



# Europe's Crisis-Law and the Welfare State – A Critique

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Dipartimento di Scienze politiche – Università degli studi di Perugia

stefano.giubboni@unipg.it

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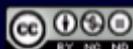
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Via Gallo, 25 – 95124 Catania (Italy)

Tel: +39 095230855 – Fax: +39 0952507020

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## Europe's Crisis-Law and the Welfare State – A Critique<sup>α</sup>

**Stefano Giubboni**  
**Università di Perugia**

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## 1. Introduction

The great economic crisis – the worst and longest at least since the post-war period, which is still holding a large part of Europe in an unequal grip – has a constitutional dimension that has certainly been overlooked, compared to other more direct and visible repercussions. In recent years the measures put into force by supranational institutions, both outside and within the traditional channels of EU law, to counteract the sovereign debt crisis by deeply modifying the economic governance of the Union, have in fact ended up questioning some of the most established paradigms that have historically forged – and constitutionally legitimised – the process of ‘integration through law’. According to the most credited of these paradigms, European integration should be conceived – particularly in its foundation – as a political project, the implementation of which is essentially left to economic processes mediated by the law. The German ‘Ordoliberal’ theorists grasped the meaning of this project better than others,<sup>1</sup> identifying the constitutional anchorage of the newly-born European Economic Community (EEC) with the fundamental economic freedoms and with the system of undistorted competition established by the 1957 Treaty of Rome. Economic and monetary Union (EMU) would have had to refine this project by bringing it to completion; but as is well known the foundation of the whole edifice started to erode soon after its construction (§ 2).

The financial and sovereign debt crisis has dramatically revealed the fragility of the EMU and the substantial erroneous basis of the constitutional premises on which it was built according to the Maastricht Treaty, with a fundamental decision to create a ‘currency without a sovereign’ (Fitoussi 2013, pp. 120 ff.).<sup>2</sup> The response to the crisis pursued by the EU unsuccessfully aimed at compensating these original defects of construction, by introducing regulatory mechanisms which, in practice, have deprived national democratic institutions (primarily parliamentary) of their budgetary powers (at least in the debtor-States) constraining the residual autonomy of the Euro-zone Member States as to their choices regarding fiscal and social policies. The most vulnerable

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<sup>1</sup> The influence of German ‘Ordoliberalism’ on the European constitutional constellation has been masterfully (and critically) examined by Joerges 2004. More recently cf. Joerges and Giubboni 2013, from which this paper has taken its starting point, expanding on some of its arguments.

<sup>2</sup> That is, to institutionalise a monetary policy fully withstanding the principle of price stability (whose management is to be entrusted to a fully independent central bank), although not supported by the creation of an adequate central (federal) budget (and therefore of a political fiscal-union).

countries are now subjected to unsustainable semi-permanent austerity constraints, set by European level mechanisms according to an ideologically uniform approach (a rigid 'one-fits-all-approach'), that consequently increases the powerfully divisive effects of the economic crisis<sup>3</sup>, at the risk of (political) disintegration.

The new European crisis-management-law, therefore, triggers apparently contradictory processes that actually coalesce into a questioning of the original constitutional assumptions of European integration. On one hand (§ 3), we are witnessing a shift in the locus of core decisions regarding essential aspects of State policies from the national to the supranational level. The Treaty on Stability, Coordination and Governance of the economic and monetary Union (an unprecedented example of *Ersatzunionrecht*<sup>4</sup>) has firmly placed at its core the new 'golden rule' of a balanced-budget. On the other hand (§ 4), the very same process of 'dethroning politics'<sup>5</sup> has been entrusted to governance-mechanisms – broadly defined outside the perimeter of the classic Community-method and even of EU law –, which hand over decisions to be taken by opaque and unaccountable technocratic élites and which, by definition, evade the traditional constraints of Community rule of law by putting it beyond the reach for an effective judicial review.

A double (and only apparently contradictory) process of de-politicisation and de-legalisation is therefore taking place within a new EU constitutional setting. The technocratic acquisition of fundamental political decisions, which in the European constitutional model was reserved to national democratic processes, especially with reference to policies affecting the Welfare State systems (Giubboni 2006 and 2012), takes place within an institutional framework that has moved away from the classic realm of the EU rule of law. The formula coined by Habermas (2011) of a 'post-democratic executive federalism' effectively depicts this dual dimension of the new European crisis-management-law. The

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<sup>3</sup> The crisis has re-emphasized the already large economic disparities, especially within the Euro-zone, mainly burdening the debtor countries and advantaging the creditors and Germany in particular (*e.g.* see Quadrio Curzio 2014). Indeed, it has resulted in a massive redistribution of wealth, but in an exact reverse sense to the one accredited by the *clichés* of the austerity supporters, given that the flow of such transfer clearly goes from the Southern countries to the Northern ones. Hence, as effectively observed, a transfer-Union has actually operated in these years in the Euro-zone: 'though contrariwise, and the Northern countries are the main beneficiaries' (Fitoussi 2013, p. 123).

<sup>4</sup> That is, an international-intergovernmental surrogate of EU law, according to the figurative expression used by the German Constitutional Court, although in a different context, in its decision of 7 September 2011 on the measures of financial assistance to Greece (2 BvR 987/10 – 2 BvR 1485/10, 2 BvR 1099/10).

<sup>5</sup> As Supiot 2010, p. 33, wrote evoking the famous Hayekian expression.

category of 'authoritarian managerialism' evoked by Joerges<sup>6</sup> is even more *tranchante* in denouncing the non-democratic traits (and the Schmittian ascendancy) of the new European economic governance. But regardless of the redolant power that these expressions or other similar ones have,<sup>7</sup> what we want to highlight here is the emergence of a new phenomenon that we might explain as a constitutional paradigm-change underlying the new European economic governance, which goes beyond the seeming emergency requirements of the austerity policies of fiscal consolidation conducted in recent years. In this new framework, the original 'Ordoliberal' normative ideal of a formal constitutional order of the European economy is disregarded at the very moment in which the ineffective answers given to the economic-financial crisis through the 'neo-monetarist medieval medicine of austerity' (Countouris and Freedland 2013a, p. 5) contribute to undermine the very democratic legitimacy of the Union, openly questioning the constitutional embedding of the several *Sozial-Staat* democratic traditions on which, in the mid-fifties, the Communities were originally rooted.

The crisis of the so-called 'European social model' has constitutional roots in the new economic governance of the Union: a constitutional dimension which is worth exploring in more depth before attempting to set out some concluding remarks on the uncertain prospects of the Welfare State in Europe (§ 5).

## 2. 'Integration through law' and its crisis

The term 'Community of law', which has been adopted over a long period by the case law of the Court of Justice, owes its success to the first president of the European Commission (Hallstein 1969). In a Community based on law, it represents, at one and the same time, 'the object and the agent'<sup>8</sup> of the integration process. Since the very beginning of this process there was, without doubt, a decisive reliance on law and on its resources, especially for the building of the common market: the founding stone of the entire Community project.

The celebrated formula of 'integration through law', established in the 1980s as a successful motto due to the seminal work of the most

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<sup>6</sup> Cf. Joerges 2012. The similarity with the term 'authoritarian liberalism', coined by Heller (1933) in the midst of the Weimar crisis is evident – and sought after. Also in similar terms cf. Wilkinson 2013, p. 548 ('executive emergency constitutionalism').

<sup>7</sup> See now Streeck 2013, p. 119 ff., speaking of technocratic neutralization of politics and of a new fiscal-consolidation-State in Europe.

<sup>8</sup> Dehousse and Weiler 1990, p. 243.

influential scholars on the European scene<sup>9</sup>, has represented the most proficient and advanced attempt to rationalise the whole European project, as it synthesised (better than through any other conceptualisation) the specific balance between law, politics and economy – on which the whole integration process was built in its founding stage. The constitutionalisation of the Treaties – carried out by the Court of Justice through the *inventio* of a new type of autonomous legal order, distinct both from the law of the Member States and from international law – was a key concept within this paradigm.

Nevertheless, on the long path that travelled from the Community of 1957 towards an ever closer union among its people, Europe has continuously renewed what Ipsen (1987) called its *Wandelverfassung*. And along this path, some of the main tenets of the 'integration through law' paradigm have been progressively weakened and eroded. The actual integrity of those principles is now being challenged, as never before, by the Union's 'existential crisis' (Menéndez 2013). Upon a closer inspection, we might assume that even the original plan for a monetary union, as had been envisioned under the Maastricht Treaty, appears to be incompatible with the fundamental principles of the role of law within the European integration process, as conceived under that model.

Monetary union was not conceived as a political union; on the contrary, it was bound to a rigid system of supranational legal rules which were aimed at compensating for the void of political budgetary solidarity among the Member States. Monetary policy was thus entirely subjected to the European constitutional rules and, at the same time, almost entirely isolated from the political process. And this could fit the normative requirements of an 'Ordoliberal' European economic constitution. However, from the outset, this construction reveals a crucial difference compared to the classic paradigm of 'integration through law'. The essential difference, with respect to the function assigned to law in the European integration process, is that, in that conceptualisation, supranational law and intergovernmental policy-making must maintain a balance. The 'dual character' (Weiler 1981) of the Community system in that model implies a necessary dynamic equilibrium between law and politics in the European integration process. Supranational law neither should nor could have entirely replaced the intergovernmental political process, given that, in such a theoretical framework, the overall balance

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<sup>9</sup> It is an obvious reference to the seminal reconstruction by Weiler 1981, followed by the no-less fundamental collective research directed by Cappelletti, Seccombe and Weiler 1986 (*et seq.*) at the European University Institute at Florence.

of the Community system depends on the mechanisms of adaptation and mutual balancing among the two subsystems.

The monetary union conceived by the Maastricht Treaty, instead, disrupts this balance. Beneath the dominant function assigned to law in the implementation of this political project we can in fact retrace the legacy of another categorisation of the Community system, the one attributable to the German 'Ordoliberal' tradition, much more demanding and prescriptive regarding the functions of European economic law. The EMU's constitutional architecture was actually meant to comply with these prescriptions by giving the EMU a configuration capable of immunising it once and for all from possible Keynesian distortions in the European macro-economic management. Nevertheless, the reforms of the economic and monetary governance of the EMU, introduced as of 2010 onwards in an attempt to mitigate the effects of the financial crisis which had spread to the sovereign debts of the Member States of the Euro-zone's periphery, have come to sever the ties also within this normative tradition, when Europe's new crisis-law entered the unexplored constitutional territories of 'post-democratic executive federalism' (Habermas 2011).

### **3. De-politicisation, loss of neutrality of the European economic constitution and de-socialisation processes**

Evidently, the European economic and monetary Union – as it was devised in Maastricht – was not able to cope with the devastating effects produced by the financial crisis: it had been founded on assumptions that did not contemplate such a systemic crisis and, more importantly, it did not have the tools to manage it (cf. *e.g.* Fitoussi 2013). That is why, at the beginning of 2010 the reaction to the crisis had begun in an unusually rapid way with respect to the usual slow pace of the Community decision-making process, although nevertheless with a fatal delay compared to what would have been necessary to ease the tensions originating from the unruly financial markets. This was carried out with unprecedented and ever more inventive regulatory techniques that became necessary and urgent – or at least were justified as such – due to the concrete risk of the imminent tightening of the crisis with the possible breakdown of the Euro-zone.

A quick chronology of events can remind us of the hectic pace eventually taken by the emergency measures adopted by the Union: 'Europe 2020' strategy (March 2010); European semester (May 2010); framework agreement on the establishment of a European stability fund (June 2010); Euro-Plus Pact (March 2011); Six Pack (December 2011); Two Pack (proposed by the European Commission on November 2011)

and adopted with Regulations n° 472 and 473 of 2013); European Stability Mechanism (February 2012); Fiscal Compact (March 2012). The cornerstone of this complex weaving of emergency tools is the Fiscal Compact, which introduces the previously evoked clause of the public debt-brake, modelled on the German constitutional experience, compliance to which is eventually left to a sort of *extra-ordinem* supervision of the Court of Justice as it is designed outside its ordinary jurisdictional competence under EU law (cf. Seifert 2014, p. 313 ff.). Access to financial support given by the European Stability Mechanism (ESM) is only permitted to those Member States of the Euro-zone that have signed the Fiscal Compact and have therefore transposed into national law – preferably at constitutional level – the golden rule of balanced budgets.

At the same time, in order to provide a less questionable legal basis than the one outlined by the Treaties at the time of the negotiation of these tools, the simplified revision procedure, introduced by the Lisbon Treaty, was activated, as provided for in Art. 48, paragraph 6 of the TEU, with the addition of a new paragraph 3 to Art. 136 of the TFEU that permits – as of 2013 – the establishment of (conditional) mechanisms of financial emergency, similar to the ones that have already been implemented. From a strictly technical-legal standpoint, these measures offer a wide range of reasons and themes for debate, and not surprisingly the debates on the limits of action guaranteed to the Union by the Treaties, especially prior to the amendment of Art. 136 of the TFEU, are still ongoing, and among many legal scholars there has been a growing criticism and a questioning of the overall legality of this creative institutional infrastructure (see especially Guarino 2012). However, the true issue here is not so much the occurrence of more or less creative interpretations of the text of the Treaties, as much as the deep constitutional change that has taken place around these reforms, so that the legal paths determined by the classic canons of the Community rule of law are, to an ever greater extent, being superseded by discretionary measures marked by contingency and conditionality that are entrusted to the discretionary governance of a distant multilateral administration. These measures revolve around some sort of new-fangled supranational functional administration, apparently fashioned on the model of independent agencies, but intended to take action in areas that fall outside the sphere of the formal competences of the Union and characterized by a wide-ranging political discretion.

However, before addressing this issue, it is necessary to focus to a greater extent on the other side of the coin of this constitutional transformation realised by the new European crisis-management-law.

Considered together, these measures assault the Euro-zone with binding detailed rules aimed at limiting and – more or less strictly – conditioning the sphere of macroeconomic discretion left to the Member States. As has been observed in practice, the reason why ‘the Euro-zone is governed by rules is that few of its Member-States – least of all its wealthier North European ones – have any appetite for fiscal union. Crudely, rules (*governance*) exist because common fiscal institutions (*government*) do not. And tighter rules do not amount to greater fiscal integration. The hallmark of fiscal integration is mutualisation – a greater pooling of budgetary resources, joint debt assistance, a common backstop to the banking system, and so on. Tighter rules are not so much a path to mutualisation, as an attempt to prevent it from happening’.<sup>10</sup>

This massive juridification, resulting from the appropriation by the new European crisis-law of the (already heavily constricted) sphere of discretion of macro-economic governance by Member States in the Euro-zone, occurs in the context of an attempt to the technical neutralization of the political decisions regarding very delicate redistribution-issues – now placed precisely inside the sharp-eyed mechanisms for surveillance and punishment of the economic governance of the Union (Chalmers 2012) –, which is clearly anything but neutral in its consequences. The pervasive juridification of decisive aspects of macroeconomic governance, along with the juxtaposition of rules and sanctions to ‘intelligent discretion’ (Salvati 2013, p. 567), which national governments were previously permitted to apply (at least partially) has resulted in a permanent loss of neutrality for the economic constitution of the EMU.<sup>11</sup> This results in the incorporation of neo-monetarist precepts into European higher law, causing highly asymmetrical impacts on the very different economies of the Euro-zone’s countries. Rules of this kind, in fact, not only refute the prospects of a greater fiscal integration and of a political solidarity on occasion (and futilely) evoked in these past years, but they actually establish a regime from which the ‘virtuous’ and wealthier Northern countries, led by Germany (Beck 2013), systematically benefit compared to the Southern ones, especially when – as in Italy – these bear the historical burden of high public debt.

Although in a highly asymmetrical way and depending on the starting point of the Member States of the Euro-zone, the

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<sup>10</sup> Tilford and White 2011, p. 2.

<sup>11</sup> On the matter cf. Countouris and Freedland 2013a, p. 6, who emphasise how ‘the monetarist dogma of fiscal austerity is being institutionalised and entrenched in the European constitutional framework with provisions such as the Euro Plus Pact and the new Treaty on Stability, Coordination and Governance in the EMU’.

'constitutionalisation of austerity' (De Witte 2013) deriving from the new European crisis-law, and particularly from the Fiscal Compact, has deep and in some cases direct implications for national Welfare State systems. In fact, it establishes a sort of permanent constitutional pressure towards a flexible (*i.e.*, de-regulated) labour market (both in terms of fostering the use of non-standard types of employment and reducing protection in the event of dismissal, especially with regard to economic lay-offs), a decentralised collective bargaining system (specifically encouraged by the Euro Plus Pact) and consequently a downgrading of the overall weight and role granted to public social security and in particular State pension systems (see Deakin and Koukiadaki 2013). Such a constitutional grounding of the most ideal-typical neo-liberal political and economic doctrines (Crouch 2013) installs the logic of permanent competition within the system between the several national social models, creating a situation in which the Member States of the Euro-zone are urged to manage their disparities and gain efficiency and competitiveness by basically utilising the only leverage remaining, which is, broadly speaking, the 'structural reform' of their own welfare systems.

Naturally I am aware that this sketchy and stylised description of the new neo-liberal economic constitution of the EMU deliberately emphasises a singular determinism that in the real world is hopelessly lacking. The reality is obviously much more complex and intricate, and the mechanisms of resilience variously activated by the several national systems – especially by the industrial relations sub-systems – show how the legislative responses given by the Member States do not follow a logic of linear and deterministic de-structuring of those widespread and deep-rooted social and labour protection arrangements that we usually encapsulate in the – increasingly less evocative – formula of the 'European social model' (cf. Treu 2013 and Carrieri and Treu 2013). However, we cannot deny the presence of very strong forces towards a de-regulative competition (in the sense of a 'race to the bottom'<sup>12</sup>) between systems of labour law and social security in the Member States (not only) in the Euro-zone and the occurrence of a significant acceleration in what Baccaro and Howell (2013) called the convergence towards a common 'neo-liberal trajectory' of the collective bargaining systems.

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<sup>12</sup> Deakin and Koukiadaki 2013, p. 163. See also Marshall 2014.

#### **4. De-legalisation of the economic and monetary governance of the Union**

As already mentioned, the constitutional direction given to the Union by the new European crisis-law is not even compatible with the classical precepts of German 'Ordoliberalism', fundamentally because it extends the sphere of the European economic constitution to areas that we may define as ontologically imbued with a concentrated dose of political discretion and therefore not likely to be reducible to immediately definable and legally predetermined rules of action that are capable of being 'subjected to constraints by constitutional rules based on justiciable criteria' (Mestmäcker 1972, p. 97). In the 'Ordoliberal' constitutional ideal, those rules may (and in fact must) be confined to the sphere of the formal-rational prerequisites for the functioning of the common market (including the institutionalization of the fundamental economic freedoms, of undistorted competition and of the principle of monetary stability entrusted to the technocratic government of an independent central bank that is isolated from political pressure), but they cannot go as far as to touch the sphere of macroeconomic policies that presuppose contingent and discretionary decisions. This sphere must remain a prerogative of national governments and their parliaments, as it has not been possible to remove them from democratic political debate.

For this same reason, in the original constitutional framework of the Treaties establishing the European Community, and fully consistent in this regard with the requirements of 'Ordoliberalism', social policy was to remain assigned to national democratic sovereignty, in particular so as to ensure the necessary respect for the private-collective autonomy of trade unions. The underlying reason for this choice of maintaining a distinct functional separation (the 'de-coupling' according to Scharpf 2010, p. 221) between the building of the common market, within the remit of the Community economic constitution, and the sphere of social policies, a prerogative of national democratic political and social processes, evidently lies in the fact that the latter belong to the realm of discretionary-politics.

None of this can be observed in the complex regulatory machine of the new European economic governance which, on the contrary, can claim to be intruding deeply into the sphere of the discretionary politics of the Member States, typifying notions that are characterized – beyond the effort of introducing 'objective' numerical parameters<sup>13</sup> – by a compelling ambiguity and a great elasticity (we can just think of concepts such those

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<sup>13</sup> See the fine deconstructive critique by Jubé 2011.

of serious or excessive macroeconomic imbalance). In such a context, the role of judicial review, entrusted by EU law (Article 263 of the TFEU) to the Court of Justice, becomes so crucial in theory but unfeasible in practice. Firstly, it is not very likely that those defined as the interested parties by paragraph 2 of that provision – namely the Member States, the Council, and the Commission – might effectively question those measures in which they themselves are so deeply involved, especially in the likelihood of an economic-financial crisis such as the current one, and that the Court may, then, effectively exercise its review functions. But, perhaps, what is most important is the fact that the Court would find itself adjudicating quintessentially political issues and consequential decisions made in light of elastic and indeterminate notions which cannot be scrutinised, as such, within the parameters of a properly defined judicial review. The two very well-known disputes on the ESM so far deliberated upon before the German Constitutional Court<sup>14</sup> and the Court of Justice<sup>15</sup> have visibly demonstrated the essentially untreatable nature of these issues before the courts, revealing that the European economic constitution is dangerously lacking in a 'guardian'<sup>16</sup> (Everson and Joerges 2013; Joerges and Giubboni 2013).

On the other hand, the answers given by the Court of Justice within preliminary-ruling-proceedings by which some judges of the debtor-States of the Euro-zone have raised questions of the compatibility of the austerity measures adopted by their national governments in implementing supranational commitments with the Troika with the EU Charter of fundamental rights have to date at best been elusive. So far, the Court has rather easily and hastily managed to declare that it does not have jurisdiction to rule on such matters,<sup>17</sup> thus avoiding, thanks to a decision on inadmissibility, a review on the merit of the (obviously

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<sup>14</sup> *Bundesverfassungsgericht*, decision of 12 September 2012 and ruling of 18 March 2014.

<sup>15</sup> Court of Justice of the European Union, 27 November 2012, case C-370/12, *Thomas Pringle v. Ireland*.

<sup>16</sup> Moreover, the methodological nationalism of the German Constitutional Court prevents it from being a guardian of the European constitution and particularly a guarantor for what Rödl (2008) may call the interdependence of labour constitutions of the Member States. The Court of Karlsruhe – beyond the commitments towards a 'European openness' – may actually play an effective role only in the protection of the German social and democratic constitution (Art. 20 and 79 of the *Grundgesetz*). A clear evidence of this is the German Constitutional Court's preliminary reference to the Court of Justice on 14 January 2014 on the OMT (Outright Monetary Transactions) programme enacted by the BCE. See BVerfG, 2 BvR 2728/13 of 14.1.2014.

<sup>17</sup> The best known of these preliminary rulings is the one decided by the Court of Justice in case C-128/12, *Sindicato dos Bancários do Norte et al.*, For a complete listing of these cases and for a careful recognition of the limits of the Court's case law, cf. Barnard 2013.

problematic) relations between these measures of fiscal consolidation and the fundamental principles of European social law, as enshrined in the Charter of Nice/Strasbourg. We do not know the extent to which the Court will maintain this elusive strategy (depending for the most on how the preliminary reference will be formulated); nonetheless, we are not confident that the Luxembourg judges will actually be able to consider the merits of these untreatable political issues reaffirming the constitutional logic of fundamental social rights.

On the whole, this case law demonstrates a fairly accurate picture of the new European constitutional constellation in times of crisis. The philosophy of the prohibition of bail-out, along with its appeal to Member States' autonomy and responsibility, is replaced by a new system of collective governance in situations of crisis. However, the law delegates the management of these situations to an unaccountable supranational technocratic authority, without worrying about the problems of democratic legitimacy arising from the new decision-making processes, especially those that take place within the ESM. This generates an apparent contradiction: on one hand, the new crisis-management-law over-regulates European economic governance in order to tighten the macroeconomic and fiscal conduct of the Member States within a dense texture of rules, assisted by a strong semi-automatic supranational sanctioning system. On the other hand, we are witnessing a creeping delegalisation, in so far as the key concepts of the new governance – starting with notions like excessive deficit or serious imbalance – create the space for discretionary political evaluations made by the post-democratic technocratic bodies in charge of their implementation.<sup>18</sup> The first facet is only apparently in line with the 'Ordoliberal' requirements of an economic policy that is bound by legal rules. In contrast, the second is openly in contradiction with such a normative ideal-type in that it recalls the Schmittian propensity to replace law with the sheer, unrestrained governmental political-discretionary decision.<sup>19</sup>

## **5. The uncertain scenarios of the Welfare State in Europe**

The European crisis-law has thus deeply modified the economic constitution of the EMU. At the same time it is evident that the crisis of the European social model has itself a precise constitutional dimension in this new context. The link between these aspects is very evident: the

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<sup>18</sup> Cf. Joerges 2008.

<sup>19</sup> Again cf. Joerges 2012.

impact caused by the measures adopted by the Member States of the Union, and especially of the Euro-zone, over national systems of labour law and social security, for the implementation of policies that are more or less directly attributable to the pervasive deployment of the new economic governance of the crisis, already offers plentiful confirmation of this tight relationship.<sup>20</sup> Nor is it a coincidence that the ambitious agenda for re-socialising Europe, suggested by the eminent group of European intellectuals gathered in London by Nicola Countouris and Mark Freedland (2013b), pleads for a substantial inversion of the constitutional trajectory imprinted on the Union by the new management-crisis-law.

These proposals for re-socialising Europe contain indeed a very detailed and path-breaking programme for reforms (also cf. Supiot 2013) and there is not the space in this paper to give appropriate attention to their technical-legal aspects. In line with the general and critical analysis carried out so far, we would rather like to suggest a more modest attempt to set out the possible scenarios for the Welfare State in Europe, in the light of models of economic and social constitution that are available or may be simply foreshadowed (or desirable).

The scenario that Deakin and Koukiadaki (2013, p. 186) effectively define of 'regulated austerity' is the mere projection of the existing one, with some timid tempering of the harshness of austerity/conditionality policies constitutionalised by the 'Stability Compact', for example through the flanking of (moderate) policies for growth and employment, a bit more effective than those foreshadowed by the anaemic 'Growth Compact'.<sup>21</sup> This scenario would essentially confirm the current trends towards de-regulative competition and internal devaluation through a (further) flexibilisation of labour markets and the reduction of wage levels by means of the marginalisation of the role of (especially national) collective bargaining. In this kind of scenario, any encouragement of practices of social dialogue, even at European level, would constitute hardly more than a 'travesty of the real thing' (Carrieri and Treu 2013, p. 24), as its value would essentially be functional to the strengthening of

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<sup>20</sup> The *Memoranda of understanding* negotiated with the Troika by the countries that made recourse (to varying degrees and in different ways) to European financial aid (Ireland, Greece and Portugal) all provide for obligations for radical reforms of the national labour law and social security systems according to a 'crude, unreconstructed neo-liberalism' (Crouch 2013, p. 41). Spain and Italy offer examples of more indirect, but not less relevant, impact of such politics of austerity *cum* conditionality. Cf. Deakin, Koukiadaki 2013 and Costamagna 2012; for Italy, Giubboni, Lo Faro 2013 and Jessoula 2012.

<sup>21</sup> On the total inconsistency of the so called Growth Compact emphatically launched by the European council of 28-29 June 2012, but actually remained unaccomplished, see Treu 2013, p. 610.

the strategies of 'competitive solidarity' among national systems<sup>22</sup> (Streeck 1999 and 2013, pp. 138 and 209 ff.).

Not even the scenario of a 'two-speed Europe' as defined by the same authors – with a division of the Euro-zone in a core group of virtuous Northern European countries led by Germany and a Southern periphery of weak economies, which are intended to go along the downside routes of competitiveness, based on the systematic compression of labour costs – evidently gives rise to optimistic outlooks on the possible dynamics of the Welfare State in the new European constitutional framework. A very different scenario is the one that Deakin and Koukiadaki (2013, p. 187) term as 'solidaristic integration', to which the two authors attribute (along with their explicit normative preference) a degree of probability that is more or less equivalent to the one defined as 'regulated austerity'. Therefore, attention must be drawn to this scenario, in order to outline a possible strategy of the re-constitutionalisation of social Europe that follows a path that is the opposite of the (de-legalised and de-socialised) one enshrined in the new economic governance of the EMU.

Deakin and Koukiadaki (2013, p. 187) suggest three convergent routes for such a re-socialisation, based respectively: a) on the expansion of the European central-budget in order to perform tasks of fiscal-transfer re-directed in favour of peripheral countries and actually adjusted to meet their needs (thus accessible beyond the suffocating conditionality requirements contemplated today by the ESM); b) on replacing the regime-competition among national labour law systems with new social harmonisation policies (or rather, more likely, with the fixing a minimum floor of social and labour standards);<sup>23</sup> c) on the rethinking of the role of the ECB, with the assignment of a broader mandate that explicitly takes into account (and therefore systematically balances) price stability, employment growth and social cohesion.

'*Vaste programme*' – one might say –, in relation to which it is hard to foresee who might be the social and political actors (the 'material forces', to use an old-fashioned expression) that can operate with realistic prospects of (even just partial) success.<sup>24</sup> However, the merit of this proposal is to clearly put into evidence how an effective prospect of the Union's re-socialisation implies, on one hand, a greater *political* investment in the new 'European social question' (De Witte 2013), and on the other, a *constitutional* reform of the Union. We could say it implies a

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<sup>22</sup> The 'competition trap' that Gallino (2012, p. 81) refers to.

<sup>23</sup> Cf. Giubboni 2013, chap. I and II.

<sup>24</sup> A less ambitious perspective was outlined in Joerges and Giubboni 2013.

re-politicisation and a re-constitutionalisation of the social question on a European and transnational scale at the same time.

Defensive responses at national level – basically a return to the original division of labour between the Union and the Member States that returns national welfare policies to the narrow boundaries of national social sovereignty – appear simply illusory. Certainly, this does not mean that there is no need to restore a greater margin of autonomy into the hands of the Member States for the determination of their social and labour policies.<sup>25</sup> However, in order to do so, it is necessary to re-construct a European social policy, both by establishing minimum protection standards, which would channel regulatory competition among the national legal systems above a common floor of rights, and also by strengthening transnational social solidarity ties, for example through auxiliary legislation aimed at fostering and coordinating autonomous collective bargaining processes at European level (cf. Carrieri and Treu 2013, pp. 33 ff.).

Time will show how much of this scenario is wishful-thinking or if it has even a minimal possibility of being pursued in a future European political agenda.

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<sup>25</sup> In this sense, cf. Giubboni 2012, p. 78 ff., and Joerges and Giubboni 2013. In equal terms, Rödl 2008, p. 164, who emphasises how a 'European labour constitution should not simply reflect the competitive framework for labour in Europe as it currently does, but should serve to re-increase the autonomy of national labour constitutions *despite* the persistence of integrated markets. In other words, a European labour constitution should support the autonomy of national labour constitutions against the pressures of the European single market' (as well as those of the new economic governance of the EMU).

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