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A New Economic Governance through Secondary Legislation? Analysis and Constitutional Assessment: From New Constitutionalism, via Authoritarian Constitutionalism to Progressive Constitutionalism

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> Finally, the crisis has shown the need to strengthen [the Economic and Monetary Union's] ability to take rapid executive decisions to improve crisis management in bad times and economic policymaking in good times.
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> Herman Van Rompuy, 'Towards a Genuine Economic and Monetary Union' (5 December 2012).[1]

INTRODUCTION[2]

THIS AVOWAL BY the President of the European Council to want to 'solve' the crisis by means of *executive decisions* is reminiscent of the economic and judicial policies of the Weimar Republic. After the costs of the crisis (from 1929) had ripped a huge hole in the budget, German industrialist associations and intellectuals of the 'new liberalism' attempted to retell the crisis as one of state debt. The 'over-exploitation' of the state by welfare policies

[1] See: www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf.
[2] The views and opinions expressed in this chapter are those of the author.

and the 'overburdening' of the economy with the tax burden had to be revised[3] by means of 'structural reforms' and a 'debt ceiling'. In the absence of parliamentary majorities, these policies, which involved drastic social consequences, were pushed through by 'presidential cabinets' assisted by Carl Schmitt as their legal adviser. Ultimately, all the measures mentioned were adopted by the *executive* using emergency regulations, which were justified on the basis of an ongoing state of emergency.[4]

Even if the current crisis in the European Union (EU) cannot be compared to the Weimar Republic in many aspects, some parallels are obvious: in Greece and Spain, the austerity policies ordered by the European executive have caused massive economic collapses. Unemployment in these two countries is 27 per cent and more than 55 per cent of young people are without work, figures surpassed in the Weimar Republic in only one year.[5]

With these developments, the 'rift between the represented and the representatives'[6] is widening ever faster: the unfolding crisis of capitalism – the most severe since the 1930s – is taking the shine off neoliberal imaginaries and is eroding the aura of those neoliberal projects that were implemented in the context of the European Union.[7] As a result, the present neoliberal mode of integration, which was based on *consensus*, is sliding into an ever deeper crisis of hegemony.[8] This becomes blatantly obvious when some of the 'organic intellectuals'[9] of the dominant ideology, whose role it is to constantly universalise and rejuvenate it, are starting to defect from their previous beliefs. Discursive elements such as 'The left might actually be right'[10] and 'Among the bourgeoisie, doubts are growing whether they were right all their lives'[11] therefore represent much more than a storm in a newspaper teacup.

But the crisis is not just causing the production of a 'world view'[12] and 'visions of Europe' to slow down; it is also affecting the *second aspect* of consensus-based rule: bank bail outs and the recession-induced reduction in tax revenues have made public debt explode, drastically reducing the scope for 'material concessions'. One after another, subaltern groups in various EU member states

[3] P-C Witt, 'Finanzpolitik als Verfassungs- und Gesellschaftspolitik. Überlegungen zur Finanzpolitik des Deutschen Reiches in den Jahren 1930 bis 1932' (1982) 8(3) *Geschichte und Gesellschaft* 386, 388.

[4] L Oberndorfer, 'Die Renaissance des autoritären Liberalismus? Carl Schmitt und der deutsche Neoliberalismus' (2012) 42(3) *PROKLA* 413.

[5] Eurostat, available at: epp.eurostat.ec.europa.eu.

[6] Gramsci, *Gefängnishefte*, Band 7 (1996) 1577.

[7] H-J Bieling and J Steinhilber, 'Hegemoniale Projekte im Prozess der europäischen Integration' in H-J Bieling and J Steinhilber (eds), *Die Konfiguration Europas. Dimensionen einer kritischen Integrationstheorie* (Münster, Westfälisches Dampfboot, 2000) 102, 106 ff.

[8] Gramsci, *Gefängnishefte*, Band 7 (1996) 1576 f.

[9] ibid, 1557.

[10] Thatcher biographer (and former editor of the conservative *Daily Telegraph*) Charles Moore, 'I'm starting to think that the Left might actually be right' *Daily Telegraph* (22 July 2011).

[11] Editor of the leading conservative newspaper FAZ Frank Schirrmacher, 'Ich beginne zu glauben, dass die Linke recht hat' *FAZ* (15 August 2011).

[12] Gramsci, *Gefängnishefte*, Band 4 (1992) 719.

are being targeted by austerity programmes. In contrast, however, to the neoliberal austerity measures that accompanied the implementation of Economic and Monetary Union (EMU), current cuts are supported by neither the people's active nor their passive consent.[13]

This can be seen in the increasingly vocal opposition and protest that has ignited strongly, parallel in spatial terms to the unequal but combined development of European capitalism. While things remained comparatively calm in the 'world champion export countries', which were able to externalise[14] the problem of insufficient demand by wage restraint and job market flexibility, intense social battles arose in the countries on the economic periphery. Nevertheless, the political crisis, unfolding asymmetrically in the member states, is being felt at a *European* level. For, at the latest, the deep economic and monetary political integration related to the euro has brought about the formation of a European ensemble[15] that is closely attached to *the national and European institutions* and their (in-)stabilities, not least through European law. This crisis of hegemony, as the thesis goes, expresses itself in the replacement of consensus, which has become brittle, by executive legislation and force on various scale levels.

What has burst open with the slogan 'real democracy now!' is, at the same time, more than a little flurry of social protest. For in this demand lies unease about a process of de-democratisation and the reduction of social rights that has achieved a *new* quality with the greatest crisis in the world economy since the 1970s: while the neoliberalisation of all fields of society and life since the beginning of the 1980s has been accompanied by a creeping erosion of the moment of *substantive* democracy fought for and won in the past – a process described by Colin Crouch as post-democracy,[16] – the EU's attempts to manage the crisis are intensifying this process into an authoritarian turn that is also breaking with elements of *formal* democracy.

This is articulated not least in the fact that the central building blocks of neoliberal crisis policy – such as the so-called 'new economic governance'[17] (and/or its constituent parts: the 'Six-pack' passed in autumn 2011 and the 'Two-pack' passed in May 2013), or the Fiscal Treaty – have no adequate legal basis in the 'European Constitution' and could be established[18] only through bypassing the

[13] Gramsci, *Gefängnishefte*, Band 3 (1992) 481.

[14] G Feigl and S Zuckerstätter, 'Wettbewerbsorientierung als europäischer Irrweg' (2012) 4 *Infobrief eu & international* 1.

[15] Buckel, Georgi, Kannankulam and Wissel are speaking in this context of a European ensemble of state apparatuses *cf* 'Kräfteverhältnisse in der europäischen Krise' in Forschungsgruppe Staatsprojekt Europa (ed), *Die EU in der Krise* (Münster, Westfälisches Dampfboot, 2012) 11.

[16] C Crouch, 'Post-democracy and the crisis' (2013) 1 *Juridikum* 41. In this article Crouch, however, presents the argument, in contrast to those represented here, that institutions of *formal* democracy remain intact during and after the crisis (2008 ff) and therefore can still be described in terms of 'post-democracy'.

[17] *cf* L Oberndorfer, 'Eine Krisenzählung ohne Kompetenz – Economic Governance rechtswidrig?' (2011) 3 *Infobrief eu &* international 7.

[18] A Fischer-Lescano and L Oberndorfer, 'Fiskalvertrag und Unionsrecht – Unionsrechtliche Grenzen völkerverträglicher Fiskalregulierung und Organleihe' (2013) *Neue Juristische Wochenschrift* 9.

ordinary revision procedure (Article 48 of the Treaty on European Union (TEU)). Not only the justifying statements made, such as that of Van Rompuy, but also the 'juristic' argumentation and techniques, such as the use of Article 136 of the Treaty on the Functioning of the European Union (TFEU) as a blanket clause for the creation of almost unlimited emergency law[19] seem to give Carl Schmitt 'alarming topicality'.[20]

Characteristic of the previous instruments of crisis policy is also that they entail a massive upgrade of the executive apparatus and have equipped it with comprehensive decision and sanction-making competences. At the same time, the parliamentary arena has been decisively weakened, at a national as well as a European level.

The suggestions raised by leading figures of the European ensemble of state apparatuses so far within the framework of the debate started in June 2012 on deepening the EMU[21] are also marked by this direction of impact. After the rules for a strict austerity policy by means of an authoritarian constitutionalism all over Europe were given permanence, and thus made immune from a democratic challenge, we are now concerned with a 'Europeanisation' of structural reforms[22] tested in southern European laboratories. In 'contracts for competitiveness', according to German Chancellor Angela Merkel, member states should, with respect to the European Commission, commit themselves to deregulating the labour market, to reforming their pension systems and to lowering their wages. The European Commission declares openly that the planned contracts aim at overcoming political resistance.

Legal structures are excellent indicators of shifts in the democratic system, as was emphasised from a neo-Gramscian perspective[23] by Stephen Gill back in the 1990s when he described the legal reframing of the neoliberal reorganisation of the economy and society at the transnational level with his concept of 'new constitutionalism'. According to the political scientist, new constitutionalism is leading to a European juridification by which economic policies to a great extent evade popular-democratic controls.[24] This is occurring with the establishment of internal and external practical constraints, which include binding limits and rules for fiscal and economic policy, and aim at making neoliberal capitalism the only model for the future. The new constitutionalism grants 'corporate capital' privileged rights, 'while constraining the democratisation process that has involved struggles for representation for hundreds of

[19] U Häde, 'Art 136, N 4' in C Calliess and M Rüffert (eds), *EUV/AEUV – Kommentar*, 4th edn (München, CH Beck, 2011).

[20] C Joerges, 'Europas Wirtschaftsverfassung in der Krise' 51(3) (2012) *Der Staat* 357, 377.

[21] The 'Report of the Four Presidents' gave the starting signal: ec.europa.eu/economy_finance/crisis/documents/131201_en.pdf.

[22] C Hermann, 'Die Finanzkrise und ihre Auswirkungen auf Sozialstaaten' (2012) 5 *Infobrief eu & international* 2.

[23] *cf* B Opratko and O Prausmüller, 'Neogramscianische Perspektiven in der IPÖ' in B Opratko and O Prausmüller (eds), *Gramsci Global* (Hamburg, Argument, 2011) 11.

[24] S Gill, 'European Governance and New Constitutionalism' (1998) 10(1) *New Political Economy* 5.

years'.[25] Thus, an institutional and operational establishment of the independence of political and judicial decision-making processes is accompanied by a curtailment of democratic controlling rights.[26]

In light of the present social rupture, the concept of new constitutionalism must, however, be radicalised. The shifts taking place in the field of 'European law' have to be reconceptualised in parallel with developments across the whole of society that are tending in the direction of 'authoritarian competitive statism'[27] and are increasingly difficult to describe with the *topos* of post-democracy, since it posits an incremental process up to the crisis, that left the procedures and institutions of formal democracy *untouched*.[28] It is my view that the new constitutionalism, with which Gill described the legal codification of neoliberal dogmas in a manner that *abides by European law* and is supported by an at least passive consensus, is evolving into an *authoritarian* constitutionalism.

In order to be able to illustrate these developments and ruptures in the European judicial system, I shall depict the primary legal bases of European economic policy in section I. Here, on the one hand, those 'constitutionally legal' assurances of neoliberal policies will become tangible, which Gill terms 'new constitutionalism'. On the other hand, this is also an illustration of the legal foundations on which the legal acts of the 'new economic governance' and the contracts for competitiveness lie. On this basis, the essential instruments of the crisis policy will be explained (section II) and legal issues will be addressed which show a pattern: in order to promote the neoliberal 'processing of the crisis', despite a collapsing consensus, the ordinary revision procedure is being circumvented and the appropriate instruments are being pressed into the 'European Constitution' illegally (section III). Theoretical deliberations on the character of the exposed authoritarian constitutionalism and the dangers and chances for democracy in Europe follow.

I THE NEW CONSTITUTIONALISM – OR THE EUROPEAN LEGAL BASIS OF ECONOMIC POLICY?

The primary legal structure of the economic policy of the European Union was set down by the Treaty of Maastricht (1992; in effect since 1993) and has since essentially remained unchanged.[29] The fact that the pertinent Articles (120 to

[25] S Gill, *Power and Resistance in the New World Order* (Basingstoke, Palgrave Macmillan, 2003) 131 f.

[26] H-J Bieling, 'Europäische Verfassung als 'neuer Konstitutionalismus' (2013) 1 *EuR – Beiheft* 216 f.

[27] L Oberndorfer, 'Hegemoniekrise in Europa – Auf dem Weg zu einem autoritären Wettbewerbetatismus?' in Forschungsgruppe Staatsprojekt Europa (ed), *Die EU in der Krise* (Münster, Westfälisches Dampfboot, 2012) 50.

[28] See above (n 16).

[29] The Treaty of Lisbon (2007/2009) led to a renumbering of pertinent Articles, upgraded the role of the Commission in the sanction procedures of Arts 121 and 126 TFEU and took away the right of member states threatened by sanctions to vote on relevant decisions.

126) of the TFEU were conceived in the phase of 'euphoric neoliberalism'[30] becomes clear in the principles that prefix the chapter on economic policy. Thus, the Union and the member states are obliged to create their economic policy in 'accordance with the principle of an open market economy with free competition' (Article 120 TFEU) and to comply 'with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments' (Article 119, paragraph 3 TFEU).

These elements of neoliberal theory petrified into a 'constitution' are complemented by the statement that through free competition 'an efficient allocation of resources' is favoured (Article 120 TFEU) – a determination that is little more than a 'constitutional' reference to an economic theoretician.[31]

The conviction, clearly prominent in these principles, of constitutionally anchoring economic ideologemes refers to the theory of 'economic constitution'[32] that understands itself to be an overall decision about the economic life of a community and not to be subject to a democratic challenge.[33] Ordoliberal intellectuals[34] developed this concept in the 1930s and brought it into position against the increasing demands for democratisation of the economy.[35] At the latest, by the 1970s, a Europeanisation of the approach arose, in which a 'constitutionally legal' binding of economic policy on a European level was called for that should conform strictly to justiciable criteria in its execution.[36]

How much this conception could be realised in the EU's principles of economic policy is also reflected in the juridical commentary literature. In the face of the relevant provisions, Ulrich Häde comes to the conclusion that the European Treaties are close to the neoliberal concept of an 'economic constitution',[37] understood as an anti-interventionist legal framework.[38] Häde here recognises no general prohibition of intervention that aims at correcting the market, but sees that a special obligation of justification for special measures has been established in the principles of economic policy.[39]

[30] Bieling and Steinhilber, above (n 7) 112.

[31] FA von Hayek, 'Wettbewerb als Entdeckungsverfahren' in FA von Hayek, *Freiburger Studien* (Tübingen, Mohr, 1969) 249.

[32] C Joerges, 'Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik' in R Wildenmann (ed), *Staatswerdung Europas? Optionen einer Europäischer Union* (Baden-Baden, Nomos, 1991) 225.

[33] W Eucken, *Die Grundlagen der Nationalökonomie* (1940) 86.

[34] Ordoliberalism is the German variety of neoliberalism, *cf* principally R Ptak, *Vom Ordoliberalismus zur Sozialen Marktwirtschaft – Stationen des Neoliberalismus in Deutschland* (Opladen, Leske and Budrich, 2004).

[35] *cf* Oberndorfer, 'Die Renaissance des autoritären Liberalismus?', above (n 4).

[36] E-J Mestmäcker, 'Macht-Recht-Wirtschaftsverfassung' (1973) 137(2) *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 97, 109.

[37] *cf* For an affirmative illustration, see P Behrens, 'Die Wirtschaftsverfassung der EG' in G Brüggemeier (ed), *Verfassung für ein ziviles Europa* (Baden-Baden, Nomos, 1994) 73.

[38] U Häde, 'Art 4 EGV, N 8' in C Calliess and M Ruffert (eds), *EUV/ EGV – Kommentar*, 3rd edn (München, CH Beck, 2007).

[39] ibid, N 9.

Apart from the economic principles, the chapter on economic policy has three essential objects of regulation. Article 121 TFEU contains the procedure for coordinating the economic policy of the member states and establishes the competences of the relevant institutions of the European Union. Article 126 regulates behaviour in case of excessive deficit. Articles 123 to 125 TFEU, finally, contain prohibitions of public refinancing away from the financial markets.

A The Comprehensive Prohibition of Public Refinancing to Release Market Power and for Disciplining the Welfare State

The last mentioned prohibitions entail that those member states whose currency is the euro can no longer finance themselves cheaply through their central banks. In addition, a direct injection of funds by the European Central Bank (ECB) and a common European debt and/or liability is forbidden.

This monetary regime was described by legal science long before the economic crisis and its specific unfolding in the EU as the legal establishment of the disciplining of the public sector by the market:

> The state should, just as any other debtor, face the laws of the market when borrowing money. If the buyers of government bonds see the debt as problematic, then the state should be confronted with rising credit costs. Thus the 'classic' method of eliminating debt from a highly indebted state by heading for the money printing press . . . is ruled out.[40]

The fact that this European constitutionalisation of the 'monetarist revolution'[41] has not only been driven forward by global market financiers and the European Commission (especially by its Directorate General for Economic and Financial Affairs – DG ECFIN), but also in a massive way by national state apparatuses, in particular the neoliberally-oriented finance ministries, which thus try to weaken welfare state-oriented institutions (such as social ministries and the Directorate General for Employment, Social Affairs and Inclusion), can be seen in the history of the origins of the pertinent provisions: it was the present Economic and Financial Committee (Article 134 TFEU), to which each member state sends two members, who are to be selected 'from among senior officials from the administration and the national central bank',[42] who introduced a comprehensive prohibition of financing away from the capital markets, in the course of preparations for the Treaty of Maastricht.[43]

[40] E Gnan, 'Art 104, N 3' in H von der Groeben, J Thiesing and C-D Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag* Vol 5 (Baden-Baden, Nomos, 1997/1999).

[41] The term comes from the monetarist Karl Brunner. *cf* also K Brunner, 'The "Monetarist Revolution" in Monetary Theory' (1970) 105 *Weltwirtschaftliches Archiv* 1.

[42] *cf* Art 3 of Council Decision of 21 December 1998 on the detailed provisions concerning the composition of the Economic and Financial Committee, [1998] OJ L358/109.

[43] E Gnan, 'Art 104 EGV, N 12' in H von der Groeben, J Thiesing and C-D Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag* Volume 5 (Baden-Baden, Nomos,1997/1999).

Articles 123 and 125 TFEU concern the main options for budget financing and 'therefore close all the loopholes . . . that could aid the member states . . . to credit supplies independent of capital markets'.[44]

According to Article 123, neither the ECB nor the central banks of the member states may give credit directly or purchase debt instruments *directly*, that is to say without mediation of the financial markets. This prohibition played a not insignificant part in the escalation of the crisis in Europe: in contrast to the media view, state debt in the eurozone in 2007 was much lower, at 80 per cent of aggregated GDP, than that of the United States (110 per cent). Even the Greek state debt stood at 'only' 107 per cent at the start of the economic crisis, just below the national debt of the United States – not to mention countries such as Spain and Ireland, which in 2007 had total debts of only 25 per cent and 36 per cent respectively. And although the economic collapse in the United States in 2008 and 2009 turned out to be considerably more dramatic than in the eurozone, a strong rise in spreads on government bonds occurred not there but in some countries of the Union: the interest rate for 10-year government bonds rose to over 7 per cent for Spain and over 6 per cent for Italy.

The main cause of this was that the financial markets assumed that the ECB would obey the prohibition on direct purchase of government bonds. A reduction of interest rates was introduced only when the ECB announced in September 2012 that if necessary it would buy unlimited government bonds from secondary markets (indirect purchase).[45] To save the euro, the prohibition of Article 123 was broken, but only at the last minute and at immense cost. Even though we are dealing with an indirect purchase of bonds, it is obvious that an abusive circumvention of a judicial prohibition is being used; for the programme aims only at achieving the goals possible by direct purchase of government bonds.[46] Nevertheless, this procedure does not have the same advantages as 'public refinancing' through a direct purchase of government bonds, since the seigniorage – profit obtained from the 'creation of money' – is passed on, through buying bonds on the financial markets, to banks and other finance market dealers.

The course of the financial crisis in the United States has been completely different: at the very beginning of the crisis, the Federal Reserve sought financing at a distance from the capital markets and invested in government bonds in order to reassure all market actors and to keep interest rates on the national debt within a reasonable framework.[47]

[44] U Häde, 'Art 123, N 4' in C Calliess and M Ruffert (eds), *EUV/AEUV – Kommentar*, 4th edn (München, CH Beck, 2011)).

[45] See: epp.eurostat.eceuropa.eu/.

[46] *cf* also Recital 7 of Regulation (EC) 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Arts 104 and 104b, para 1.

[47] *cf* M Marterbauer and L Oberndorfer, 'Federating Competition States vs Building Europe from Below – EU Treaty Revisions as an Opportunity for the Democratization of Economy and Politics' (2012) 3(9) *Queries* 76.

The 'no-bail-out' clause (Article 125 TFEU) follows the same logic, with its mutual disclaimer of liability, as Article 123 TFEU: the aim is to force 'the public sector with a balance of budget deficits into the mechanism of a free market and thereby activating its disciplinary effect'.[48] Article 125 explains that the Union, as well as every member state is prohibited from taking on a liability for a(nother) member state. In order to be able to save endangered banks, and then indirectly endangered states and in the end the euro as a neoliberal project, the countries of the eurozone had to support the rescue packages (European Financial Stabilisation Mechanism (EFSM), European Financial Stability Facility (EFSF) and European Stability Mechanism (ESM)) on partially questionable legal foundations[49] because of Article 125 and to set up treaties based on private and international law.

Beyond the illustrated legal basis, the chapter on economic policy, as previously mentioned, regulates the process of economic coordination (Article 121 TFEU) and the excessive deficit procedure (Article 126 TFEU). Finally the chapter contains Article 136 TFEU, which aims to enable the member states of the eurozone to achieve a stronger *coordination* in the areas of Articles 121 and 126. The European Commission has chosen these three provisions as a legal basis for the new economic governance (Six-pack and Two-pack) and is planning to propose a regulation for establishing the contracts for competitiveness on the basis of these Articles as well.

B Economic Coordination: Principles, Proceedings and Sanctions (Article 121 TFEU)

The member states agreed in the Treaty of Maastricht that they would 'regard their economic policies as a matter of common concern and shall coordinate them within the Council' (Article 121, paragraph 1). The complete communitisation of monetary policy therefore finds in the field of economic policy no equivalent. The term, 'their economic policies' rather expresses that this remains the responsibility of the member states.[50] They still create and implement, according to Article 121, economic policy in their own jurisdiction ('*their* economic policies') but they are *by law bound* to fall in line with the procedures and content of a coordinated economic policy. This is evident from the fact that 'even the sharpest sanctions in the course of economic supervision consist of merely a reprimand',[51] which as a recommendation, according to Article 288, paragraph 5 TFEU, is not legally binding.

[48] B Kempen, 'Art' 125, N 1' in R Streinz, *EUV/AEUV. Vertrag über die Europäische Union und über die Arbeitsweise der Europäische Union – Kommentar*, 2nd edn (München, CH Beck, 2012).

[49] Art 122, para 2 and Art 136, para 3 TFEU.

[50] M Koch, 'Arts 120–122, N 3' in C-O Lenz and K-D Borchhardt (eds), *EU-Verträge. Kommentar nach dem Vertrag von Lissabon*, 5th edn (Köln, Bundesanzeiger, 2010).

[51] B Kempen, 'N 1' in R Streinz, *EUV/AEUV. Vertrag über die Europäische Union und über die Arbeitsweise der Europäischen Union – Kommentar*, 2nd edn (München, CH Beck, 2012).

The pivotal point of the process is marked by the 'broad guidelines of the economic policies of the Member States and of the Union'. These features are adopted by the Council in the form of a recommendation at the suggestion of the European Commission and after argumentation in the European Council (paragraph 2). *The Council*, in what follows, is the EU body in which coordination is to take place, according to Article 121.

If the Council reaches the conclusion, on the basis of reports by the European Commission, that the economic policy of a member state does not correspond to the 'broad guidelines of the economic policies', or risks 'jeopardising the proper functioning of the economic and monetary union', then it can direct a recommendation to that member state. The Council is not obliged to give such a reprimand ('can'). Rather, it is granted a 'wide political discretionary power'.[52]

In order to create a certain 'pillory effect', the Council can also publish its recommendations (paragraph 4). But the sanctions arsenal does not go beyond this 'naming and shaming': 'The Council can do no more; its possibilities end here'.[53] The European Commission, which up to the Treaty of Lisbon was called on only to prepare the groundwork for the Council, was slightly upgraded by the Treaty of Lisbon. It now has the possibility, according to Article 121, paragraph 4 TFEU, of independently directing a warning to the member state – inasmuch as can be determined within the framework of the above described process – that the economic policy of the member state is not compatible with the 'broad guidelines of the economic policies'.

The Council makes the above mentioned decision by qualified majority, without considering the vote of the relevant member state. Finally, Article 121 TFEU contains, in paragraph 6, the power to issue a regulation that grants only the determination of 'details' of the process. In marked agreement with the ordoliberal concept of an economic constitution, which wanted to safeguard the free market economy from 'attacks' by the 'parliamentary-democratically composed mass society',[54] the European Parliament is informed only about the coordination of economic policy and the deficit procedures (Article 121, paragraph 2 and Article 126, paragraph 11).

In order to make multilateral surveillance of their economic policy possible, the member states have an obligation to provide information. Thus, they are to transmit to the European Commission details of important measures of their economic policies and any further data considered necessary (Article 121, paragraph 3 TFEU).

[52] D Hattenberger, 'Art 99 EGV, N 15' in J Schwarze (ed), *EU-Kommentar*, 2nd edn (Baden-Baden, Nomos, 2009).

[53] U Häde, 'Art 99, N 15' in C Calliess and M Ruffert (eds), *EUV/EGV – Kommentar* 3rd edn (München, CH Beck, 2007).

[54] In this way, the ordoliberal theoretician Walter Eucken castigated the world economic crisis as a result of attacks by the 'parliamentary-democratically composed mass society'. *cf* R Ptak, 'Freiburger Schule' in H-J Urban (ed), *ABC zum Neoliberalismus. Von 'Agenda 2010' bis 'Zumutbarkeit'* (Hamburg, VSA, 2006) 83.

C Proceedings and Sanctions Regarding Excessive Deficits (Article 126 TFEU)

The proceedings regulated by Article 126 TFEU achieved fame through the so-called 'Maastricht criteria'. According to this Article, the member states are obliged to avoid excessive deficits. Significant for evaluation are two reference values: the government debt and government deficit as a percentage of GDP. The currently valid figures of 60 per cent and 3 per cent are however, not set down in the Treaties, but rather in a 'Protocol on the excessive deficit procedure', which is referred to in Article 126, paragraph 2. The goal of this treaty determination is to make an 'expansive budgetary policy' impossible.[55]

But, in contrast to frequent presentations in the media, neither the Treaties nor the deficit protocol contain a defined establishment of the term 'excessive deficit'. Transgression of one or both of the Maastricht criteria is *one* indicator, but one that alone does not meet the criterion of 'excessive deficit'.[56] In fact, the European Commission must consider 'all other relevant factors' in its reports, according to Article 126, paragraph 3 TFEU, and even the Council can, according to paragraph 6, determine a deficit only 'after overall assessment'.

The fact that the member states, according to Article 121, are fundamentally afforded responsibility for economic policy becomes especially apparent within the framework of Article 126 (paragraph 10), that clarifies that proceedings for failure to fulfil an obligation cannot be made on the basis of deficit procedures. 'In place of judicial verification comes the decision of the Council, provided with judgemental and prognostic leeway',[57] and the Council decides 'in the composition of finance ministers' (ECOFIN Council). In order to balance the exclusion of judicial control with political supervision, Article 126 contains a multi-staged procedure whose steps build on and depend on each other. To be able to justify 'hard sanctions' (for example, fines) which can be imposed by the Council in Article 126 (in contrast to Article 121 TFEU) and in order to give the member states the time and opportunity to reduce their excessive deficits, all procedural steps must be passed before the Council can finally decide about administering sanctions.

In the first step, the European Commission prepares a report if a member state does not meet one of the Maastricht criteria (paragraph 3). If the European Commission is of the opinion that an excessive deficit exists in a member state, or could arise, it addresses an opinion to the member state (paragraph 5). Building on this, the Council decides, after an overall assessment, whether an excessive deficit exists (paragraph 6). If this is the case, it addresses a recommendation to

[55] M Schulze-Steinen, *Rechtsfragen zur Wirtschaftsunion – Möglichkeiten der gemeinschaftlichen Gestaltung mitgliedstaatlicher Wirtschaftspolitik nach dem EG-Vertrag* (Baden-Baden, Nomos, 1998) 234.

[56] B Kempen, 'Art 126, Rn 15' in R Streinz, *EUV/AEUV. Vertrag über die Europäische Union und über die Arbeitsweise der Europäische Union – Kommentar*, 2nd edn (München, CH Beck, 2012).

[57] B Kempen, 'Art 126, Rn 46' in R Streinz, *EUV/AEUV. Vertrag über die Europäische Union und über die Arbeitsweise der Europäische Union – Kommentar*, 2nd edn (München, CH Beck, 2012).

the relevant member state 'with a view to bringing that situation to an end within a given period' (paragraph 7). Only when the Council recognises that its recommendation has led to no appropriate measures can it make its recommendation public (paragraph 8). Now the Council can, if a member state persists in failing to put into practice the recommendations, decide to give notice to the member state to take, within a specified time limit, measures for deficit reduction (paragraph 9). If a member state fails to comply with a decision taken in accordance with paragraph 9, the Council *may* impose 'hard sanctions', especially the deposit of a non-interest-bearing capital contribution and the payment of fines (paragraph 11).

Parallel to the modus in the coordination of economic policy, the Council makes its decisions by qualified majority and in exclusion of the relevant member state (paragraph 13). Paragraph 14 also authorises the Council to lay down detailed rules and definitions for the excessive deficit procedure.

D The Stability and Growth Pact

In order to further develop the procedure for economic coordination and the excessive deficit procedure, the Stability Pact was adopted in 1997. Because the chair of the French socialists at that time, Lionel Jospin, saw the Stability Pact as furthering the juridification of neoliberal economic policy, he demanded a renegotiation of the Pact, adopted at the European Council in Amsterdam. In the end he managed only to implement a new title: the pact of two regulations has been since called the Stability and *Growth* Pact.[58]

The Regulation 'on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies',[59] also denoted the *preventive component* in the Pact and was decreed on the basis of Article 121, paragraph 6 TFEU which authorises the Council to determine the 'details' of proceedings. It makes the obligation to inform on the part of the member states (Article 121, paragraph 3 TFEU) more concrete by prescribing the submission of so-called stability programmes containing medium-term budgetary objectives. In the case of substantial deviations from these medium-term budgetary objectives, the Council *can*,[60] according to Article 6, paragraph 2 of the Regulation, direct a recommendation to the relevant member state 'at an early stage' to effect the implementation of necessary measures.

The Regulation denoted as the *corrective component* (Regulation on speeding up and clarifying the implementation of the excessive deficit procedure)[61] was decreed on the basis of Article 126, paragraph 14 TFEU. The Regulation

[58] S Halimi, 'Das Spardiktat, Was in Frankreich zur Wahl steht' *LE MONDE diplomatique* (13 April 2012).

[59] Regulation (EC) 1466/97 of 7 July 1997.

[60] B Kempen 'Art 121 AEUV, N 20' in R Streinz, *EUV/AEUV. Vertrag über die Europäische Union und über die Arbeitsweise der Europäische Union – Kommentar*, 2nd edn (München, CH Beck, 2012).

[61] Regulation (EC) 1466/97 of 7 July1997.

established, calculated from the announcement of the budget data, a 10-month time limit for the decision to level sanctions, as well as additional interim deadlines for the procedural steps of Article 126 TFEU (Article 7, Regulation 1467/97). In addition, they tried to achieve a tightening of the proceedings through a narrowing of the interpretive leeway of inexact judicial terms (especially the evaluation of the Maastricht criteria, Article 126, paragraph 2(a) and 2(b) TFEU). In regard to the sanctions, the Regulation contains clarification: as a rule, a fixed, interest-free annual deposit at a rate of 0.2 per cent of GDP should be imposed (Article 12, Regulation 1467/97). The sum is converted by the Council into a fine, if the excessive deficit has not been corrected two years after the sum has been fixed (Article 13, Regulation 1467/97).[62]

After Germany and France in 2002 and 2003 exceeded the deficit limit of the Maastricht criteria, a slight softening of the Regulation[63] occurred due to political pressure, in which especially the 10-month deadline was lengthened to 16 months and the discretionary leeway for evaluation of the Maastricht criteria (Article 126, paragraph 2(a) and (b) TFEU) was relaxed again.

In return, the *preventive* component was tightened in that, by means of a Regulation,[64] the country-specific medium-term budgetary objectives should be set in a range between 1 per cent of GDP new indebtedness and a balanced or surplus budget (Article 2(a) Regulation 1055/2005).

E Article 136 TFEU: Option for Intensified Obligations for Coordination and Information in the Eurozone

Article 136 TFEU was created anew with the Treaty of Lisbon and enables the Council to decree measures for the eurozone in order (i) 'to strengthen the coordination and surveillance of their budgetary discipline' and (ii) 'to set out economic policy guidelines' for the eurozone 'while ensuring that they are compatible with those adopted for the whole of the Union' (Article 136, paragraph 1 TFEU). Furthermore, this may occur only within the framework of the pertinent Articles (Articles 121 and 126 TFEU) and according to the procedure provided there.

F Surveillance and Neoliberal Normalisation

By means of this – now concluded – illustration of the primary law and secondary regulation of the economic policy *until the crisis*, we can confirm Gill's thesis: the new constitutionalism constructs a governmental surveillance system of

[62] B Kempen, 'Art 126 AEUV, N 18' in R Streinz, *EUV/AEUV. Vertrag über die Europäische Union und über die Arbeitsweise der Europäische Union – Kommentar*, 2nd edn (München, CH Beck, 2012).

[63] Regulation (EC) 1056/2005 of 27 June 2005.

[64] Regulation (EC) 1055/2005 of 27 June 2005.

national economic policy that corresponds to Michel Foucault's concept of control by 'surveillance and normalisation'.[65] Even when there is *no direct control*, economic policies are 'surveilled' by European and international financial institutions and thus are subject to a neoliberal 'self-rule'.[66] This statement must, however, be differentiated, as in the chapter on economic policy, we find, upon closer examination, two different logics that enable economic policy to divest itself of 'popular-democratic control' to differing degrees of intensity and through diverging spatial jurisdictions. In the procedure of economic coordination (Article 121 TFEU), with regard to excessive deficits (Article 126 TFEU) and intensified coordination and information in the eurozone (Article 136 TFEU), the member states retain certain discretionary powers, even if to differing degrees, within which they can shape their budgetary and economic policy. Popular-democratic powers still have the chance to problematise the respective policies of their state apparatus, because they are, at least formally, responsible for them and have decision-making powers. Nevertheless, the fairly effective limitation and/or partitioning of these powers functions entirely in accordance with the governmental pattern of 'surveillance and normalisation' described by Gill: neoliberal path dependency is created by rule-based economic policy, competitive evaluation and self-evaluation and a discursive separation of member states into model students and sinners, although this cannot be imposed unconditionally.

However, the prohibition on public refinancing outside the financial markets (Articles 123 to 125 TFEU) extends beyond the logic of surveillance and normalisation. In connection with the spatial shift of monetary politicy to the European level laid down by the Maastricht Treaty (competence now lies with the explicitly independent ECB), access to public refinancing away from the financial markets remains blocked for states even during crises and prohibited for the ECB – even if 'popular-democratic powers' could exercise effective pressure on their decision makers. Therefore, Gill's remarks regarding the blockade of public refinancing are to be put into concrete terms: the new constitutionalism in this area not only operates through surveillance and normalisation, but has in this field made national economic policy *immediately* subject to discipline by markets; a connection which became generally tangible during the crisis. In Foucault's terms, this area has rather become a system of 'surveillance and punishment'.[67] This 'retardation' of governing technologies 'back' to direct domination, which detaches itself even more strongly from 'self-rule' and consensus, now comes to a head – as the following sections will show – in authoritarian constitutionalism and is transferred to other fields of economic policy.

[65] M Foucault, *Security, Territory, Population* (London, Palgrave Macmillan, 2007) and M Foucault, *The Birth of Biopolitics* (London, Palgrave Macmillan, 2008).

[66] Gill, 'European Governance and the New Constitutionalism', above (n 24) 13.

[67] M Foucault, *Discipline and Punish – The Birth of the Prison* (New York, Vintage Books, 1977).

II NEW ECONOMIC GOVERNANCE AND CONTRACTS FOR COMPETITIVENESS AS AUTHORITARIAN CONSTITUTIONALISM

> What is going on is a silent revolution – a silent revolution in terms of stronger governance by small steps. The member states have accepted – and I hope they understood it exactly – . . . very important powers of the European institutions regarding surveillance, and much stricter controls of the public finances.
>
> José Manuel Barroso, speech to the European University College (18 June 2010).

This announcement by the President of the European Commission has become reality. In separate steps, and for the most part aside from public debate and academic discussion, a 'silent neoliberal revolution'[68] is taking place, which will entail a profound restructuring of European economic policy. So far we have established three stages in which the new economic governance has been set up. In autumn 2011, the so-called Six-pack went into effect, a package of five regulations and a directive. In May 2013, the Two-pack, consisting of two decrees, followed and in 2014 the next step is planned – the contracts for competitiveness.

A The Tightening of the Stability and Growth Pact

Three of the six legal acts of the so-called Six-pack are aimed at tightening the Stability and Growth Pact (SGP).

With Regulation 1175/2011,[69] based on Article 121, paragraph 6 TFEU, the *preventive component* of the SGP is tightened, especially by the following reforms: (i) if the debt level of a member state is higher than 60 per cent of GDP, the *annual* improvement of the cyclically-adjusted budget balance must be at least 0.5 per cent of GDP (Article 5, paragraph 1 Regulation 1466/97 as amended by Regulation 1175/2011); (ii) the Regulation *introduces* a rule to limit spending growth. Thus, the annual expenditure growth must not exceed the 'reference medium-term rate of the potential GDP growth' (Article 5, paragraph 1(a) Regulation 1466/97 as amended by Regulation 1175/2011); (iii) the process of establishing significant deviation from the adjustment path towards the medium-term budgetary objective also has time limits (Article 6, paragraph 2 Regulation 1466/97 as amended by Regulation 1175/2011); (iv) in resolving whether the concerned member state has failed to take remedial measures, the European Commission has received upgraded support from the 'introduction' of Reverse Majority Voting. Thus, the resolution 'shall be deemed to be adopted by Council unless it decides, by simple majority, to reject the recommendation within

[68] E Klatzer and C Schlager, 'Europäische Wirtschaftsregierung – Eine stille neoliberale Revolution' (2011) 1 *Kurswechsel* 61.

[69] Regulation (EU) 1175/2011 of 16 November 2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

10 days of its adoption by the European Commission' (Article 6, paragraph 2 Regulation 1466/97 as amended by Regulation 1175/2011).

The *corrective* component of the SGP is tightened in particular by means of Regulation 1177/2011,[70] (enacted on the basis of Article 126, paragraph 14) so that in future the development of the government debt will have the same importance as that of the budget deficit. This was achieved by inserting a new section that more closely defines just what is to be understood by sufficient regressiveness of the level of government debt (Article 126 paragraph 2(b) TFEU): it exists when the difference from the reference value (now 60 per cent) has decreased in the past three years 'on an annual average by one twentieth' (Article 1(a) Regulation 1467/97 as amended by Regulation 1177/2011).

Ultimately, the SGP 'effectuated' to *effectively enforce budgetary surveillance* by means of a new Regulation (1173/2011)[71] which is based on Article 121, paragraph 6 in conjunction with Article 136 TFEU. The Regulation determines a sanction system for the preventive and corrective components of the SGP, but it is valid 'only' for those member states whose currency is the euro (Article 1, Regulation 1172/2011).

In the *preventive arm* of the SGP, the concerned member state will be obliged to deposit an interest-bearing security of 0.2 per cent of GDP, when the decision (Article 6, paragraph 2 Regulation 1466/97 as amended by Regulation 1175/2011) has been made that it has failed to undertake appropriate measures against a considerable deviation from the adjustment path (Article 4, paragraph 1 Regulation 1173/2011). Here the position of the European Commission is again upgraded by Reverse Majority Voting in its decision making (Article 4, paragraph 2). But this time the Council needs not just a simple but a qualified majority in order to veto the decision within 10 days.

As an executive measure for the *corrective component* of the SGP, the Regulation further provides that, following the decision of the Council according to Article 126, paragraph 8 TFEU (see above for an explanation) a fine of 0.2 per cent of GDP can be levied with a further decision (Article 6, paragraph 1 Regulation 1173/2011). Here as well, the Regulation for decision initiates Reverse Majority Voting, which again demands a qualified majority for a veto by the Council (Article 6, paragraph 2 Regulation 1173/2011).

In spite of the comprehensive enhancement of the role of the European executive branch (Directorate General for Economic and Financial Affairs of the European Commission – DG ECFIN), in the 'renewed' SGP and the tightening of its austerity rules, the abovementioned Regulations provide for *no* co-decision rights for the European Parliament. Under the title of 'Economic Dialogue', the Parliament is granted only limited consultation rights in the preventive (Article 2(a), Regulation 1466/97 as amended by Regulation 1175/2011) and in the cor-

[70] Regulation (EU) 1177/2011 of 8 November 2011 amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.

[71] Regulation (EU) 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area.

rective (Article 2(a), Regulation 1467/97 as amended by Regulation 1177/2011) components.

At this point I would like to pause the presentation of the instruments of the new economic governance and subject the tightening of the SGP to a brief economic and judicial interim evaluation. If one observes the tightening of the SGP critically and from an economic or political science perspective, it seems that the trend that Gill described as 'new constitutionalism' is continuing. By tightening a rule-based economic and budgetary policy defined mainly by the European executive branch, this policy can avoid nearly all popular-democratic control. In addition, a turning from the path of neoliberal austerity policies – despite increasing criticism – is becoming ever more subject to preconditions.

At the same time, the pro-cyclical effect of the illustrated provisions is further tightened with the 'reforms': the obligation to implement austerity measures even during an economic downturn leads to a further breakdown of (state) demand, and so to a continued decline in the economy and finally to a spiral of debt. This again emphasises that the new constitutionalism, despite constant repetition of its 'saving' mantra, is not aimed primarily at debt reduction. Rather, it aims at preventing an expansive economic and social policy, which could shift the power relationship in favour of trade unions and social movements.

If one looks at the tightening of the SGP from a jurisprudential perspective, it becomes clear that the central instruments of the new SGP were passed without the necessary basis of competence. This 'radicalisation' of the new to an authoritarian constitutionalism becomes particularly obvious in the Macroeconomic Imbalance Procedure (explained in detail below), but it appears even in the 'further development' of the SGP, because some of the new components could only have been introduced in compliance with law, by an ordinary revision procedure (Article 48 TEU). The 'introduction' of a reverse majority voting in the different regulations is manifestly illegal. Article 121, paragraph 6 TFEU, used to substantiate these changes, allows, as we showed in section I, only the possibility of adopting a regulation with 'detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4'. A quick look at these paragraphs of Article 121 TFEU makes it clear that here *only* the Council – without any restriction – is granted the *possibility* of directing a recommendation to the member states. Article 121 TFEU neither provides for the legal act of a decision (Article 288 TFEU), nor calls on the European Commission to adopt such a decision, which consequently receives its validity through the inactivity of the Council, as provided by reverse majority voting. Just as little does Article 121 recognise sanctions that go beyond 'naming and shaming' by recommendations and making these public (explained in detail in section I). Therefore, the introduction of 'hard' sanctions in the form of interest-bearing deposits for effectuating the preventive components is inadmissible. In addition, we are dealing here with a binding legal act that is simply not provided for in the system of Article 121. The series of manifest illegalities that distinguish the tightening up of the SGP is concluded by the bringing forward of imposing fines in the *corrective* component. As previously

illustrated, Article 126 provides a strict procedural course at the primary law level, which allows for the possibility of imposing fines (paragraph 11) *only* when the member state has failed to meet the obligations of paragraph 9. Shortening this procedure through secondary law, as provided for by Article 6, paragraph 1 Regulation 1173/2011 is therefore illegal.

B European Semester

A further component that the European lawmaker has incorporated in secondary law by means of Article 2(a), Regulation 1175/2011 is mainly unproblematic, however.[72] The European Semester concerns a *temporal* structuring of and agreement on the procedures developed so far within the framework of the EU on the coordination of economic and employment policies on which a political consensus has been reached within the framework of the 'Europe 2020 Strategy'.

C Directive on the Requirements for Budgetary Frameworks of the Member States

The fourth legal act of the so-called Six-pack, Directive 2011/85/EU,[73] due to be implemented by the end of 2013, aims at reducing the leeway for unrealistic budget prognoses, increasing transparency and obliging the member states to enact 'numeric fiscal rules'. The member states must in future guarantee that all sub-sectors of general government (Article 3) and all contingent liabilities (Article 4) that could considerably affect their finances are included statistically in their financial planning.

While comprehensive and sustainable statistical compilation is welcomed from the viewpoint of the critical economy, it appears problematic that the Directive also obliges the member states to pass 'numeric fiscal rules' that should maintain values in 'compliance with the reference values on deficit and debt' (Article 5(a)) and should ensure the introduction of a 'multiannual fiscal planning horizon' to pursue the 'medium-term budgetary objectives' (Article 5(b)). The competence basis used here (Article 126, paragraph 14, sub-paragraph 3) does not provide for an analogous binding introduction of national budget rules. Rather, Article 126, paragraph 14, sub-paragraph 3 TFEU enables the Council only to 'lay down detailed rules and definitions for the application of the provisions' for carrying out the Protocol on the excessive deficit procedure annexed to the Treaties (see section I). Article 3 of the Protocol, however, pro-

[72] Whether the authorisation of the Commission to issue a warning according to Art 121, para 4 TFEU outside its area of use is legally allowed is at least questionable (see for this authorisation Art 2(a), para 3(b)).

[73] Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.

vides only that *member states* must ensure that their budgetary law will not endanger fulfilment of the obligations that arise from the Treaties. A Council competence concerning numeric fiscal rules for member states can just as little be extracted from Article 126, paragraph 14, sub-paragraph 3 TFEU as a competence to order the monitoring of adherence to the rules by 'independent analysis carried out by independent bodies or bodies endowed with functional autonomy vis-a-vis the fiscal authorities of the Member States' (Article 6, paragraph 1(b) Directive 2011/85/EU).

D Macroeconomic Imbalance Procedure: Neoliberal Restructuring and Interventionism in the Area of Wage Policy

The official title of the 'Regulation on the prevention and correction of macroeconomic imbalances'[74] was purloined from heterodox economists who have stressed for decades that the introduction of EMU without common policies on wages, taxation, transfers and social welfare will accelerate capitalism's inherent tendency to create *uneven development*. They further argued that the imbalances in the distribution of income and foreign trade would have to be reduced to deal with a principal cause of crisis. To that end, the countries that are running a current account surplus due to wage moderation or labour market deregulation (for example, Hartz IV in Germany), and that are therefore partly responsible for the indebtedness of those countries with a current account deficit should significantly increase their wages and thus labour costs.[75]

The above-mentioned Regulation, however, tries to establish an entirely different meaning of 'uneven development'. This becomes obvious where the legal act declares that 'the need for policy action is particularly pressing in Member States showing persistently large current-account *deficits* and competitiveness losses'.[76] 'Corrections' in the area of 'wage policies' and deregulation of 'labour markets, product and service markets' are to be undertaken[77] until 'competitiveness'[78] is restored. The juridical interpretation of this package of laws leaves little doubt that, by mandating a race to the bottom, economic governance aims to create a permanent competition state in and through the legal form and that 'stable prices, sound and sustainable finances and monetary conditions'[79] are to be implemented in authoritarian fashion if necessary.

By drafting this Regulation as a largely undetermined framework, the European legislature makes the European executive the sole judge of what

[74] Regulation (EU) 1176/2011 of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L306/12.

[75] E Stockhammer, O Onaran and S Ederer, 'Functional Income Distribution and Aggregate Demand in the Euro Area' (2009) 3(1) *Cambridge Journal of Economics* 139.

[76] Recital 17.

[77] Recital 20.

[78] ibid.

[79] Recital 1.

constitutes a macroeconomic imbalance. The executive enjoys an almost unlimited latitude to directly push through dominant interests. The Directorate General for Economic and Financial Affairs of the European Commission (DG ECFIN) decides whether an imbalance exists in a member state through the use of a 'scoreboard' consisting of 'macroeconomic and macrofinancial indicators'. The European Commission decides in an annual update[80] on the composition of these indicators that guide European economic policies. The Council and the European Parliament have the right only to comment.[81] With regard to substance, the European executive apparatus is bound only by a few general provisions. Even if the balance of forces on the European level should change significantly, their *wording* would give little support to attempts at reducing these imbalances in the alternative way favoured by heterodox economics. According to the Regulation, the indicators will be used to detect imbalances 'in price and cost developments', as well as 'non-price competitiveness' at an early stage.[82] The wording is unambiguously neoliberal, too, with regard to the crucial question of the current account: the fairly neutral term 'current account positions', which would arguably include surpluses, is still used. In interpreting the Regulation, however, recitals have to be taken into account that require action *primarily* in the case of 'current-account deficits and competitiveness losses'.[83]

While, according to the Regulation, the European Commission (DG ECFIN) *alone* de jure is appointed to create a scoreboard with macroeconomic indicators,[84] it establishes the objectives of European economies and then evaluates the economic performance of member states without the right of co-determination on the part of the European Parliament. If the European Commission reaches the conclusion that a macroeconomic imbalance exists in a member state, it initiates a thorough examination, combined with 'monitoring missions in the concerned Member State'.[85]

If the European Commission, during this examination, reaches the conclusion that an excessive imbalance exists in a member state, the Council can, at the suggestion of the European Commission, adopt a recommendation with the statement that an excessive imbalance exists and that corrective action should be taken.[86] This leads to the consequence that the concerned state must present a 'corrective action plan' in which exact structural reforms and a timetable for their implementation must be included.[87]

[80] Art 4, para 8.
[81] Recital 12.
[82] Art 4, para 3(b).
[83] Recital 17.
[84] Art 4, para 8.
[85] Art 5, para 1.
[86] Art 7.
[87] Art 8, para 1.

If the Council reaches the conclusion that the plan for corrective action is sufficient, it shall '*endorse* the plan by way of a recommendation'[88] (sic!). Inasmuch as the intended action and the timetable for its implementation are considered insufficient, the Council directs a recommendation to the member state to present a new corrective action plan.[89] The European Commission checks on the implementation of the action plan and can carry out 'enhanced surveillance missions'. The concerned member state is to submit regular progress reports.[90]

Formally, the decision on whether the member state is implementing the corrective action plan properly belongs to the Council; de facto, however, the European Commission decides by reverse majority voting: 'The European Commission's recommendation on establishing non-compliance shall be deemed to have been adopted by the Council, unless it decides, by qualified majority, to reject the recommendation within 10 days of its adoption by the European Commission'.[91]

In order to effect the orderly implementation of competitive restructuring in a timely manner within the eurozone, the sixth legal provision of the so-called Six-pack was decreed.[92]

By means of this procedure, for the first time in European economic policy (aside from the excessive deficit procedure), sanctions have been provided that go beyond mere 'naming and shaming' by publicising decisions.[93] For eurozone countries, annual fines of 0.1 per cent of GDP, a substantial sum, can be levied if the corrective action is not implemented properly.[94] This fine can also be levied when the member state has twice submitted an insufficient corrective action plan.[95] The preceding recitals entail that the fine should be imposed until the Council determines that the member state 'has taken corrective measures in compliance with its recommendations'.[96] And the sensitive decision about levying sanctions should take place according to the Regulation by way of reverse majority voting and thus mainly by the European Commission alone.

Although the package of laws also contains some clauses that protect basic and fundamental human rights, closer examination reveals that economic governance will interfere substantially with formal freedoms. Through reciprocal references, the various levels of the European ensemble of state apparatuses mutually take the burden off each other. Article 1 of the Regulation on competitive restructuring declares that any recommendation must respect trade unions right to collective bargaining. The European Commission, however, does

[88] Art 8, para 2.
[89] ibid.
[90] Art 9, paras 1 and 3.
[91] Art 10, para 4.
[92] Regulation (EU) 1174/2011 of 16 November 2011 on the enforcement measures to correct of excessive macroeconomic imbalances in the euro area.
[93] ibid.
[94] Art 3, para 2(b) in conjunction with para 5 Regulation (EU) 1174/2011.
[95] Art 3, para 2(a).
[96] Recital 12.

not need to interfere *directly* with basic rights: in keeping with the Regulation's wording,[97] it needs only to demand that 'competitiveness' be enhanced in the area of 'wage policies'. The national level within the European ensemble of state apparatuses (for example, a member state government), which, under this provision, is required to submit concrete corrective measures, can in turn invoke the 'implementation of EU requirements' when interfering with basic rights.

The fact that the DG ECFIN is willing to use the competences granted to it by the Regulation for further neoliberal restructuring of Europe became apparent on close examination of the Communication of May 2013, which will be dealt with in part here.[98] The Communication recommends that Spain implements further employment market reforms because 'rigidities in product and labour markets contribute to high unemployment'.[99] In Slovenia and France the minimum wage should be lowered; otherwise – according to DG ECFIN – further competitive losses loom and the profits of corporations would be put under pressure.[100] Alluding to collective bargaining negotiations taking place mainly at sectoral level, the European Commission demands that Italy creates a general framework that is friendlier to big business.[101] The DG ECFIN is here obviously attempting to convert its theory into practice outside the countries under the Troika regime: already in 2012, DG ECFIN recorded in a study that the new economic–political control instruments must be used to reduce the 'wage-setting power of trade unions'.[102] Thorsten Schulten and Torsten Müller therefore come to the correct conclusion that '(t)he new system of European economic governance with its newly introduced mechanisms for monitoring sanctions and intensified coordination has led to a new European interventionism in the area of wage policy'.[103]

Before submitting the Macroeconomic Imbalance Procedure to a legal analysis, I would first like to illustrate the latest plans for consolidating the EMU by establishing contracts for competitiveness. Because these are to be decided on the same deficient judicial foundation as the Macroeconomic Imbalance Procedure (Article 121 in conjunction with Article 136), it is possible to show how both instruments feature the pattern that I conceptualise as authoritarian constitutionalism.

[97] Recital 20.

[98] Communication from the Commission of 10 April 2013 on the results of the in-depth review under Regulation 1176/2011 on the prevention and correction of macroeconomic imbalance COM (2013) 199.

[99] ibid, 6.

[100] ibid, 8 and 11.

[101] ibid, 9.

[102] DG ECFIN, *Labour Market Developments in Europe 2012* (European Commission) 104.

[103] T Schulten and T Müller, 'A New European Interventionism? The Impact of the New European Economic Governance on Wages and Collective Bargaining' in D Natali and B Vanhercke (eds), *Social Developments in the European Union* (Brussels, ETUI, 2013).

E Contracts for Competitiveness

The substance of crisis policy to date, especially of the planned contracts for competitiveness, is illustrated particularly well by a keynote speech on the future of the EU given in Davos at the end of January 2013 by a central figure of the European ensemble of state apparatuses.[104]

The European Union, according to Angela Merkel, has been coming along well on a stability path whose guardrails are strict fiscal discipline, on the one hand, and structural reforms for more competitiveness, on the other. The establishment of the necessary instruments would have been 'unimaginable' only a few years ago. But what is missing now is an instrument for competitiveness throughout Europe that must create a *global* competitiveness. The time factor is central, because, on the one hand, it must be ensured that the structural reforms become effective before the political situation escalates further and, on the other, experience shows that pressure is needed for such reforms. The massive increase in unemployment in Europe is therefore an opportunity, because in Germany too, only the existence of five million unemployed made a competitiveness drive possible. Following the implementation of strict fiscal discipline, the next big European issue is the question of competitiveness:

> I see it like this – and this is what we are talking about in the European Union – that, analogous to the Fiscal Treaty, we resolve on a pact for competitiveness in which the nations conclude contracts with the European Commission in which they oblige themselves to improve elements of competitiveness that do not yet comply with the necessary state of competitiveness.

In this regard, areas such as 'unit wage costs (and) supplementary wage costs' must get in the focus.

What exactly is meant by 'pact for competitiveness' is made clear in, among other sources, a detailed Communication on the deepening of EMU, which the European Commission completed at the end of 2012.[105] If the European executive branch has its way, the new instrument should be fitted into the Macroeconomic Imbalance Procedure.[106]

Despite the largely unrestricted position on competitive restructuring of European economies accorded the European Commission since the resolution on the new economic governance, the contracts for competitiveness would once more strengthen the influence of the European executive and national governments in relation to the European Parliament. The contracts for competitiveness, according to the concept, are to be concluded directly between the member

[104] See: www.bundesregierung.de/ContentArchiv/DE/Archiv17/Reden/2013/01/2013-01-24-merkel-davos.html.

[105] Commission, 'A Blueprint for a Deep and Genuine Economic and Monetary Union' COM (2012) 777.

[106] Regulation (EU) 1176/2011 of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L306/12.

states and the European Commission. In order to further the passing and implementation of reforms 'by overcoming . . . political and economic deterrents to reform,[107] financial support should be given if the timetable set in the treaty is met. In this way, the "short-term impact of reforms raising the flexibility in the labour market" could be compensated'.[108] The appropriate financing should be arranged through a special fund into which the countries of the euro area must pay.[109]

With the contracts for competitiveness, a gap in previous crisis policy is to be filled. If a given country does not come under the sway of the Troika and no 'excessive imbalances' are determined by the European Commission, the way to a corrective action plan and thus an eased crackdown on social rights and public services remains closed. This gap is now to be filled.

Even a brief look at these plans makes clear what is supposed to be achieved. The practice of 'Memoranda of Understanding', developed in the southern European laboratory of neoliberalism, which grants financial support in return for detailed 'structural reforms' (ranging from decentralising collective bargaining to the privatisation of the water supply)[110] should be Europeanised.

While the contracts for competitiveness seem largely undisputed among the leading figures of the European ensemble of state apparatuses, the judicial configuration will still be subject to struggle: in contrast to the German Chancellor, who would like to conclude 'a pact for competitiveness' in accordance with international law, analogous to the Fiscal Treaty, the European Commission prefers a solution through European secondary law.

F Article 136 TFEU: An Unrestricted General Clause?

In its concept for the deepening of the EMU, the European Commission explains that Article 136 TFEU, upon which it had already based the Macroeconomic Imbalance Procedure, forms a suitable basis for the contracts for competitiveness.[111] This argumentation is more than doubtful. Article 136 empowers the Council to enact measures for the euro area to (i) 'strengthen the coordination and surveillance of . . . budgetary discipline' and (ii) to 'set out economic policy guidelines for [the euro-zone states], while ensuring that they are compatible with those adopted for the whole of the Union'.[112] In addition, this must happen only within the framework of the relevant provisions (Articles 121 and 126 TFEU) and according to the procedure laid down therein. This means that the specific rules for the euro area must be within the framework of the boundaries

[107] COM (2012) 777, 22.
[108] ibid, 22.
[109] ibid, 45.
[110] fn 22.
[111] COM (2012) 777, 26.
[112] Art 136, para 1 TFEU.

established by the Treaties, which 'reduces the meaning of the Article to a minimum'.[113] Thus, it follows that Article 136 TFEU allows nothing more and nothing less than existing primary law.[114] It is a matter of fact that it does not contain 'any authorisation for further intervention in the economic competences of the member states'.[115] On this basis, at the very most, more intensive coordination and information obligations for the euro area can be established.[116]

Therefore, it does not take a legally trained eye to recognise that Article 136 TFEU does not establish a foundation for either the essential components of the Macroeconomic Imbalance Procedure, already concluded, or for the intended contracts for competitiveness. The relevant Article 121, to which Article 136 refers in matters of economic policy, does not provide either for sanctions in the form of fines in the Macroeconomic Imbalance Procedure, or for a reverse majority voting. Neither can authorisation be found in Articles 121 and 126 for the European Commission to conclude contracts for competitiveness nor any competences for surveillance of implementation of the 'reforms' agreed to. Furthermore, no financial support for the implementation of agreements can be drawn from the Treaties. With regard to Article 121 TFEU, the incompatibility with European law of these contracts for competitiveness is thus obvious. Furthermore, does the aspired instrument not fulfil the condition required by Article 136 TFEU, because it represents neither a measure of budgetary discipline, nor the adoption of economic policy guidelines.

G Out of the Pandora's Box Opened by the Fiscal Treaty: The Contracts for Competitiveness

Perhaps it is this obvious incompatibility with EU law that moved the European Commission to leave a back door open in its concept: 'Intergovernmental solutions should therefore only be considered on an exceptional and transitional basis where an EU solution would necessitate a Treaty change'.[117] Here, the European Commission is alluding to the flight from European law according to the 'Fiscal Treaty model'. In any case, a preference for this repeated use of a treaty of international law to circumvent those consensus requirements that are demanded to change the European Treaties can be inferred from the German Chancellor's Davos speech. But it is precisely because this approach would be congruent with the Fiscal Treaty that the legal arguments[118] brought against it

[113] B Kempen, 'Art 126 AEUV, Rn 2' in R Streinz, *EUV/AEUV. Vertrag über die Europäische Union und über die Arbeitsweise der Europäische Union – Kommentar*, 2nd edn (München, CH Beck, 2012).

[114] J-V Louis, 'The Economic and Monetary Union' (2004) 41 *Common Market Law Review* 575; U Häde, 'Art 136 AEUV – eine neue Generalklausel für die WWU?' (2011) 66 *Juristenzeitung* 333.

[115] Häde, 'Art 136, Rn 4', above (n 19).

[116] B Kempen, 'Art 126 AEUV, Rn 2' in R Streinz, *EUV/AEUV. Vertrag über die Europäische Union und über die Arbeitsweise der Europäische Union – Kommentar*, 2nd edn (München, CH Beck, 2012).

[117] COM (2012) 777, 13.

[118] Fischer-Lescano and Oberndorfer, above (n 18).

can also be transferred to a great extent to a 'pact for competitiveness'. This is especially true for the central role of the European Commission, whose deployment (borrowed administration) outside European law, without the explicit consent of the member states 'is inadmissible from the standpoint of European Union law'.[119] The verdict dominating among European law scholars that the Fiscal Treaty is contrary to European Union law therefore applies to the contracts for competitiveness, too.

H Two-Pack: An Attempt at Legalising the Troika and the Need for Authorisation of National Budget Plans

In contrast to the contracts for competitiveness, the so-called Two-pack has been in effect since May 2013. The first of the two Regulations[120] represents, in essence, an attempt to put the previous role of the European Commission on a legal basis within the framework of the Troika. This venture also fails, however, due to its deficient legal basis. Article 2 of the Regulation empowers the European Commission to *resolve* to put those member states that receive financial aid from the rescue packages (EFSM, ESM, EFSF) or other sources, or are in serious difficulties in regard to their financial stability under enhanced surveillance. If a member state requests financial aid from another member state, third countries, of the rescue packages or the IMF, then it must prepare the macroeconomic adjustment programme according to Article 7, paragraph 1, in agreement with the European Commission. The adjustment programme must then be approved by the Council with a qualified majority (paragraph 2). If the financial aid comes from the rescue packages, this provision should probably assure that, in addition to the respective institution (such as the Board of Governors of the ESM, Article 13, paragraph 4 ESM Treaty), an organ of the European Union is also called on for approval. In the case of financial aid from non-EU states, the provision should probably try to limit the (economic) political influence of third countries.

However, none of these competences and duties of the European Commission with regard to content can be recognised in Article 121 TFEU, which is used as the legal basis for the Regulation through Article 121, paragraph 6 in conjunction with Article 136. As already shown in section I, on the basis of Article 121, paragraph 6, only the 'details of the procedure of economic coordination' can be specified. Article 121 contains neither the competences in the Regulation regarding content (negotiation, decision, surveillance of the adjustment programme), nor an empowering of the European Commission and the Council for a binding

[119] C Calliess and C Schoenfleisch, 'Auf dem Weg in die europäische "Fiskalunion?"' (2012) 67(10) *Juristenzeitung* 477.

[120] Regulation (EU) 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

legal act (Article 288 TFEU), but instead allows only non-binding recommendations. The path to authoritarian constitutionalism seems to have been established as the Six-pack took effect and will be pursued anew towards a 'juridification' of a so far extra-legal 'crisis policy' of the European executive branch.

The second Regulation[121] of the Two-pack aims at surveillance and coordination of the budgetary policies of the eurozone member states (Article 1, paragraph 1). Thus, it complements the European Semester (see above) with further requirements and deadlines. The member states have until 15 October of every year to publish a budget plan for the following year and submit this to the European Commission (Article 4, paragraph 2 in conjunction with Article 6, paragraph 1). The corresponding budget should be determined by 31 December (Article 4, paragraph 3).

After the member states have submitted their draft budget, the European Commission adopts – before 30 November – its opinion. If it notes a grave violation of the Stability and Growth Pact, the European Commission demands that the member state concerned presents a revision as soon as possible, but in any event within three weeks of the date of its opinion (Article 7, paragraph 2).

In this way, the European Commission is granted substantial power in an area that was previously termed the 'royal right of parliaments'.[122] This rests not on decision making in a narrow sense, because the opinion is a non-binding 'legal act' of the Union (Article 288 TFEU), but the European Commission can in future exercise considerable discursive pressure if it 'rejects' the draft budget of a member state as insufficient.

While most of the Regulations of the new economic governance – as far as their content is concerned – are at least loosely related to the legal basis they are built on, this is not discernible with regard to the Regulation on draft budgetary plans. The basis for competence chosen by the European Commission – Article 121 TFEU (in conjunction with Article 136 TFEU) – deals with the coordination of economic policy, which includes 'employment policies, structural policies, innovation policies, as well as wage and income policies',[123] but not budgetary and fiscal policies, even if these are naturally closely intermeshed with economic policy.[124] The only field in which EU competence exists in the area of budgetary policy – and this is very limited – is the procedure in case of an excessive deficit. Article 126, relevant to this topic, has however neither been used as a legal basis for the Regulation, nor does it provide for the competence of the European Commission to comment on draft budgets with position statements and, if need be, to reject them.

[121] Regulation (EU) 473/2013 of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

[122] D Riedel, 'Merkel verlangt Preis für Griechenlandrettung' *Handelsblatt* (16 October 2012).

[123] B Kempen, 'Art 119, Rz 12' in R Streinz, *EUV/AEUV. Vertrag über die Europäische Union und über die Arbeitsweise der Europäische Union – Kommentar*, 2nd edn (München, CH Beck, 2012).

[124] Schulz-Steinen, above (n 55) 90 f.

The obvious lack of effort made by the legal staff of the European Commission and the Council to embed the two Regulations of the Two-pack in European law shows that the authoritarian constitutionalism within the European ensemble of state apparatuses is, for the most part, indisputable. This is also shown by the fact that the legal means of the action for annulment, to which the member states and the institutions of the EU have privileged access, in contrast to natural or juristic persons (Article 263), has until now not been brought into play against a single legal action of the new economic governance.

III CONSTITUTIONALISM AS A CONTESTED, STRATEGIC PROJECT

The new economic governance, the Fiscal Treaty and the intended contracts for competitiveness without doubt display characteristic features of the new constitutionalism. Like the establishment of the EMU, these instruments are aimed at securing the neoliberal mode of integration 'by means of political and legal mechanisms that can be altered only with difficulty'.[125] Yet, new constitutionalism has become radicalised in several ways and is increasingly taking on an authoritarian form.

In my concluding theses I shall try to illustrate and discuss these shifts and the fact that such developments represent a challenge to and, at the same time, an opportunity for the establishment of European democracy.

1. With his conceptual approach, Gill has drawn attention to the introduction of neoliberal economic (constitutional) law in a manner that is legally permissible and has been supported by the at least passive consensus of the subaltern.[126] However, since the consensus in favour of the neoliberal mode of integration and the deepening of economic union is growing ever weaker, moves are being seen away from those sediments of law that are themselves the product of the new constitutionalism. In order to bypass a treaty revision and the requirements of consensus it would entail, instruments of neoliberal economic policy are being unlawfully inserted into the 'European Constitution' or even – following the model of the fiscal Treaty – established with complete avoidance of European law. While up until the European crisis of hegemony, national compromise balances were circumvented and challenged by the shifting of policy fields into European law, now even the power relations condensed in the European legal form are becoming too tight for the radicalisation of the neoliberal project. Since – as became apparent after the elections in Greece in June 2012 – the hegemonic crisis of the European ensemble of state apparatuses has resulted in whole states threatening to break out of the neoliberal consensus, it

[125] S Gill, 'Theoretische Grundlagen einer neo.gramscianischen Analyse der europäischen Intergration' in H-J Bieling and H Steinhilber (eds), *Die Konfiguration Europas. Dimensionen einer kritischen Integrationstheorie* (Münster, Westfälisches Dampfboot, 2000) 44.

[126] Drawing on Gramsci, critical theory uses 'subaltern' to denote groups that are subordinated by societal power relations (Latin: *subalternus*).

is to be expected that the deepening of the EMU will be pursued for the time being using the methods of authoritarian constitutionalism. After all, each member state has the power to veto any 'revision of the Constitution' under the ordinary revision procedure.

2. The new constitutionalism intended to make economic policy more independent of the necessity of subaltern agreement. However, the *open* resistance to the radicalisation of the neoliberal mode of integration is now to be broken by an *almost complete* decoupling of the European ensemble of state apparatuses from the requirements of consensus. A return to the new constitutionalism will only be made once the deepening of the EMU has been widely completed by authoritarian constitutionalism. This is suggested, for example, by the fact that the European Commission merely aspires to a *treaty revision* that would create 'a means of imposing budgetary and economic decisions on its members' over the *medium to long term*.[127] In view of the instruments that have been or are about to be put in place by authoritarian constitutionalism, which are tantamount to a de facto sidelining of Europe's national parliaments, the actors would be able to live with the failure of *constitutional* steps to strip the legislative of its powers using the methods of the new constitutionalism.

3. Authoritarian constitutionalism is associated with increasing encroachments on the procedures of formal democracy and the rule of law in the nation states. Contrary to national populist contentions, this is not directed at individual states. Rather, such encroachments are intended to place the European ensemble of state apparatuses, with its neoliberal configuration, *of which the national executives are part*, in a position to chip away at the social rights that are still anchored in the national legal systems. This is another common denominator of the Fiscal Treaty, the new economic governance and the contracts for competitiveness: they especially weaken those terrains on which the subaltern are still able to assert their interests comparatively easily (in particular national parliaments). At the same time, there has as yet been no enhancement of the European Parliament's status and power. The central axis of conflict in authoritarian constitutionalism is therefore not the European Union versus the nation state, but the European ensemble of state apparatuses versus (representative) democracy.

4. The abovementioned upgrading of the executive must be further differentiated. No *general* strengthening of the executive is occurring. Instead, it is especially those state apparatuses whose configuration is particularly neoliberal and masculinist that are gaining in status and power: the national finance ministries represented on the ECOFIN Council and the European Commission's Directorate General for Economic and Financial Affairs (DG ECFIN).[128]

5. Gill argues that the new constitutionalism sets up a governmental surveillance system of state economic policy that corresponds to Foucault's concept of

[127] COM (2012) 777, 31.

[128] E Klatzer and C Schlager, 'Genderdimensionen der neuen EU Economic Governance' (2012) 3 *Kurswechsel* 23.

control by 'surveillance and normalisation'.[129] Even though no direct intervention takes place, economic policies are being monitored and thus subject to neoliberal 'self-government'.[130] The crisis of hegemony is leading to a shift in this area, too. With economic governance, *repressive* measures have been introduced into EU economic policy and both the Fiscal Treaty and the new economic governance *force* those member states which are affected by unequal development and deficits to presentation and approval of structural reforms. Because the neoliberal hegemony has become fragile, governmentality in the field of economy is no longer sufficient for the necessary control. In Foucault's terms, authoritarian constitutionalism often involves a retardation, which leads to a system of 'surveillance and punishment'[131] in the area of European economic policy.

6. While the new constitutionalism left basic and fundamental human rights for the most part untouched, at least in their formal dimension, its authoritarian intensification is aimed especially at breaking through at that point where defence of social rights is guaranteed. By establishing austerity and competitiveness as the new basic norms, authoritarian constitutionalism reclassifies basic and fundamental human rights, such as the right to collective bargaining (Article 28 of the EU Charter of Fundamental Rights), and legitimises their elimination. European interventionism, brought forth by authoritarian constitutionalism in the area of wage policy, therefore aims not coincidentally at those institutions and apparatuses (collective agreement systems, labour rights and unions) that are at least objectively capable of protecting the interests of the subaltern and/or effectively representing them.

7. However, it is certainly open whether the authoritarian turn will succeed, or the new constitutionalism could actually be disrupted by the struggles for 'real democracy' in Europe. The demand raised by these movements for an assembly that would found Europe anew could be a project that paves the way to a form of progressive constitutionalism,[132] one that would give the people of Europe the opportunity to argue about alternatives and shape their common future. In any event, the expansion of repressive techniques of rule and their constitutionalisation must not be understood as purely strengthening the neoliberal societal formation. Even though it has probably never been more dominant than it is today, the loss of its leading, hegemonial moments, is making it become brittle and ossified. Stephen Gill's thesis that the new constitutionalism is much more a strategic project than a concluded historical process, which implies its existence is contingent and disputed[133], therefore remains valid as far as its authoritarian further development is concerned as well.

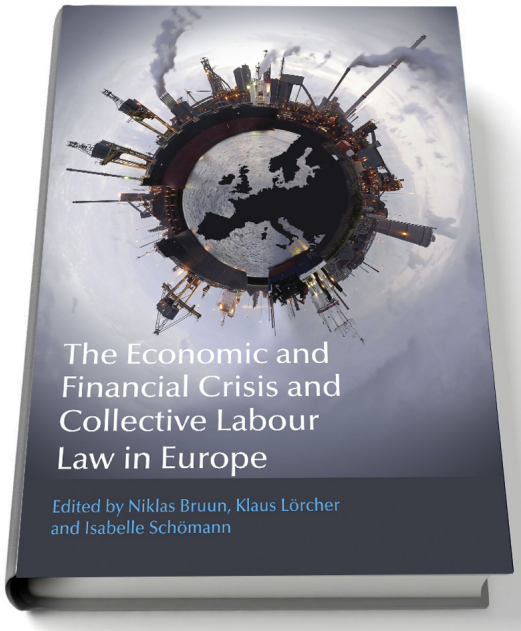
[129] Foucault, *Security, Territory, Population* (above (n 65); Foucault, *The Birth of Biopolitics* above (n 65).

[130] Gill, 'European Governance and New Constitutionalism', above (n 24) 13.

[131] Foucault, *Discipline and Punish – The Birth of the Prison*, above (n 67).

[132] Marterbauer and Oberndorfer, above (n 47).

[133] S Gill, 'Inequality and the Clash of Globalizations' (2002) *International Studies Review* 47, 47.



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Conclusions
Niklas Bruun, Klaus Lörcher, Isabelle Schömann

The current economic and financial crisis erupted several years ago. Its effects impacted deeply upon society, in which legal rules and social patterns have developed to enable the establishment of civilisation, justice and peace. Over time it has become more and more obvious that policy, financial and economic actors have adopted austerity measures as a main tool to solve the ensuing problems, and that these measures have hit social policy standards sometimes dramatically.

Recent analyses have dealt with several aspects of this issue. This book focuses on one important element: the impact on collective labour law. It seeks to add to the debate by presenting mainly legal arguments derived from different sources and backgrounds, examining the EU and 'Troika' measures, the economic and political background and the sometimes dramatic consequences of austerity measures on democracy, collective bargaining and the right to strike. Against the framework of EU law, the relevant ILO Conventions, (Revised) European Social Charter and European Convention on Human Rights provisions, the non-compliance of these measures is analysed and demonstrated. The book is also dedicated to procedural questions, and in particular, how legal approaches may be used to challenge austerity measures.

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