



The Structural Crisis of European Law **As a Means of Social Integration** From the Democratic Rule of Law To Authoritarian Governance

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Abstract

Europe has been badly hit by several overlapping crises. This paper explores how the said crises were triggered by, and in turn, aggravated, a structural crisis of European law. By doing so, the concrete implications of 'austerity' in constitutional terms are spelled out. Firstly, the crises have led to punctual decisions and structural reforms honouring European constitutional norms in the breach. Secondly, the government of the crises has facilitated the radicalisation of the ongoing mutation of European constitutional law, in particular changes to the structural and substantive constitutional law which have locked in a constitutional vision of sorts at odds with the regulatory ideal of the Social and Democratic *Rechtsstaat*. Thirdly, the very nature of European law, and in particular its condition of grammar of democratic law, has been endangered: European law is in the process of becoming an instrument of authoritarian governance.

Keywords

Collective Goods - Economic Constitution - Fiscal Crisis - Law - Legitimacy - Social Integration - Subjective Rights

William Roper: So, now you give the Devil the benefit of law!

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

Richard Bolt, *A Man for all Seasons*

The various, overlapping and mutually reinforcing crises that have hit the European Union since 2007 have accelerated the transformation of the constitution and organisation of power both within the European states individually and at the EU level. The financial crisis has been followed by the economic crisis, and then, they resulted in fiscal crises, which have become lately intertwined with the refugee crisis and a 'national security' crisis in the wake of several major terrorist attacks.

In this paper¹, I focus on the impact of the mentioned above crises on the law, and I argue that European law is undergoing a three-fold crisis. Firstly, the government of the crises has led to breaches in a number of constitutional norms, something that has eroded the rule of law in Europe (Section 1). Secondly, the crises have propelled major changes in the substantive and structural constitutional law of the European Union, thus radicalising the mutation of national and supranational constitutional law which was ongoing well before the crises, and in the process, remoulding the post-war regulatory ideal of the Social and Democratic *Rechtsstaat* into the consolidating state, the institutional counterpart of so-called 'austerity' politics (Section 2). Thirdly, European law has been widely used as a tool of (pseudo) technocratic governance, as it has become detached not only from democratic politics, but from politics in general; this is transforming the kind of law that European law is (Section 3), a phenomenon much facilitated by a certain narrative and understanding of European law (as analysed by Kaupa Clemens).²

1. The government of the crises and the rule of law: punctual breaches or systematic side-lining of law?

The constitutional soundness of quite a number of legal norms and practices through which the European Union has aimed at containing and overcoming the crises has been contested. An exhaustive list of the controversial decisions and reforms will

¹ The final and fully edited version of this working paper has been accepted for publication by the *Journal of Law and Society*, and will appear in Volume 44, 2017.

² K. Clemens, 'Has (downturn-) austerity really been 'constitutionalised' in Europe? On the ideological dimension of such claim', in (2017) *Journal of Law and Society*, forthcoming. See also *The Pluralistic Character of the European Economic Constitution*, (Hart Publishers, 2016).

push this paper beyond its word limit even before its first section is concluded. Still, a sample of the most relevant points of 'friction' between constitutional standards and the ways in which the crises have been governed is necessary (and hopefully sufficient) to prove the first thesis of this paper, namely, that the government of the crises has resulted in the erosion of the rule of law in Europe. In the remainder of this section, I provide that sample, focusing first on the government of the financial crisis (Section 1) and then on the government of the fiscal crisis (Section 2).

1.1. The government of the financial crisis

It is well-known that since the late 1970s the financial sector has been growing at a far more rapid pace than the non-financial sector. It led to the 'financialisation' of Western economies,³ and in the inflation (at some points, hyperinflation) of financial assets.⁴

Doubts regarding the real value of financial assets would have risen sooner or later. The day of the financial reckoning came in 2007, leading to the major financial crisis of September 2008, which has been aptly described as an 'accident waiting to happen'.⁵ The collapse of financial institutions which was reputed to be fully solvent did not only cast doubts on the solvency of all other financial institutions and assets, but given the extensive intertwinement of financial markets and financial actors, doubts on the solvency of the financial system as a whole. When financial markets came close to freezing in the autumn of 2008, economists rightly spoke of a 'systemic' crisis. This crisis has not ended yet. Regulatory changes have been far too little, far too late. The ghost of the collapse of major financial institutions triggering a new systemic collapse is very much alive.

The European government of the financial crises has been structured around two key sets of policies. Firstly, the European Central Bank (ECB) has adopted several 'non-conventional' monetary measures formally aimed at dispelling the (allegedly irrational) doubts about the solvency of financial institutions, so as to bring back financial markets to 'normality'. Since August 2007, vast amounts of liquidity have been injected into the financial institutions of the Eurozone at fixed (and low) rates. At the same time the criteria by reference to which the eligibility of the guarantees (collateral) that banks have to provide has been much relaxed. At some points, banks have been offered as much liquidity as they demanded, as was the case in the due extensive refinancing operations of late 2011 and early 2012. Secondly, Member States have implemented expansive programmes of public aid to financial institutions, by means of capital injections, acquisition of 'toxic' assets or the

³ C. Lapavistas, *Profiting without Producing: How Finance Exploits us All*, London: Verso, 2013.

⁴ Presciently, R. Triffin, 'How to End the World "Infession"', in R. S. Massera and R. Triffin (eds.), *Europe's Money* (Oxford: Oxford University Press, 1984), 13-76. See also P. Coggan, *Paper Promises*, (Harmondsworth: Allen Lane, 2011).

⁵ For the phrase, see Parliamentary Commission on Banking Standards, "'An accident waiting to happen": The failure of HBOS', Fourth Report of Session 2012-13 available at: <<http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpcb/144/144.pdf>>, p. 3.

extension of more or less conditional guarantees. Each of these measures raises serious constitutional concerns.

Sizeable injections of liquidity at fixed rates are hardly compatible with capital allocation by competitive markets, as required by Article 127.1 TFEU when read in the light of Article 120 TFEU. At some points (for example in the fall of 2008 and the fall of 2011) the ECB has come close to substituting financial markets. Since 2007, the ECB has constantly shaped the operation of financial markets through its unconventional refinancing operations (in the usual jargon, the ECB has been a market maker). This entails that the ECB has come to determine to a rather large extent the terms according to which markets allocate capital within the Eurozone and beyond. This influence has been strengthened through the other 'non-conventional monetary' policies of the ECB, to which we will come back below, including the acquisition of Eurozone sovereign debt in secondary markets (through the Securities Markets Programme, the—merely announced—Outright Monetary Transactions Programme, and last but not least, quantitative easing as practised by the ECB).

In its turn, state aid to financial institutions seems to run afoul of Article 107 TFEU. The fact that the European Commission weakened the rules it regarded as applicable after large amounts of aid were granted in late 2008 is regarded by some as an indicator that Article 107 TFEU has actually been bent.

Taken together, 'non-conventional' refinancing and substantial state aid constitute a great departure from the regulatory ideal of 'free markets' as enshrined in the Treaties. If indeed the financial system is at the core of contemporary capitalist economies, the public interventions described in the foregoing paragraphs alter in a thorough and systematic manner 'competitive markets'. One may well discuss the soundness of the normative choices which underlie the Treaties as they stand (as I for one am willing to do), but as long as these are the choices enshrined in the Treaties, it is hard to avoid the conclusion that the policies followed by the ECB and the Member States were in breach of the Treaties. The fact that the breaches favour the interest of the financial institutions (and as could not but be the case, of some more than others) makes the breach even more problematic.

1.2. The government of the fiscal crisis

The launching of a peculiarly asymmetric economic and monetary union in 1999 paved the way for the growth of structural imbalances within the Eurozone.⁶ Such imbalances largely shaped the form that financialisation took in Europe.⁷ The Eurozone core (led by Germany) radicalised its reliance on trade surpluses as the driver of (rather modest) economic growth, a strategy much facilitated by the locking in of currency exchange. German surpluses were to a large extent the result of a very favourable trade balance with the Eurozone periphery.⁸ The growing trading gap

⁶ A. Bagnai, *Il Tramonto dell'Euro*, Reggio Emilia: Imprimatur, 2012, at 93ff.

⁷ J. Beeler, J. Jäger and R. Weissenbacher, (2015) 'Uneven and dependent development in Europe', in J. Jäger and E. Springler (eds) *Asymmetric Crisis in Europe*, 81-97, at 86.

⁸ Bagnai, above, n. 4, at 80ff.

between the Eurozone core and the Eurozone periphery was financed by means of recycling the resulting Eurozone core profits into Eurozone periphery private debt.⁹ The geometrical growth of private debt in the periphery fostered real estate speculation (Spain, Ireland) and rather unequal and unbalanced consumption booms (Greece, to a lesser extent Portugal).¹⁰

The financial crisis of 2007-8 resulted in a sudden stop of the enormous financial flows from the Eurozone core to the Eurozone periphery, revealing the shaky grounds on which the apparent catching up between core and periphery were built, as well as casting serious doubts about the solvency of the piles of cross-border debt cumulated in the first decade of the monetary union. This posed a new systemic risk, not only due to the amounts of money involved, but also due to the fact that the euro was a stateless currency, in the double sense that monetary union was not grounded in a political union (so there was no lender of last resort of national sovereigns), and the monetary union did not come hand in hand with the banking union (so it was far from clear who was the guarantor of the last resort of the cross-border financial credit transactions). As a result the immense risks stemming from cross-border transactions were 'widows'. In other words, it was unclear who would be their guarantor of last resort. That, in turn, generated uncertainty about the solvency.

From the autumn of 2008 to the spring of 2009, several decisions were taken, leading to the three-fold policy which the Eurozone applied to contain the risks stemming from the great pile of 'non-performing' cross-border loans.

Firstly, widow risks were nationalised, or what is the same, exchequers pledged to absorb them. Private debt was thus transformed into public debt, and in the process, creditor financial institutions were cleared of any responsibility on account of their flawed risk assessment. Secondly, the costs of absorbing widow risks were imposed on 'debtor' countries, i.e. the countries where the debtor financial institutions were established, which, in actual practice, were those of the Eurozone periphery. Thirdly, the debt absorbed by periphery exchequers was transformed into loans extended by the Eurozone (in a coordinated fashion or collectively) to the 'debtor' countries, under the condition that 'assisted' states applied specific economic, fiscal and social policies. Thus Eurozone 'conditionality' was born, and spelled out in the several Memoranda of Understanding at the core of 'financial assistance' programmes.

At the same time, the 'liquidity' of 'assisted' Member States was further supported by the acquisition of their debt in secondary markets by the ECB, through the above

⁹ Among many others, Y. Varoufakis, *The Global Minotaur* (London: Zed Books, 2013, second edition), pp. 165ff.

¹⁰ F. Bogliacino and D. Guarascio, 'La crisis del euro en perspectiva', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833322; and 'La natura del processo di integrazione monetaria e i destini dello stato sociale europeo', *La rivista delle Politiche Sociali-Italian Journal of Social Policy*, forthcoming.

mentioned Securities Markets Programme and Outright Monetary Transactions Programme.¹¹

The granting of financial assistance to states experiencing acute fiscal crises raises constitutional concerns to the extent that it is hard to reconcile with Articles 125.1 TFEU and Article 122.2 TFEU. Financial assistance is, arguably, in breach of Article 125.1 TFEU because it implies a clear break from the principle of absolute national fiscal independence and its corollary, strict national responsibility for national debt, as enshrined in Article 125.1 TFEU (the so-called no bailout clause). No matter how strict the conditions imposed upon Member States, the decision to grant assistance to a Member State in Eurozone implies accepting the risk of the assisted Member State being incapable or unwilling to return the loan, which would de facto result in the original debt having been shifted to the creditors' states. If we go beyond forms and consider substance, extending credit to a Eurozone state in fiscal crisis implies the risk of debts being, factually if not formally, mutualised. Moreover, the fiscal crises experienced by assisted Eurozone states might be characterised as an 'exceptional occurrence beyond [their] control', or what is the same, as the kind of situation in which the no bailout clause enshrined in Article 125.1 TFEU is excepted by virtue of Article 122.2 TFEU.

However, the very narrative of the crisis endorsed by most, if not all, finance ministers and supranational officials is hard to reconcile with the characterisation of the crisis as an exceptional occurrence beyond the control of the governments of Eurozone periphery states. Either the crises are the product of 'irresponsible' fiscal policies (as was sustained, and remains to be claimed) or the crises are due to 'occurrences' beyond the control of the states in fiscal crisis. If the former, then Article 122.2 TFEU cannot be the foundation of financial assistance. If the latter, financial assistance to countries experiencing fiscal crises should not have taken the form of loans at far from concessionary rates and under conditions of strict conditions. For Article 122.2 foresees solidaristic, not punitive, assistance.

By the same token, the Securities Markets Programme (SMP) and the (not yet implemented) Outright Monetary Transactions (OMT) Programme are criticised on account of their breaching not only Article 123.1 TFEU, which forbids the ECB from acting as lender of last resort of the Member States of the Eurozone. The SMP and OMT can also be criticised as incompatible with the strict division of labour between Member States and ECB at the basis of the independence and consequently strictly defined mandate of the ECB, restricted to the implementation of monetary policy. As Harm Schepel explains,¹² the ECB has claimed that both programmes were needed to ensure the capacity of the ECB to implement its monetary policy. Doubts about the 'irreversibility' of the euro did not only generate 'excessive' interest rates for some

¹¹ For details on the three steps I refer to A: J. Menéndez, 'Neumark Vindicated' in D. Chalmers, M. Jachtfuchs, C. Joerges (eds.), *The End of the Eurocrat's Dream*, (Cambridge: Cambridge University Press, 2016), pp. 78-125.

¹² See H. Schepel, 'The Bank, the Bond and the Bail-Out: On the Legal Construction of Market Discipline in the Eurozone', *The Journal of Law and Society*, forthcoming.

Member States, but also damaged the key lever through which the ECB implements its monetary policy, as changes in the interest rate will fail to affect interest rates in countries in fiscal crises (assuming that markets will keep on demanding much higher interest rates, no matter which monetary decisions the ECB takes). As Schepel argues, the argument is far from persuasive on many accounts. For our present purposes, it is important to stress that no matter what the aims of the decisions might be, its necessary and unavoidable consequence is that the ECB has bought considerable amounts of debt of some states, and not others, and in doing so, has muddled the independence of both the ECB vis-à-vis the Member States, and of the Member States vis-à-vis the ECB (as the several letters penned by Trichet during his very literary spell at the presidency of the ECB abundantly prove). Whether ECB's independence was bound to be frustrated is an even more relevant but still different question.

Finally the key instruments spelling out conditionality through Memoranda of Understanding have been subject to severe constitutional criticism on two main accounts. For one, the latitude and concreteness of the Memoranda are said to be incompatible with the necessarily attributed character of the competences of the European Union (Article 5 TEU). Memoranda include, among many others, measures regarding public health, the organisation of the administration of justice, civil procedural law and the sale of specific assets within specific deadlines, all issues regarding which the Union is simply not competent. For two, the substantive conditions imposed through the Memoranda are regarded as being in breach of international, supranational and national fundamental rights standards. Several reports of international organisations have detailed a number of specific breaches. Some national constitutional courts have also rendered judgments, which substantially if not formally imply the unconstitutionality of several of the decisions and norms enshrined or resulting from Memoranda of Understanding.¹³

1.3. Taking stock

It is far from extraordinary that crisis government raises major constitutional concerns. Indeed, all crises seem to result in similar controversies and debates. To a certain extent, this is so because crises reveal the structural limits (and flaws) of the pre-existing constitutional order. In the case of the Eurozone, it is hard to escape the conclusion that some of the norms being breached were simply impossible to comply with, either in themselves, or within the specific overall structure of the European Union, and in particular, of the asymmetric economic and monetary union. Assuming, as the original design of the Eurozone did, that the stability of the currency area could be ensured without either a central bank acting as lender of last resort, with the mutualisation of the debts of states strictly forbidden, and without any politically scheme of redistribution of economic resources across monetary union was bound to be an illusion.

¹³ Cf. the rulings of the Portuguese Constitutional Court. See *The Key Legal Texts of the European Crises*, <http://www.sv.uio.no/arena/english/research/publications/publications-2014/menendez-losada-legal-texts-v1-170914.pdf>.

Still, it would be too quick to downplay the constitutional controversies around crisis government. There is more to it than the painful pangs of the 'evolution' of European law.

For one, if we move beyond the analysis of specific breaches, and consider the justification of the contested measures, we will notice that the advocates of crisis government have no consistent understanding of European law, either before or after the crisis measures breaching European constitutional law. Not only are we kept on being denied access to some of the key opinions of the legal services of the European institutions where the constitutional soundness of the reforms are argued for (so we cannot know why the said services found the reforms constitutionally sound), but the arguments that have been made in public reveal a pattern of ad hoc justification, lacking any consistency both across different disputes and with the constitutional theory that underlies the institutional interpretation of European law.¹⁴ Just to illustrate the point. A narrow reading of Article 122.2 TFEU may lead to the conclusion that the Greek fiscal crisis was an occurrence beyond the control of the Greek state, and thus the granting of assistance to Greece was covered by the said article. But the literal, narrow reading of Treaty articles is not the standard way in which European law has been interpreted by European institutions. Why is a narrow reading justified in this case and not in *Van Gend en Loos* or *Costa*? If, moreover, financial aid is covered by Article 122.2 TFEU, the specific kind of aid granted to Greece, as already indicated, should be coherent with Article 122.2 TFEU, and in particular, with the association of this type of aid with the aid provided in case of natural disasters. Solidarity, not punishment, should be offered when Article 122.2 TFEU is invoked.

For two, the fact that the crises have revealed the limits of some rules does not result in a licence to reshape at will the European constitution in the name of an underlying emergency, thus bypassing not only the processes of constitutional reform, but also any requirement of consistency. It matters not only whether emergency government is in line with pre-existing constitutional law, but also what actual practices or conventions are followed to fill the resulting gaps. This by itself suggests the need to move the second set of questions put forward in the introduction, namely, the impact that the government of the crises has had on the substantive and structural constitution of the European Union.

2. The transformation of the European constitution: the (un)constitutional mutation of the European Union

The government of the European crises has transformed the constitutional setup of the European Union. Punctual decisions, ordinary legislative reforms and constitutional conventions have de facto altered the structural and substantive

¹⁴ As Clemens stresses (see note 1), the inconsistency of the standard EU law narrative on the crisis is hard to reconcile with the alleged determinacy of EU law which would *require* austerity policies to be implemented.

constitutional law of the European Union, with the case law of the Court of Justice and 'quasi' European Treaties (the so-called Fiscal Compact, the peculiar Treaty establishing the European Stability Mechanism) having formally 'locked-in' the changes.¹⁵ Constitutional change has proceeded not only through the ordinary process of European Treaties amendment (which presupposes ratification by all Member States, and would have required in many instances national constitutional reforms), but also through a process of de facto transformation of the organisation of power in Europe.¹⁶ It is in this sense that I have argued that the crises have accelerated and radicalised the process of constitutional mutation¹⁷ of European Union law that started well before the 2007 crises, and indeed can be dated back to a previous set of crises, those of the 1970s.¹⁸

In this section I consider the main changes in both the substantive constitution of the European Union (and very specifically on its socio-economic constitution, subsection 2.1) and in the structural constitution of the European Union, in the allocation of power across levels of government, between Member States, and among supranational institutions (subsection 2.2).

2.1. Substantive constitution: From the Social and Democratic *Rechtsstaat* to the consolidating state

The substantive content of European supranational constitutional law has been deeply transformed through the crises. Three key objectives of public action (financial stability, full faith and credit of public debt, and economic growth) have been turned into self-standing ends of public action and meta-principles of European law. In the process, such meta-principles have been redefined as constant financial liquidity, fiscal soundness and competitiveness.

A) From financial stability to financial liquidity

Financial stability was long understood as the capacity of the financial system to perform in a constant manner its key social functions, and very especially, intermediation between savers and investors. Public action was expected to foster financial stability through regulation and supervision of financial institutions. Financial stability was not an end in itself, but a means to achieve other key socio-economic ends, including full employment and rising living standards.

By the time the Maastricht Treaty was signed, the understanding of financial stability had changed. The focus of public action shifted from actions aimed at ensuring the

¹⁵ It seems to me that this supports rather than contradicts Clemens' argument, because the narrative which supports the constitutional mutation is deeply Münchhausenian: It presupposes that the changes that result from a new practice are justified by the new practice.

¹⁶ For the conceptual framework, see S. D'Albergo, *Costituzione e organizzazione del potere nell'ordinamento italiano* (Torino: Giappichelli, 1991).

¹⁷ A. J. Menendez, 'A European Union in Constitutional Mutation?', (2014) 20 *European Law Journal*, 127-141.

¹⁸ See W. Streeck, *Buying Time* (London: Verso, 2014).

actual discharge of the social functions of the financial system, to lighter intervention limited to foster and to guarantee deep financial markets capable of pricing all assets, and thus ensuring that all financial assets could be bought and sold at any moment. It is revealing that in the constitutional framework of monetary union, as enshrined in the Maastricht Treaty, we can find reference to monetary stability (the 'price stability' at the core of the mandate of the ECB), but not to financial stability or to the stability of the financial system. This was partially due to the fact that financial regulation and financial supervision remained competences in the hands of Member States (as pointed, monetary union was not only to be asymmetric, leading to no full-blown fiscal and political union, but also will proceed without a banking union); but was also partially due to the strength in the immediate aftermath of the collapse of the Berlin Wall of economic theories and visions according to which financial markets tended to self-stabilise; views that fostered deregulation and the weakening of prudential supervision assuming they were the proper ways to encourage the coming into-existence and reproduction of deep financial markets.¹⁹

The government of the crises has contributed to entrench the identification of financial stability with financial liquidity. The non-conventional monetary policy of the European Central Bank has indeed aimed at ensuring financial liquidity, even if doing so required standing in for money markets or the ECB becoming a market maker (something which, as we saw in the first section, casts doubts on whether we can speak of allocation of capital through competitive markets, as required by Article 127.1 TFEU). Similarly, the ECB buying of public debt in secondary markets was justified in the name of ensuring the 'proper functioning' of sovereign debt markets, and in particular, avoiding an escalation of the rates that (some) Eurozone states had to pay to borrow money. The latter would have resulted in those states getting no access to financial markets, and eventually public debt becoming not only impossible to issue, but also to negotiate. Such an outcome was said to render the ECB incapable of implementing its monetary policy; quite certainly, it constituted a major threat to the liquidity of the public bonds of Eurozone states. Finally, the Eurozone provision of financial assistance resulted in assisted states being offered alternative funding to that provided by financial markets, with a view to ensure not only the full faith and credit of their standing debt (which implied preserving the liquidity of the underlying financial assets, because only if there is an expectation that debt would be paid can secondary markets in public bonds function smoothly) but also with a view to ensure that assisted states eventually were capable of 'returning' to financial markets.

It can thus be said that a strong constitutional convention on both the new understanding of financial stability, and in the place that financial stability as financial liquidity has in European constitutional law, underpins some of the key elements of the European government of the crisis. This new understanding of the principle and of its systemic hierarchy has been entrenched in the Fiscal Compact, the Treaty Establishing the ESM and in the case law of the European Court of Justice.

¹⁹ M. Amato e L. Fantacci, *The End of Finance* (Oxford: Polity, 2013) and *Saving the Market from Capitalism* (Oxford: Polity, 2014).

Of particular importance is *Pringle*, a ruling in which the ECJ explicitly characterises financial stability as liquidity as the ‘higher principle’ underpinning the European socio-economic constitution.²⁰

It is important to notice that financial liquidity entails the protection of the value of financial assets. This is reflected in the emergence of constitutional conventions according to which Eurozone States not only cannot default on their sovereign debts, but they should also act as guarantors of last resort of their financial institutions. This, however, does not rule out that the interests of the holders of specific assets may have to be sacrificed for the sake of protecting the integrity of the financial system as a whole, and thus the liquidity of most assets. In other terms, the concrete rights to private property of specific financial assets holders are subordinated to ‘financial liquidity’ as a collective good of sorts. This was argued to be the case, for example, regarding the Memorandum of Understanding at the core of the provision of financial assistance to Cyprus.²¹ It is important to notice that the subordination of the right to private property to fiscal liquidity is not an expression of the post-war constitutional subordination of the right to private property to the social function of property (and consequently to the whole set of goals of the Social and Democratic *Rechtsstaat*), but a consequence of the fact that financial liquidity is not an intrinsic part of markets as much of capitalism (which moreover benefits specific capitalists).²² Indeed, the Eurozone crisis has empirically shown that ensuring liquidity in financial markets (as the ECB has constantly done) does not lead by itself to the financial system providing funding opportunities for non-financial economic activities. Similarly, the policies through which liquidity has been restored and guaranteed have had enormous distributive implications, benefiting in a clear disproportionate manner (some of) the (big) holders of financial assets. This is clearly at odds with the goals of the Social and Democratic *Rechtsstaat*.

B) From full faith and credit of public debt to fiscal probity

Full faith and credit of public debt is intrinsically related to the democratic legitimacy of government, and in particular, to sovereign democratic control over the shape of the tax system and over monetary policy. The soundness of public debt is guaranteed by the capacity of the state to issue currency and to allocate the financial burdens resulting from public policies through a democratically decided and constitutionally framed tax system. The constitutional discipline of fiscal policy was flexible in all post-war European constitutions. Only the original text of the German Fundamental Law (and the Swiss Constitution) contained a rule which was open to be constructed as constituting a hard fiscal rule. The German Fundamental Law was reformed in 1966, and the German ‘fiscal’ constitution accordingly brought in line with other European constitutions.

²⁰ C-370/12, *Pringle*, ECLI:EU:C:2012:756 , §135.

²¹ See now C-8 to 10/15, *Ledra*, ECLI:EU:C:2016:701 §69, 71, 72, 74. The conflict between financial stability and the protection of the value of some financial assets is also at the core of the 2014 Bank Recovery and Resolution Directive.

²² Amato and Fantacci, above, n. 16.

The present generation of fiscal rules is a stepchild of asymmetric monetary union, and indeed, of the transfer of monetary competence to an intentionally depoliticised Central Bank, which is explicitly forbidden from acting as lender of last resort of the Eurozone States. The Maastricht Treaty debt (60% GDP) and deficit (3% GDP) ceilings were intended as means both to ensure the coordination of fiscal policy in an asymmetric monetary union and to guarantee fiscal solvency in the absence of a lender of last resort which underpinned sovereign bonds. The Stability and Growth Pact accentuated the latter role of fiscal rules by means of introducing a procedural and substantive operationalisation of the deficit ceiling that explicitly aimed at limiting the margin of discretion of Member States by reference to a regulatory ideal of 'fiscal probity' structurally biased in favour of structural reforms which resulted in lower public expenditure (for example, by means of favouring private pension systems).²³

The colossal growth of private debt, and the resulting artificial growth of tax revenue, cloaked in plain sight the structural consequences of the affirmation of fiscal probity as key principle of European constitutional law.

The crises and the government of the crises have radically altered the effective bite of fiscal rules. As pointed above, a constitutional convention has emerged according to which no Eurozone state may default on its debts.²⁴ Similarly, the 2012 Spanish constitutional reform turned full credit of public debt a paramount constitutional objective, subordinating any state expenditure to there being monies left to refund principal and pay interests of sovereign debt. By the same token, the different Memoranda of Understanding have been firmly based on the assumption that the reduction of public expenditures could have an expansionary effect by means of generating confidence in public policy (growth through austerity).²⁵ Fiscal rules have not only been tightened, but new fiscal rules have been introduced, establishing compulsory deficit reduction and debt reduction 'trajectories' and automatic correction mechanisms (or what is the same, automatic stabilisers in the reverse, automatic cuts in expenditure once a certain deficit threshold is reached). More conspicuously, the Fiscal Compact requires Member States to patriate fiscal rules, and in particular, to introduce a deficit ceiling either in the national constitution or in norms of equivalent dignity and force (Article 3.2 of the Fiscal Compact).

Still, it should be noticed that neither the Memoranda of Understanding nor the recommendations of the Commission have identified fiscal probity with the actual reduction of deficits and debts (quite fittingly, given that debt has not only got reduced, but increased, in all Member States that have introduced debt ceilings in

²³ For an insider's criticism, insightful even if in need of being nuanced, G. Guarino, *Ratificare Lisbona?* (Firenze: Passigli, 2008).

²⁴ Whether or not the threat is a credible one, the Euro Summit seems to have suggested that it would consider the expulsion of any defaulting state from the Eurozone.

²⁵ Very influential was the presentation by the 'father' of austerity through growth, Alberto Alesina, to the ECOFIN of April 15th, 2010, 'Fiscal Adjustments: Lessons from Recent History', available at <http://scholar.harvard.edu/alesina/publications/fiscal-adjustments-lessons-recent-history>.

their constitutions), but with the 'sustainability of debt'. This entails that public policy as a whole is subordinated to guaranteeing the full faith and credit of public debt. The latter is no longer a means, but an end, as has to be guaranteed even if states lack the means to provide such guarantee. In the absence of any supranational effective coordination of tax policy, Member States are de facto hampered to make an effective use of tax policy to increase revenues to underwrite their debt if its solvency is questioned. The European Central Bank is thus the gatekeeper of probity, but is unwilling to act as such unless Member States are committed to the kind of policies that make up conditionality, and which require fiscal probity. The circle is thus closed.

C) From economic growth to competitiveness

Economic growth was regarded as a key means of achieving the reconciliation of the different ends to which post-war European states and the European Communities aimed. This instrumental character of economic growth is clearly reflected in the Preamble to the 1957 Treaty establishing the European Communities, where growth is defined as the means to achieve the goals of a 'constant improvement of the living and working conditions of [European] peoples' and 'economic and social progress'.

European economies grew constantly and intensively during the *treinte glorieuses*. By the late 1960s, however, growth slowed down. During the 1970s, the monetary shock following the collapse of the international monetary system in 1971 and the oil crises of 1973 and 1979 pushed European economies into recession. Since then, growth has come to be regarded as an end, something that has led to a different understanding of the means through which growth is to be achieved.

It was at this point that the present mutation of the way in which power is organised in Europe was unleashed.

The radical reinterpretation of economic freedoms as the ultimate parameter of the validity of law in Europe, first put forward by the European Commission, then supported by the European Court of Justice (Cassis de Dijon), and then partially endorsed by the European Council under the form of the Single European Act, resulted in economic integration being emancipated from political integration, and consequently, from ordinary legislation. Economic freedom and undistorted competition were defined as self-standing metaconstitutional principles. Their holders were thus to be unencumbered from any national law which could be regarded as an obstacle to the exercise of the said freedoms. Asymmetric economic and monetary union dented state capacities further. Not only monetary union (even monetary cooperation under the ESM) was conditioned to the renunciation of key macroeconomic levers (monetary policy, control over the rate at which the state borrowed money) but came hand in hand with the transformation of free movement of capital in the only economic freedom the application of which extended beyond the EU borders.

It is in this context (and thus well before the present crises) that 'competitiveness' of the national economy emerged as a key end of public action. Indeed, the move towards the single market shifted quite radically the relationship between Member States, as European law, instead of creating the conditions for national autonomous policy choices, unleashed a dynamics of competition between legal systems, under which the systems more protective of socio-economic rights quickly came to be perceived as non-competitive. The Lisbon Strategy codified to a rather large extent the premises of such dynamics. But it was through the government of the crises that the imperative became so strong and so powerful as to empower European institutions to undertake the structural transformation of national socio-economic models.

This was first reflected in the economic programmes to which the granting of financial assistance was conditioned. Such programmes aimed very explicitly at turning around the economies of the assisted states by means of increasing their exports. While in 'classical' IMF programmes the national currency is devalued, such an option was not available to assisted states as long as they remained within the Eurozone. Instead, 'internal devaluations' were to be implemented, or what is the same, policies aimed at reducing wages and social benefits. The government of the crises, however, has not aimed at eliminating the imbalances within the Eurozone that cumulated during its first decade, in the terms briefly discussed above, but rather to render the whole Eurozone more competitive, pushing every Eurozone state into constant surpluses with the rest of the world. The aim is not internal rebalancing, but generalising the German (and Dutch) net external surplus position to the Eurozone as a whole. This is why competitiveness is not an end only for states in fiscal crisis, but for the Eurozone and the European Union as a whole, so that constant pressure in favour of the reduction of wages and social benefits is found in the recommendations of the Commission à propos national stability and convergence plans, multi-annual financial perspectives and annual budgets. Constant gains in competitiveness are required because the rest of the world, quite obviously, is not in a monetary union with the Eurozone, so any competitive advantage is likely to be diluted by the exchange rate. Indeed, macroeconomic stability criteria assume that macroeconomic stability is fostered by trade surpluses.²⁶ By the same token, the Five Presidents' Report takes for granted that external competitiveness is a founding principle of European constitutional law, so much so that the report can largely be seen as a reflection on how to effectively achieve that objective (and in the process, reshape the national economies of Member States which used to have an economic model in which domestic demand was the key driver of economic activity into export-led economies).²⁷

²⁶ As reflected in the asymmetric rule regarding current account balance. More than 4% deficit is indicative of an imbalance, but only more than 6% surplus is regarded as reflecting a macroeconomic imbalance. Cf. 'Scoreboard for the Surveillance of Macroeconomic Imbalances', (2012) 92 *European Economy, Occasional Papers*.

²⁷ What was a rather vague objective in the 2000s (Lisbon Strategy) has become now the alpha and omega of economic policy.

2.2. The structural constitution: Powers shifted to the centre, to non-representative institutions and to 'creditor' states

The government of the crises has led to power being shifted in three directions: to the centre (with many socio-economic competences having been allocated to the supranational level of government), to non-representative institutions, and to 'creditor' states (as a result of the marked 'relativisation' of the principle of equality among Member States).

A) Centralisation of power

The supranational level of government has been assigned the power to both monitor and ensure the stability of the financial system as a whole (macro-prudential supervision being now in the hands of the ECB as 'leader' of the Systemic Risk Board) and to supervise all major financial institutions (the 'second pillar' of the ECB is in charge of the micro-prudential supervision of all major financial institutions of the Eurozone).²⁸

European institutions have been assigned new powers to monitor and discipline national fiscal policy. For one, an emerging constitutional convention forbids Eurozone states from defaulting on their debts. For two, the Eurozone has acquired the financial means and has set up the decision-making process necessary to provide financial assistance to Member States experiencing fiscal crises. The acceptance of financial assistance is subject to the condition that the assisted state accepts the troika (the ECB, the Commission and the IMF)²⁹ conditioning national economic and social policy as a whole. For three, the European Central Bank has assumed the role of lender of last resort of Eurozone states, a power that it has pledged to exert by reference to the terms of the financial assistance provided by the Eurozone, and consequently, by reference to their underlying conditionality. For four, the Commission (and very especially the Commissioner for Economic and Financial Affairs) has seen its powers to monitor and discipline national fiscal policy strengthened, as a result of the introduction of new fiscal rules, and the increased authority given to the proposed decisions it puts forward to the Council (which will be approved if a qualified minority, not majority, of Member States agree with them). For five, Member States are obliged to insert into their constitutions (or constitutional laws) a deficit ceiling. The European Court of Justice has been acknowledged as having power to review the 'European constitutionality' of the eventual national

²⁸ And Member States which may decide to transfer such competence to the ECB.

²⁹ Quite obviously, the oddest institution out of the three that make up the troika is the IMF, because it is not only independent from the EU as such, but also rather external to it. A full assessment of the actual role of the IMF in Eurozone financial assistance would require access to documents that remain reserved for the time being. B assistance (but see P. J. López and C. Nahón, 'The Growth of Debt and the Debt of Gut, contrary to what might be expected taking into account the IMF involvement in multilateral financial growth: (Some) Lessons from the Case of Argentina', *The Journal of Law and Society*, forthcoming), there is clear evidence that the Commission and the ECB have been stronger advocates of policies much more intrusive with national policy autonomy than the IMF itself. See IMF's Independent Evaluation Office, 'The IMF and the Crises in Greece, Ireland and Portugal', 8 July 2016, http://www.ieo-imf.org/ieo/files/completedevaluations/EAC_REPORT%20v5.PDF.

reforms (including constitutional reforms) adopted to comply with the new obligation.

European institutions have been given the power to require Member States to bring their economies into (macroeconomic) equilibrium, or what is the same, to stabilise their economies. The Commission now has the power to define the set of macroeconomic indicators to be regarded as relevant to determine whether national economies are or are not in equilibrium, and then to monitor and discipline national compliance, so that macroeconomic imbalances, very especially, 'excessive' macroeconomic imbalances are prevented, or, when they manifest themselves, corrected.

Finally, a constitutional convention has emerged according to which the remit of monetary policy is to be as wide as necessary to achieve the goals of monetary policy, independently of the (narrow) legitimacy basis of the European Central Bank. This implies that the ECB can decide on the shape of its monetary policy independently of whether or not this affects the conduct of national fiscal policies, while the reverse does not hold.

B) Power to non-representative institutions

Power has not only shifted across levels of government, but also (and crucially) along the supranational level of government. The new competencies attributed to the European Union have all resulted in gains by institutions whose legitimacy is indirectly democratic (to be pedantic, whose "chain" of democratic legitimacy is long, with many links) while the competencies and authority of both the European Parliament and of national parliaments (with the rather more formal than substantive exception of some national parliaments, as just indicated) have largely stalled. Most new powers are assigned to the European Central Bank, the Commission and the European Court of Justice. The other clear institutional winner is the Eurozone Council (the so-called Euro Summit). While on the face of it this seems to point to a deepening of the 'intergovernmentalisation' of the Union, the fact of the matter is that the 'formalisation' of the unequal position of creditor and debtor countries turns this 'new intergovernmentalism' in to less a guarantee of the transmission of democratic legitimacy from the national to the supranational level, than in to a serious risk to the democratic legitimacy of Eurozone collective actions. By contrast, the European Parliament has been assigned no substantive powers in the reform of European 'economic governance'.

C) Power to creditor states

Majority voting in the monitoring, and especially, the disciplining, of national fiscal policy results, de facto, in empowering creditor/surplus states (a minority within the Eurozone) against debtor/deficit states. Given the interplay of the rules assigning votes in the Council and the national interests at stake, it is not too far-fetched to see that a Commission seeking to sanction a debtor/deficit state (say Greece) will look for the votes of the creditor/surplus states, namely, Germany, Austria, Finland and

the Netherlands, which happen to make up a qualified minority. Similarly, while the European Stability Mechanism can only act by unanimous consent when taking important decisions (including the decision to provide financial assistance to one Eurozone state), there is one exception, which allows decisions by 85% of the votes when there is urgency. Votes have been attributed in a rather peculiar fashion (according to democratic standards), as the voting weight of each state depends on the capital of the Mechanism it has subscribed. This means that some, but not all of the states, have formal solo veto power: Germany, France and Italy. Of those countries perhaps only Germany can effectively make use of such power without setting a precedent that may apply in the long run to it.

2.3. Taking stock

In substantive terms, we can observe that the government of the crisis has turned the relationship between ends and means in the Social and Democratic *Rechtsstaat* upside down. Financial stability, full credit of public debt and economic growth have been turned from means to ends, and in the process, have been redefined as constant liquidity of financial markets, fiscal probity and competitiveness. The ends of the Social State (providing public goods and services, redistributing income and ensuring macroeconomic steering with a view to guarantee full employment and rising living standards) have not only been turned into means, but detached from its old ends. It should be noticed that purposive fiscal, monetary and macro-economic policy are not regarded, as in orthodox neo-classical economics, as self-defeating, but have been recovered as key means of the transformation of national socio-economic structures, which in some Memoranda of Understanding is defined in the utmost detail. This time however purposive policies are aimed at the realisation of the very different goals of the 'consolidating state'. All substantive policies, from social policy to education policy, from health policy to urban planning, are decided in the shadow of fiscal policies that guarantee the eternal rolling over of public debt. If a ghost is haunting the national exchequers, it is the ghost of internal devaluation, i.e. the phantom of further reductions of wages and working conditions in the name of competitiveness. The prospect of new rounds of internal devaluation plays the role of the bigger evil that renders palatable the lesser evil of pre-emptive wage moderation and a further weakening of social rights.³⁰ The consolidating state cannot but be a Social and Democratic *Rechtsstaat* in reverse.

In structural terms, as we saw, power has been centralised, leading to both the empowerment of supra-national non representative institutions and the abandonment of the principle of equality between Member States. As a result, the Union has got transformed, from a (weak) quasi-federal polity into a rump centralised, hierarchical and deeply asymmetric state, the actual strength of which is only fully revealed in crises moments, when it can make to bear its power over money (the Eurozone as lender of last resort of Member States, the ECB as lender of

³⁰ See Christodoulidis, in *The Journal of Law and Society*, forthcoming.

last resort to national financial institutions).³¹ But the long shadow of such emergency powers is bound to leave its mark in ordinary European politics.

3. The structural crisis of the law

In this section I turn to the third dimension of the crisis of European law, namely, the structural transformation of the role that law plays in the process of European integration. Or what is the same, to the impact that the crises have had on the kind of law that European law is.

In a nutshell my claim is that the European law that is emerging from the crises is detached not only from democratic politics, but also from politics tout court, and has become a tool of (pseudo) technocratic governance. Integration through a law that poses itself as pure (beyond political conflict) cannot but turn out to be a means of authoritarian governance. To prove the thesis, I consider the extent to which formal legal arguments have played a key role in (1) undermining the pre-existing European constitutional law, through finding out or, more frequently, manufacturing empty constitutional spaces and the 'recharacterisation' of breaches of legal norms as conflicts between legal systems; (2) providing cover to the pseudo-technocratic discretion by means of which the substantive contradictions at the core of the new understanding of substantive European law are avoided.

3.1. Decoupling governance from democratic constitutional law through law

European law as emerging from the crises has played a key role in justifying the radical alteration of the pre-existing, democratically legitimated, European constitutional law. Or to put it differently, constitutional limits have been transcended through formal legal arguments.

The bite of democratic constitutional law has been avoided by means of 'finding' spaces³² where the force of constitutional law would not reach (and which could be labelled as empty constitutional spaces) or by means of reconstructing breaches of law as conflicts between legal orders. At the core of both trains of argumentation is the rejection of any form of hierarchical relationship between national, European and international law (contrary to what is indeed assumed in both national and European constitutional law), or what is the same, a peculiar variant of radical constitutional pluralism. Punctual decisions (the provision of 'financial assistance' to Greece in May 2010) and structural reforms (the establishment of the European Financial Stability Facility in the spring of 2010) the constitutionality of which was regarded as dubious under either European or national law were said to be valid because adopted on the

³¹ While this structural transformation has been fuelled by the government of the Eurozone crisis, there are signals of similar trends in the government of other crises (very especially the refugee crisis, with the creation of the embryo of a supranational police force, the European Border Guard). Cf. A. Menéndez, *The Refugee Crisis*, (2017) 22 *European Law Journal*, forthcoming.

³² By 'finding', rather obviously, is meant the characterisation of a given situation as lacking in legal framework, whether this is the case or not.

basis of public international law. Similarly, troika officials have tended to justify actions in clear breach of national or European law by means of claiming that when acting they are neither bound by national law, as 'supranational agents', nor by Union law, as they are not implementing mandates under EU law. By the same token, the decision to expel one finance minister from an Eurogroup was justified on the basis of the Eurogroup not being formally established in the Treaties, and consequently, not being subject to EU law.

The escape into empty constitutional spaces has further relied on the alleged state of emergency in which the European Union found itself, so that either circumstances would concur rendering necessary to set aside (temporarily) some legal norms, or would reveal the shortcomings of existing norms, leading to a quasi-constitutional moment in which there was no option but to remould the constitution.

3.2. Cloaking (pseudo) technocratic discretion

Considerable changes in European secondary law have resulted, as was pointed above, in a much denser set of fiscal rules framing fiscal and economic policy. Such transformation results not only in the centralisation of power, but at the same time alters the very nature of European law, by means of turning the law into the cloak of arbitrariness disguised as (pseudo)technocratic governance.

Firstly, it is simply impossible to constrain fiscal policy by means of rules. Even if we were to reduce fiscal policy to a means to cut the sharpest corners of economic cycles (that is, to a lever of macroeconomic policy), a rule-based fiscal policy would remain a contradiction in terms. The Treaties define the European economy as a market economy based on free competition. Market economies do not self-stabilise themselves, but rather move from one stage of disequilibria into another. Stability is created through collective action, i.e. state action. But that state action cannot just be defined by long-term goals. It also requires attention to the specific socio-economic conjuncture in which the economy and the polity find themselves. This implies that macroeconomic policy cannot but be discretionary. Consequently, either all the key levers of macroeconomic policy (fiscal policy, monetary policy, social policy) are open to be used in discretionary fashion, or at least some of them are. The Eurozone has formally committed to non-discretionary monetary policy (by means of making of price stability the first and foremost mandate of the ECB, renouncing to set any macroeconomic objective as part of its mandate, as is the case with other central banks), and has now committed, through fiscal rules, to (almost) non-discretionary fiscal policy. As a matter of fact, however, both European monetary policy and fiscal policy are discretionary, only the discretion is cloaked under the appearance of technocratic governance. Consider first fiscal policy and fiscal rules. The Spanish government implemented a major income tax reform in 2015. This led to a major drop of the revenue raised by the tax. As a result, Spain failed not only to honour the 'old' Maastricht deficit ceiling, but also failed to comply with the commitments it had entered into in its stability plan under the new fiscal rules. This seemed a clear-cut case in which a fine was due. And indeed the Commission proposed sanctioning

Spain in July 2016. With a fine of zero euros,³³ but the Economic and Financial Affairs Council (Ecofin) did not endorse even such a purely symbolic fine. My point is not whether it was a wise or unwise decision to sanction Spain, but rather that the non-application of the sanction proves how much of an illusion non-discretionary fiscal policy is. As several of the institutional actors involved in the issue rightly pointed out, political discretion trumped an 'automatic application' of the new fiscal rules.³⁴ If the rules, however, cannot but be applied discretionally, then the rules are not really rules, but the mere semblance of rules, or pseudo-rules. The semblance of rules is not only ineffective, but perverse because they cloak the exercise of discretion, which can be presented as the technocratic implementation of a rule. This creates a serious risk of arbitrariness, as the existence of the formal rule empowers the Commission and the Council to decide when to apply and when not to apply the rule (indeed, arbitrary selectiveness of application is inbuilt into pseudo-rules). What if next time the Commission and the Council regard as convenient to sanction a state which finds itself in a similar situation to that in which Spain found itself? Less obviously, but equally problematic, is the arbitrariness at the core of the understanding of monetary policy as defined by reference to its goals, not the legitimacy basis of the ECB, which underpins the OMT ruling of the CJEU. The ECB has made use of its discretion to implement non-conventional monetary policies that not only have a massive impact on fiscal policy, but which can serve as functional equivalents of discretionary fiscal policy. This is clearly the case of the different instruments through which the ECB has implemented quantitative easing. This is problematic for many reasons, but for our present purposes it is a further instance of discretion being cloaked and presented as the technocratic implementation of rules.

Secondly, the fiscal rules at the core of the new 'European economic governance' are false rules, because they are constructed around a radically indeterminate concept, i.e. 'structural deficit'. The syntax of fiscal rules (the concrete and clear-cut way in which they are written) and the compliance-inducing mechanisms attached to them (the European Semester, the new sanctioning procedure) make them look like rules in the strict sense of the term. However, if fiscal rules define the framework within which Member States, and very especially Eurozone states, are to implement their fiscal policy, the concept of 'structural deficit' is the concept by reference to which the new fiscal rules are defined (new fiscal rules set limits to public action by reference to a percentage of the 'structural deficit'). And here lies the problem. The structural deficit is not the actual deficit (which is itself not a brute figure, but a figure obtained after the elaboration of raw fiscal data), but the figure that results from 'discounting' the positive or negative effects that the economic cycle has on the national exchequers. What is said to be the 'structural deficit' depends on which model of the

³³ In the words of President of the Commission Juncker: 'We must not be more Catholic than the Pope, but please make it known that the Pope wanted a fine of zero', available at <http://www.politico.eu/article/wolfgang-schauble-bails-out-spain-portugal-sanctions-juncker-german-finance-minister/>

³⁴ Available at <http://www.politico.eu/article/wolfgang-schauble-bails-out-spain-portugal-sanctions-juncker-german-finance-minister/>

Available at http://elpais.com/elpais/2016/07/28/inenglish/1469704242_546729.html

'economic cycle' is the correct one. There are, however, many possible models. This entails that different opinions on what is the 'structural deficit' can emerge, and that the judgment on which model is best is not final, but depends on the future performance of the economy. Moreover, given the degree of economic interdependence within the European Union, and especially, within the Eurozone, any serious model of the business cycle of each Member State has to take into account the evolution of the economy of the Union as a whole, and in particular of that of each Member State (if not that of the world economy at large, or at least, the conjuncture of the main non-European trading partners of the Member State in question).³⁵ This entails that while the structural deficit may be a useful concept in terms of policy-making, it is fully inadequate as a concept on which to base the legal discipline of national fiscal policy, particularly, the eventual imposition of sanctions on one member state. The first reason is that defining the rule by reference to a radically indeterminate concept gives the European Commission a massive margin of discretion, as it suffices to tweak the underlying economic model to obtain the desired result. The second is that an indeterminate concept cannot be the ground on which to take transcendental decisions, including the imposition of fines on Eurozone states. This is clearly illustrated by the shifting estimation of Ireland's and Spain's structural deficit by the IMF.³⁶ In 2008, the IMF calculated that during the period 2000-2007, Ireland had run an annual surplus at an average of +1.3% GDP, and Spain of +0.5% GDP. In 2012, the IMF revised the figures for the said period, on the basis of a different model of both economies. Ireland was now said to have run an average deficit of 2.7% GDP, Spain of 1.2% GDP.

The pretence is that discretion can be kicked out of the Eurozone window by means of the 'rulification' of Eurozone economic governance. The reality is that discretion is merely cloaked, and in the process, turned into arbitrariness, as the Commission is empowered to define the economic model by reference to which structural deficits are to be calculated, and the ECB is given the power to take decisions that are formally monetary but objectively fiscal. The consequences of these transformations are heightened by the additional new rules (the sanctioning procedure) or constitutional conventions (the ECB as lender of last resort to both member states and national financial institutions). Discretion denied is arbitrariness cloaked.

³⁵ The more growth is made to depend on external/international competitiveness, as has been clearly the case since 2010, the more the business cycle model of each Member State becomes dependent on the performance of Eurozone and non-Eurozone economies, rendering things even more complex, and consequently, less amenable to precise calculation. And, hellas!, constant trade surpluses result in importing the socio-economic problems of the countries buying them.

³⁶ M. Wolf, *The Shifts and The Shocks* (Harmondsworth: Allen Lane, 2015), p. 85.

4. Conclusion

In this paper I have claimed that the European financial, economic and fiscal crises have resulted in a triple crisis of law. Firstly, the government of the crises has resulted in the taking of decisions and the adoption of reforms of dubious constitutional validity, thus undermining the predictability of law, at the core of the rule of law. Secondly, the government of the crises has accelerated and radicalised a long-term process of mutation of European constitutional law, resulting in major changes to the way in which power is organised in Europe, which I spelled out by reference to changes in both structural and substantive European constitutional law. Thirdly, the government of the crises has transformed the very kind of law that European law is, turning it into a means of (pseudo)technocratic governance.

No polity emerges the same from a major crisis. At the time of writing, it has become almost self-evident that the European financial, economic and fiscal crises were but manifestations of a deeper existential crisis of European integration. The refugee crisis and the semi-latent security crises seem to indicate that the Union has become incapable of meeting major challenges before they become open crises. It is far from obvious whether the European Union will brave the crises. The more the Union mutates it is also less clear whether the price of overcoming the crises would not be unacceptable in normative, social and cultural terms. Only going out of the crises in a way that allows us to be at the same time loyal to the ideal of the Social and Democratic *Rechtsstaat* constitutes a real way out of the crises.

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