has, as I have argued in Section 2, contributed to its “Ordoliberal tilt.” The substitution of political processes by legal fiat has become normatively unsustainable.

The third benefit: The framing of conflicts as diagonal constellations and the insights into the law–politics relationship it fosters, helps improve our understanding of the difficulties and the deficiencies of the European praxis. The responses to the European crisis, undergone in recent years, provide a drastic illustration. The term “Constitutional Mutation,” the title of Part II of The Eurozone Crisis, is a felicitous characterization of these developments. It acknowledges that the Maastricht regime is unsustainable, and that the need for legal change is irrefutable, but it insists that the changes must aim for renewed legitimacy and accountability.\(^{37}\) The Tuoris’ account is comprehensive in the coverage of the pertinent legal materials, political decisions, and academic discussions. Thanks to the alliance of economic expertise and jurisprudential depth, this account is critical, but the authors tend to turn to overly optimistic interpretations of their insights. The “normalization” of European crisis politics—the “realignment of the principles of the macroeconomic constitution” (Chapter 6) relies essentially on the disciplining of “states in difficulties” through “strict conditionality” of financial assistance as provided for in article 136(3) TFEU. How comforting can the inclusion of that provision in the TFEU be, if it legalizes practices whereby member states “in difficulties” are being transformed into “zero-choice democracies”?\(^{38}\) What follows from the “ politicization” of the European Central Bank, its participation in the activities of the Troika, and its new role as a “stakeholder” about which we read at 184 et seq.? How comforting can be the fact that such developments should be countered by a grounding of decision-making in “objectively given economic parameters” (at 211)?

My concern and objection in a nutshell is that the departure from European law and

\(^{35}\) See Berman, Global Legal Pluralism, supra note 18.

\(^{36}\) On these notions, see Frank I. Michelman, Brennan and Democracy 34 (1999), and Rudolf Wiethölter, Justifications of a Law of Society, in Paradoxes and Inconsistencies in the Law 65 (Oren Perez & Gunther Teubner eds., 2005).

\(^{37}\) This understanding of the European constitutional constellation as a Wandelverfassung (Hans Peter Ipsen) seems in principle compatible with the idea and quest for a “law of law production.” See Hans Peter Ipsen, Europäische Verfassung—Nationale Verfassung, Europarecht 195, 201(1987).

\(^{38}\) I am borrowing this term from Niklos Heplas, supra-national Technocracy and Zero Choice Democracy: The Greek Experience, Contribution to the workshop on Technocracy and Democracy in Times of Financial Crisis, University of Darmstadt, Mar. 6–7, 2014; see again Section 4.2.1 below.
constitutionalism as we knew it is more alarmist than the Tuoris are ready to concede. I will focus in the following remarks on the “new modes” of European governance, and then illustrate my concerns with a discussion of the recent jurisprudence of the German Constitutional Court and the Court of Justice of the European Union (CJEU).

A particularly intriguing characteristic of Europe’s new modes of economic governance is the “form” of its crisis management. This form is “managerial” in the sense in which Martti Koskenniemi uses this term, and it is extremely delicate for three inter-dependent reasons. First, through the supervision and control of macroeconomic imbalances, it disregards the principle of enumerated powers, and, by the same token, cannot respect the democratic legitimacy of national institutions, in particular, the budgetary powers of the parliaments of the member states receiving assistance. Second, in its departure from the one-size-fits-all philosophy, which dominates European integration in general and monetary policy in particular, it nonetheless fails to achieve a variation, which might be founded in democratically legitimated choices; quite to the contrary, the individualized scrutiny of all member states is geared toward the objective of budgetary balances and seeks to impose the necessary accompanying discipline. Under the conditions of monetary unity, member states can only respond to pertinent requests through austerity measures: reductions in wage levels and social entitlements. Third, the machinery of the new economic governance with its individualized measures, oriented only by necessarily indeterminate general clauses, is regulatory in nature, establishing a transnational executive machinery outside both the realm of democratic politics and the form of accountability formerly guaranteed by the rule-of-law. The core concepts used by the new economic governance cannot be defined with any precision, either by lawyers or by economists, and are, therefore, not justiciable. This implies that rule-of-law and legal protection requirements are being suspended. This type of delegalization is accompanied by assessments of Member State performance, which cannot be but highly discretionary.

All of these measures were taken to compensate for the failure of the original EMU and the Stability Pact to prevent a downfall of the financial system of the Eurozone and to provide for rescue measures. This is why Ernst-Wolfgang Böckenförde, a renowned scholar and former judge at the German Constitutional Court, started to talk of a state

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40 Martti Koskenniemi, Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization, 8 THEORETICAL INQUIRIES IN LAW 9 (2007).

41 See, the listing of pertinent requests in Mark Dawson & Floris de Witte, Constitutional Balance in the EU after the Euro-Crisis, 76 MOD. L. REV. 817, 825–827, nn.33–37 (2013).

42 See the concerned analysis by Michelle Everson, The Fault of (European) Law in (Political and Social) Economic Crisis, 24 LAW & CRITIQUE 107 (2013).

of emergency.\textsuperscript{44} His perception is shared by a broad spectrum of commentators,\textsuperscript{45} and a good number of observers, who do not use this term, exhibit related concerns just the same. The Tuoris warn against resorting to such categories and against the “alarmist tones of political leaders” (at 136). Suffice it here to list some of the prominent characterizations: “executive federalism” (Habermas),\textsuperscript{46} “new sovereignty with largely unfettered power of rule” (Chalmers),\textsuperscript{47} the “consolidating state” (Streeck),\textsuperscript{48} “legally and politically unconstrained experpertocracy” (Scharpf),\textsuperscript{49} “executive powers beyond the reach of national and European democracies” (Curtin),\textsuperscript{50} the transformation of the EU’s democratic deficit into a “democratic default” (Majone).\textsuperscript{51} None of these characterizations sounds flattering. There are widespread concerns about their compatibility with Europe’s commitments to democracy and the established understandings of the rule-of-law. So are concerns about the erosion of the legitimacy of the integration project as such. As the most prominent (and most thoughtful) proponent of the integration-through-law project has explained recently: While democracy had neither been on the foundational agenda or credibly accomplished later, an Ersatz-legitimation through the output which the project delivered has become equally fictitious at least for the member states in Europe’s new periphery. What is left is “messianism,” the release of the peoples of Europe from their bellicose past into a common future which the former aggressor was invited to share.\textsuperscript{52} This grand legacy certainly deserves to be preserved. It does not, however, render the present economic, social and political hardships sustainable. The encounters of constitutional adjudication with Europe’s crisis management document these challenges instructively. Who other than our highest courts could be in a position to defend the law and its rule in such difficult times?

4. Constitutional guardianship under the impact of the crisis

The Tuoris therefore have good reasons to dedicate essential sections of their monograph to the evaluation of the recent judgments. Their analyses are in line with the

\textsuperscript{44} Böckenförde, supra note 30.
\textsuperscript{46} Jürgen Habermas, A Pact for or against Europe?, in WHAT DOES GERMANY THINK ABOUT EUROPE? 83 (Ulrike Guérot & Jacqueline Hénard eds., 2011).
\textsuperscript{48} WOLFGANG STREECK, BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM, at ch. 3 (2014).
\textsuperscript{50} Deirdre M. Curtin, Challenging Executive Dominance in European Democracy [Chorley Lecture, London 2013], 77 Mod. L. Rev. 1 (2014).
\textsuperscript{51} MAJONE, supra note 15, 179–207.
promises of the jurisprudential approach. They respect Europe’s constitutional accomplishments; they openly address the difficulties faced by the courts when they have to adjudicate upon the basis of a flawed legal and institutional framework; they continue to explore the law’s economic background and impact; and they do not shy away from identifying “the eternal loser” of the integration process, namely the welfarist legacy of post-war Europe and the project of a “social” Europe (at 231–247). This is more than a merely descriptive and uncritical account.

As indicated in Section 2.1 on “integration through law” and Section 2.3 on the Maastricht judgment, it seems to me that the The Eurozone Crisis does not liberate itself from the European tendency to overburden legal proceedings with controversies which law is not legitimated to resolve or to delegate to expert bodies tasks to which expertise cannot provide conclusive answers. Both of these issues are informed by my reading of the recent jurisprudence, which is more critical, or more desperate, than the Tuoris’.

4.1. The “methodological nationalism” of the Bundesverfassungsgericht

Germany’s Constitutional Court (GCC) has a very strong and much contested record of decisions on the integration project in general and on Monetary Union in particular. The problématique of its Maastricht judgment is discussed in Section 2.3. The decision can be characterized as an exercise in “methodological nationalism,” as the court cared exclusively about Germany’s economic philosophy and failed to consider the impact of an imposition of this philosophy on the rest of Europe. The Tuoris are fully aware of the weight of this judgment and the indebtedness to its reasoning in the case law that followed. The GCC has indeed repeated the message on the legal importance of the commitment to the stability philosophy in its judgment of September 7, 2011 on the aid measures for Greece and the euro rescue package, and again in the decision of September 12, 2012 rejecting an application for a temporary injunction to prevent the ratification of the European Stability Mechanism (ESM) Treaty and the Fiscal Compact.

The development of new modes of economic governance in the course of Europe’s crisis management has profoundly transformed the constitutional constellation of the Union and drastically affected what was still left of the Ordoliberal constitutional legacy. It was the CJEU’s Pringle judgment, handed down on November 27, 2012, that pronounced this change very clearly. Europe’s new economic governance, so the

53 The term is borrowed from Michael Zürn, Politik in der postnationalen Konstellation, in Politik in der entgrenzten Welt 181 (Christine Landfried ed., 2001). The term is by now more widely in use.


55 GCC, Case 2 BvR 1390/12, Sept. 12, 2012; an incomplete English translation is available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html (accessed on Aug 20, 2014); see Tuori & Tuori, supra note *, 200 et seq.

56 Case C-370/12, Pringle v. Government of Ireland, Ireland and the Attorney General, Judgment, Nov. 27, 2012.
Court explained, was no longer committed to a “system of undistorted competition,” which would place its trust in the “discovery procedure of competition.” Its new vocation has instead become one of safeguarding “the financial stability of the euro area as a whole”; the governmental and regulatory means which seek to serve this end are, so to speak, “legal per se.”

Thereafter, in its spectacular judgment of January 14, 2014, the German Constitutional Court made use of the reference procedure for the first time in its history. The arguments of the Court questioning the legality of the ECB Outright Monetary Transactions (OMT) program seem to rely strongly on Ordnungspolitik reservations against any bail-out and state financing as articulated by the President of the Bundesbank, Jens Weidmann.

One must not, however, read the objections of the OMT judgment in isolation. This judgment was preceded by the preliminary injunction decision of September 12, 2012 and followed by the definite settlement of the matter in the judgment of March 18, 2014. Both of these decisions evidence a readiness to subscribe fully to the logic of the Pringle judgment. This logic is characterized by the means–ends rationality of assumed functional necessities. It does not apply rules, but resorts to differentiated and situational managerialism. The irony of this move is that it occurs in the name of democracy. As the German Constitutional Court underlines, the Bundestag must remain an institution that defines the limits and the conditions of Germany’s financial contributions to the ESM. Contrary to many more benevolent observers, the GCC, in my view, again exercises “methodological nationalism.” The Bundestag is, of course, a democratically legitimated and politically accountable institution par excellence. However, it derives its legitimacy from Germany’s citizens alone, and this mandate does not justify an encroachment into the political affairs of other democracies. Quite to the contrary, we should expect Germany’s courts and also its political institutions to respect those of other EU member states. Yet, encroachments occur through the dependence of financial support on “strict conditionality” as spelled out in great detail in the “Memoranda of Understanding” to be approved by the receiving state. “Understanding” here is a euphemistic notion. As Michelle Everson has recently observed, conditionality irrevocably undermines “the status of the Member States as ‘Masters of the Treaties’ . . . Just as the Federal Government within Germany respects the democratic integrity of the Länder which make up the federal state, the Federal Republic of Germany cannot, in its relations within the European Union, contract with ‘slaves’. It cannot enter into partnership with anything other than fully sovereign states.”

Damian Chalmers has addressed the same phenomenon expressing similar concerns. “The associative

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ties” as they are now established in the Eurozone, he argues, “are not concerned with securing mutual recognition of citizens or of realising common purposes. They are to secure order and the survival of the system: a European raison d’état in which the latter becomes not simply a value in itself but possibly the highest value.”

4.2 “Brother can you paradigm?”

The above-mentioned issue of “a largely unfettered power of rule to realise the governmental objectives it sets itself” lies at the core of the Pringle case, which the Tuoris discuss extensively and interestingly. My observations will be restricted to three points: (1) the theoretical background of conditionality; (2) the dilemmas of legal interpretation, the need for its conceptual backing, and the emptiness of the European Court’s message; and (3) the constitutional vocation of the European judiciary.

(a) The democracy deficit of “strict conditionality”

The first point concerns the legitimacy basis of conditionality which has been legalized through the new article 136(3) TFEU. This basis is thoroughly discussed in Chapter 7 of The European Crisis. The Tuoris subscribe to the so-called argument from external effects in the version which was prominently defended by Miguel Poiares Maduro in his pleas for “A New Governance for the European Union and the Euro.” “The origin of the crisis,” the argument goes, “can be found in the democratic failures of some states and the externalities they imposed on others but also in the incapacity of national democracies to control excessive cross-border capital flows.” To rephrase this intuition: under the impact of Europeanization, our societies are experiencing an ever-greater gulf between decision-making both in and by individual polities and the impact of the resulting decisions on their neighbors. This schism is a normative challenge to democratic orders because the very notion of democratic self-legislation requires that those citizens who are the subjects of the law and affected by it can, in the last instance, interpret themselves as the law’s authors. I readily admit that I have defended this argument ever since the mid-1990s: European law has the potential and the vocation to compensate the structural democratic deficits of nation-statehood. Here lies its inherently democratic potential and legitimacy, which is categorically different from that of nation states. These affinities notwithstanding, I find Maduro’s version of the argument, and hence also the apparent, albeit not whole-hearted, consent

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62 Chalmers, supra note 60.
65 Id. at 1.
of the Tuoris, as deeply flawed as does Alexander Somek.\textsuperscript{66} To identify structural democracy deficits in the external impact of national policies and laws does, by no means, justify a correction of such practices by a supranational executive compound. Such corrections must, instead, remain compatible with Europe’s commitments to democracy and the rule of law.

(b) Methodological queries with Pringle

The judgment of the CJEU in \textit{Pringle} is, in conjunction with the amendment of article 136 TFEU, characterized as a transformative act, and the Tuoris are prepared to defer “to the weight the speech acts of the constitutional legislator and the constitutional court (ECJ) have in EU constitutional discourse” (at 119). Yet, they also feel free to criticize important elements of these transformations, including the rescue actions undertaken by the ECB through which “the ECB has risked attaining a stakeholder position \textit{vis-à-vis} the banking sector, which may cause complications for its role as an independent monetary expert” (at 226).

I restrict myself here to their particularly intriguing comments on the interpretation of the bail-out provision. The CJEU is praised both in Germany and elsewhere for its meticulous use of the methods of legal interpretation. The \textit{Pringle} judgment covers the classical Savignyan canon complementing it by the post-classical “purpose” (\textit{telos}) of the law. The well-known crux of our canon is that the various methods can point in different directions, and we must then find a meta-norm that would instruct us as to which methods is to be the governing one. What seems so irritating about the CJEU’s reasoning is its oscillation between strictly formalist arguments (such as: “The subject-matter of Article 122 TFEU is solely financial assistance granted by the Union and not that granted by the Member States.”\textsuperscript{67}), on the one hand, and a sudden turn to an imagined \textit{telos}, “apparent from the preparatory work relating to the Treaty of Maastricht,” on the other:

\begin{quote}
Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely, maintaining the financial stability of the monetary union.\textsuperscript{68}
\end{quote}

This contradictory reasoning is deplorable and deserves the critique recently aimed at it by Michelle Everson in her plea for legal honesty.\textsuperscript{69} Fortunately enough, the Tuoris are, in their argumentation, more cautious and more sophisticated than the CJEU. In their discussion of the Maastricht provisions concerning the EMU and of the purpose and \textit{telos} of the bail-out prohibition, they build upon their insights into the Ordoliberal legacy and, on this basis, set out the conceptual basis and economic philosophy of the no-bail-out clause which was meant to discipline national politics. This discussion is fully in line with the current state of \textit{Ordnungsökonomik}, as Lars Feld, the President of

\textsuperscript{66} Chalmers, \textit{supra} note 60.

\textsuperscript{67} C-370/12, Pringle, Judgment, Nov. 27, 2012, ¶ 118.

\textsuperscript{68} Id., ¶ 135.

\textsuperscript{69} Everson, \textit{supra} note 59.
the Walter Eucken Institute in Freiburg and, according to a ranking in the *Frankfurter Allgemeine Zeitung*, Germany’s most influential economist, has recently restated with lucidity.\textsuperscript{70} Feld, however, does not subscribe to the step taken by the CJEU in *Pringle*, namely, replacing the telos of *Ordnungsökonomik* with the higher objective of “maintaining the financial stability of the monetary union.” He does not support this step because he does not believe in its rationality. At this point, the position taken by the Tuoris in *The Eurozone Crisis* seems somewhat ambiguous: the two-level teleology is first understood and acknowledged as a harmonization of the objective of disciplining member states with “crisis resolution, which may require measures deviating from this prohibition.” Then, the authors warn that an improper use of such a deviation might have destructive effects and suggest a precautionary measure: the potential contradiction is to be solved via “strict conditionalität” (at 127–130).

It is again apparent from this argumentation that the Tuoris have moved beyond traditional Ordoliberalism as cultivated by the Freiburg School. The type of “harmonization” which they suggest is irreconcilable with the function of *Ordo* in this tradition. What the Tuoris defend is an operation that cannot be guided by legal rules but must resort to discretionary managerialism. To be sure, first-generation Ordoliberals, in particular Walter Eucken, did believe in an “economic science” which would be able to deliver conclusive answers to the queries of decision-makers.\textsuperscript{71} It is this belief in expertise upon which the Ordoliberal quest for the establishment of independent bodies with decision-making powers was based. “Science,” as Eucken understood it, is meant to provide a shield against political discretion. The Tuoris are clearly committed to this belief. This shield, however, was then removed by Friedrich A. von Hayek who profoundly unsettled the institutional basis of traditional Ordoliberalism. Following his conceptualization of competition as a “discovery procedure,” the lawyers of the second generation of Ordoliberals revised the “system of undistorted competition” accordingly. Moreover, in his seminal Nobel Prize acceptance lecture in 1974, von Hayek explained that the kind of expertise which policy-makers tend to invoke is a mere “pretence of knowledge.” One need not be a Hayekian economic philosopher to acknowledge the weight of this argument.

A diagnosis, which seems to capture more comprehensively and adequately the challenges of Europe’s crisis management, has been provided by Colin Crouch in his prize-winning deliberations on *The Strange Non-Death of Neoliberalism*.\textsuperscript{72} According to this diagnosis, the failure of the EMU cannot be attributed exclusively to the flaws in its institutional design. It is, instead, also indicative of a crisis of the neo-liberal philosophy which inspired it. But this paradigm has not been replaced to date. “Brother can you paradigm?” is the challenging question raised by Peter Hall.\textsuperscript{73}


\textsuperscript{73} Hall, supra note 61.
future, he replies. If there is a kernel of truth in these observations, we have to be cautious with polemics against those who act under irresolvable uncertainties—as long as they do not operate under false pretenses. We should, however, be equally cautious with the disregard of our commitments to democratic principles and the rule of law. This price may be unreasonably high.

(e) The judiciary as guardian of constitutionalism or pouvoir constituant

Europe’s constitutional courts find themselves in a very uncomfortable situation. They are confronted with problems for which no reliable theoretical answers are available. They not only lack conceptual, but also democratically legitimated, guidance. There are, in my view, two lessons for courts to learn from such observations. The first is that we must neither be surprised by the takeover by crisis managers and their practices of “muddling through,” nor arrogant in our evaluation of all this. But it does not follow that we should endorse a judicial deferral to the praxis of Europe’s crisis management and characterize it as “constitutional speech act” (at 119, 149, 187). In the recent OMT judgment by the Federal Constitutional Court, two dissenting judges expressed their unease with the quest for decisions on issues that are undecidable under the standards of law. According to Judge Lübbe-Wolff, the complaints should have been rejected as inadmissible. Judge Gerhardt argued that the court should not get in the way of political decision-making where the political actors could voice political opposition. The two dissenters may have gone a step too far. The law’s state of emergency was generated by a legal framework which, illegitimately and in a dysfunctional way, constrained policy-making by democratically legitimated institutions. Judicial constraint could go hand in hand with the search for a reconfiguration of this misconceived law–politics relationship that would enable and encourage the return to a constitutional condition. What we all have to become aware of are the uncertainties and contingencies under which we have to move ahead. This is anything but a revolutionary insight. The risks inherent in market economies are not categorically different from so many others with which modern societies have to cope. This acknowledgement could protect us from the tragic choice in which The Eurozone Crisis would have us entangled, the choice between depoliticized technocratic rule, on the one hand, and the establishment of democratic federalist structures, on the other (at 213). Since we cannot expect that a normatively attractive alternative will come about through some democratic Urknall, or Big Bang, we would indeed have to conclude with the authors: “In sum, we are not very optimistic” (at 266).