The Economic Constitution & the Political Constitution: seeking the common good in the post-national setting

Abstract

In the post-national setting, the concept of the economic constitution has been seen as design template and saviour: whether based in transactional certitude, or founded in ordo-liberal precepts, the economic constitution is assumed to legitimate economic integration across national borders in the absence of comprehensive political settlement. Nevertheless, recent tensions, not just in the EU but more strikingly so, within the WTO context indicate the limits to economic constitutionalism. This contribution seeks the roots of recent disfunction within the history and theory of economic constitutionalism. The contribution traces an adjudicational economic constitutionalism and its place within the European legal order, including the new EU Charter of Fundamental Rights and contrasts this vision with the more comprehensive and/or socialised models of economic constitution found, not only within Weimar, but also within the post-revolutionary/post-conflict constitutional context. The contribution also places a major emphasis upon theorising around the apex of economic-constitutional thought, ordo-liberalism, but concludes that no concept of the economic constitution can be seen in isolation from its social-political context, or from notions of the common good. To this exact degree, failures in modern economic constitutionalism may derive from a misplaced universalism, a technocratic absolutism that abdicates political responsibility for the common good, locating it instead in an 'idolatry of the factual' or a new naturalism of market inevitability.

Michelle Everson, Birkbeck College, University of London

'In a climactic fashion, the creation of the WTO demonstrated a major aspect of globalization—that trade liberalization in a globalized world no longer refers simply to competition between economies, but between social systems' (Kang, 2016[1]).

Introduction

Hayek and Hayek alone could perhaps conceive of his market functioning without a political system. Shorn of all egalitarian welfare illusions, the myriad uncertainties of the Hayekian marketplace are also, in their price-based processes, a self-sufficient system of discovery and satisfaction of citizen preferences.[2] And yet, the movement beyond the nation state to supranational or global level has all-to-often made a legitimating assumption that new orders of post-national law can function at operational and normative level as atomised 'economic constitutions' without a clear set of (constituted) political processes to support or to contain them.

Placing 'thin' notions of economic constitutionalism that are tailored to the post-national level in their own separate category,[3] the global turn to an economic constitutionalism that escapes politics, precisely to lay claim to be legitimised in its absence, appears nothing but flawed when placed in a broader theoretical-historical context. To the degree that economic constitutionalism is also a product of judge-made law, it has always found its socialised limits in the restrictions placed on freedom to contact, the interplay between subjective and non-subjective rights, or the strict

[1] Yoo-Duk Kang, 'Development of Regionalism: New Criteria and Typology', 31:2 *Journal of Economic Integration* (2016), 234-274, at p235.
[2] See, 'Economic Conditions of Inter-State Federation', in 5 *New Commonwealth Quarterly* (1939).
[3] See, for example, Joel P.Trachtmann, 'The Constitutions of the WTO', 17:3 *European Journal of International Law* (2006) 623-646.

delimitation of the performative economic element within a complex of professional and property rights. By the same token, the first appearance of economic constitutionalism within the normativised framework of the modern, national constitution (Weimar) is characterised by its aspirational (non-subjective), politicised character; a trend that extends historically to post-conflict/post-revolutionary constitutions, even where, and interestingly so, the political context is one of an intentional increase in the liberality of the market (see below). But finally, and perhaps most importantly so, ordo-liberalism, lying at the apex of all theories of economic constitutionalism, must also be viewed in the broader social-political context. The clue is in the name; ordo-liberalism is explicit in its relationship with the normative world of political liberalism.

In other words, searching also, if not primarily so for social order, or a means to secure horizontal bonds of belonging between citizens in the non-statal sphere lying alongside the political constitution, ordo-liberals are primarily concerned with a search for the common good, however conservative in nature. This pursuit of commonality, the common weal, is also a core feature of judicial or aspirational-political economic constitutions, making economic constitutionalism a difficult or even impossible concept to reproduce at post -national level. Instead, post-national frameworks of economic law and global governance are more generally characterised by their putative universalism, sometimes inspirational (human rights), but often ambivalent, a material universalism of 'natural' welfare maximisation, or a totalising utilitarianism that only masks political abdication just as it fails to legitimise economic operation in the absence of constituted politics.

This leaves a final question of whether an economic constitution can ever be properly established at post-national level. 'Thin' conceptions of economic constitutionalism are conceivable if disappointing at normative level. A more sustainable approach might instead be found in new research agendas that take the particularism of markets and trade seriously, accept and laud the rise of a new regionalism in international economic affairs;[4] that recognise 'property', broadly defined, is enmeshed within different, sometimes competing sets of social relations and expectations about the performative economic element within human affairs.[5]

The common good (1): the 'private law society' (Franz Böhm)

> *A wholly different account of the competitive order can be attempted from a second perspective, or from its comparison with the rule of law. Like the rule of law, the competitive order should also create parameters within which the free actions of an individual are limited by the sphere of freedom of other individuals such that a*

[4] See, above, n1.
[5] See, in particular, Diamond Ashiagbor, 'Theorizing the relationship between social law and markets in regional integration projects', 27(4) *Social & Legal Studies* (2018), 435-455, and Sabine Frerichs & Rick James, in 'Correlated ownership: Polanyi, Commons, and the property continuum' in Moshe Hirsch & Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Elgar: Cheltenham 2018).

balance is attained between human rights to freedom. – In truth the desire for competitive order is closely related to the desire for freedom (Walter Eucken, (1952)[6]).

Birth of the private law society: markets within the rule of law

Albeit in an Anglo rather than German setting, T.H.Marshall's famous analysis of the formation of citizenship and social class (1953)[7] contains a description of a core component within ordo-liberal thinking, the existence of a 'private law society' stretching back into antiquity.[8] In Marshall's historical-sociological account, a nascent rule of law is inextricably linked with the rise of the market. Post the Black Death, a new 'civic' class could make economically performative use of the now universalised freedom of contract. One-time feudal subjects would make their creative way through the marketplace. Given a new egalitarian life by judges beyond the limits of the Royal Charters granted to the city-states of medieval organisation, contractual freedom would concomitantly create a new market society within the rule of law.

In Marshall's analysis, a private sphere of civic rights is only a first step in a subsequent history of class formation, class conflict and widespread politicisation precipitated by the emergence of a market with its own set of egregious inequalities: the narrative is dynamic, leading inexorably to the egalitarian democratisation of national life as an industrial class flexes its newfound powers of protest in pursuit of political and social justice. In the ordo-liberal analysis, the private law society, the market and its rule of law, are instead a haven of perpetual stability. In line with the 'Pandectic' musings of the great theorists of modern law (Friedrich Carl von Savigny (1779-1861)), the private law society stretches 'unbroken' back as an autonomous sphere via medieval charter cities to the juridical codes of antiquity. It is a continuous sphere of social organisation with its own egalitarian, quasi-democratic ordering principles (the rule of law and market price mechanism) that are quite distinct from the majoritarian politics of the public democratic sphere. It is this distinction, its pre-political character which famously recommends it also as a mode of post-national organisation.

> *In an ideally-competitive economy, market prices are the outcome of a gigantic balancing process between the countless and varied individual interests of countless, powerless market participants, which unfolds in total freedom and which reflects every individual evaluation that has been asserted. Taking the social standpoint, it is this that makes the market price free of all arbitrariness. Market prices are compound articulations of necessity, justice and reason. In its own peculiar manner, market-price-creation is a voting process, taking place, by the day, hour and even minute. The free market economy is the most perfect expression of mass democracy; its degree of precision is impossible to reproduce within political life. (Böhm 1947[9])*

[6] Walter Eucken, 'What is the Competitive Order?', in *Grundsätze der Wirtschaftspolitik* (Principles of Economic Policy) (J. C. B. Mohr (Paul Siebeck): Tübingen 1952), p250 (authors translation).
[7] T.H. Marshall, *Citizenship and Social Class* (1953) (Pluto Press 1992).
[8] See, Franz Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft', *ORDO*, 17 *Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* (1966), pp75-152.
[9] Author Translation, Franz Böhm, 'Kartellauflösung und Konzernentflechtun : Spezialistenaufgabe oder Schicksalsfrage?', 2 *Süddeutsche Juristen-Zeitung* (1947) pp495-505, at p500.

Taking Franz Böhm as indicative for the tradition, ordo-liberalism shares a great deal with Hayek, not least an ability to surprise unsuspecting students with a radical position which asserts its own quasi-(anarchic)-democratic credentials in rejecting the accumulation of power either by market participants, or by an authoritarian state. The unknown and unknowing processes of the market are the best suited to the protection of society from abuse by the individual and the collective, and, at the same time, allow for democratic expression of preference. The dangers of undue exercise of power dissipate in a realm in which '[E]very individual is dependent upon an equally-impacting, impersonal and anonymous common will, whose content and potential is transmitted and made understandable to participants through the pricing system'. None are 'masters or knaves' within the private legal society; instead, all are authors of and subject to a very special form of 'coercion', or 'a form of power that does not violate the political, social or legal autonomy of those it acts upon'.[10]

A common good in negative liberalism

> *The assumption that the French Revolution liberated the individual from society is based in a fallacy…[.]…the French Revolution, from the constitutional point of view, did not emancipate the individual from society, rather it left him in society…[.]…the society was transformed from a feudal society of privileges, which…[.] possessed a private law into a pure private law society…[which]…is by no means merely a coexistence of unconnected individuals but is a plurality of people who are subject to a uniform order. (Franz Böhm 1966)*[11]

Nevertheless, the assertion of the ordo-liberal model as an economic constitution for the post-national era is founded in a misunderstanding, and not simply since ordo-liberalism has seemingly not had the impact on EU institutional organisation that is ascribed to it.[12] Rather, standing in the late modern liberal tradition, ordo-liberalism is committed both to the preserve of the private sphere as an autonomous area of social organisation, but also to its accommodation within the positive political constitution and, far more fundamentally, to the establishment of a common good in the horizontal ties of ordered belonging it posits between citizens.

Although also a paean to markets, Böhm's 1966 manifesto for the private law society, or the basis for economic constitutionalism, must be understood within the political liberal tradition, and the efforts to overcome the inconsistencies in that tradition. The core problem tackled by Böhm is one of the potential tyranny inherent to Rousseau's *volonté Générale,* its tendency to unlimited expressions of public power, or to a collectivised menace which threatens individual liberty. His solution is to be found in the co-ordinating character of the private law society, and its market, a complex of social relations which do not challenge, but which pre-date and continue to civilise political revolution,

[10] See above n9, (Böhm 1947), all quotes at pp500-501.
[11] See above n8, (Böhm 1966), at p49
[12] See, Hubert Buch-Hansen & Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy', 17:1 *Review of International Political Economy* (2010) pp20-44.

dissipating the totalising dangers of the political collective, and binding individual citizens to one another in a society ordered by means of the myriad signals sent out by the market and its law.

Like all ordo-liberals, Böhm is a product of his own biography, his personal encounters with fascism and Stalinism;[13] he tends however to a negative rather than positive liberalism in his search for social cohesion and order. The French Revolution is identified as the moment at which the individual was released from feudal, hierarchical relationships, but simultaneously became a danger to her fellow man in the positivised law of the liberal constitution. Alienated from God and community, the individual attained a nihilistic character, or a potential for accumulation of self-pleasing power to detriment of the citizenry. Böhm's starting point is the Enlightenment, but his problem is surely a couple of centuries older, also being founded in fear of the civil war that followed upon the Reformation. He is dismissive of the positive liberal constructions of individual right: it does not address the horizontal problem of being in society, of the citizen's responsibility to the citizen within a pre-political sphere of freedom from the state. 'There is no such thing [legally] as society, which vis-à-vis the state, might be a body responsible for constitutionally protected rights and powers …. mention [is made] only of human rights or constitutional rights of the individual.'[14]

In effect, Böhm had not accepted the Revolution and its *volonté générale* with the competence to carve out a private sphere from the Republic. Rather, his biography and arguments are reminiscent of those of William Blackstone, early 18th Century English constitutionalist, seen as author of the protean liberal constitution[15] and a jurist with a mission to heal the wounds of English civil war and its authoritarian aftermaths. Civil war was less a collapse of sovereign power, and far more a pluralist dissolution of English society, quite independent from the form taken by the state. As we have learned repeatedly, authoritarian regimes are not established out of an abyss. Instead, they arise as advantage is taken and power is accumulated within the fissures and schisms of societies under stress. Böhm's course is set early on: in the face of collapsing European empires, the inability of the Weimar Constitution to master the centrifugal schisms of the 1920s, social order is paramount, even if only as a counterfactual, a counter-story, or as a normative mission to identify the ties that bind.

Blackstone is unashamedly romantic in his pursuit of social order: natural law reigns unabashedly proud as the 'genius' of the common law provides continuity with Justinian codes by asserting a rule

[13] See, for detailed explanation of the isolation of Böhm during the Nazi period, his refusal to compromise with the regime, Rudolf Wiethölter, 'Franz Böhm (1895-1977)', *Juristen an der Universität Frankfurt am Main*, Bernhard Diestelkamp & Michael Stolleis (eds), (Nomos: Baden-Baden 1989), pp209-252

[14] See above n8, (Böhm 1966), at p49.

[15] See, Duncan Kennedy, 'The Structure of Blackstone's Commentaries', 28 *Buffalo Law Review* (1979) pp205-301.

of law that neutralises conflict within a private society where each individual is 'free', only insofar as she does not infringe upon the freedom of others. Likewise, the state or Hobbes' body of citizens is self-limiting in its exercise of political sovereignty. It is constrained by Aristotelian philosophies, or by the notion that the *polis* can only express itself through a *demos* made up of representatives apportioned to the different estates (aristocratic, bourgeois, popular) and their imputed virtues (wise, productive, democratic) in society. In contrast to such antiquarian usage, Böhm's language is that of modernity. Individuals are not left staring across a void at the state. Instead, in an '[U]nforeseen ray of hope,' Rousseau's inadequate reliance upon the 'virtues', or *esprit de corps*, of the populace to avoid all potential excess is immediately mediated by another body of (unidentified) thought, surely Scottish Enlightenment thinkers, who asserted the existence of systems, primarily the market, but also the law, that co-ordinate the actions of the individual citizenry without recourse to government: 'In this society the individual plans of members of society would be controlled with the help of an automatically functioning coordination system….[.]…the task of government consists merely in creating the conditions enabling this control mechanism to operate in accordance with the constitution'.[16] And yet, from the *demos* to the *polis*: for all that democratic constitutionalism is welcomed, the need for horizontal belonging between citizens is still the main preoccupation in the effort to overcome disorder. It is unsurprising therefore that Böhm's relocating of the individual in society also suffers from an aura of romanticism and rhetorical device, and still takes refuge in imprecise evocation of the mechanism of the separation of powers. In pre-political terms, the private law society, like the common law, is to be found in the genius of innumerable generations stretching somehow unbroken back to classical codes; a striking parallel to Blackstone, or an homage to Savigny in the German tradition.

A political mandate

> *Certainly, it is helpful when experts contribute and their views are heard. Nevertheless, far greater powers must be amassed than those offered by a 'brains-trust' composed of a couple of dozen denizens of expertise and ministerial bureaucracy, where the task is one, either of divesting power from wildly-proliferating edifices of might, or of preventing their collapse of the social order by means of their hierarchical capture in an overarching order. Whatever the desired mode of tackling the issue, the challenge will only be mastered where the political approach chosen is knowingly and whole-heartedly supported by broad swathes of public opinion (Böhm, 1947[17]).*

The negatively-liberal search for a common good of horizontal belonging, might, on its own, disqualify ordo-liberalism as an economic constitution for a post-national age: the carving out of a sphere of economic freedom from the dispositions of nation states by means of positively-constituted rights (see only the 'four freedoms' of the European market) could, surprisingly, be argued to be alien to the entire tradition. In addition, however, ordo-liberalism famously also seeks

[16] See above n8, (Böhm 1966), at pp63-63.
[17] See above n9, (Böhm 1947), at p497.

to renew the legitimacy of its romanticised private law society in the positive approbation of the political constitution: 'The first demand made of a modern economic constitution is accordingly that it is knowingly founded in a clear and unassailable expression of political will'.[18]

Granted, Böhm's first assertion of a political root for the private law society derives from a time when he was writing with an eye to how he might persuade the regime now established within Germany to accept a secure a sphere of 'private action' for the citizenry; a safe, Nazi-free space of (economic) self-expression. Nevertheless, his acceptance of the moral authority of a political constitution, even if then located within the context of a *Volk*, its 'blood and historical-emotional common experience'[19] survives into less oppressive times. There is no artifice in Böhm's immediate post-war writings. Rhetorical tricks are cast firmly aside: the German people should be enthused, should be explicitly included within the debate on and the political decision for de-concentration and de-cartelisation, and not simply to break up the concentrations of power implicated in fascist disaster. Instead, an enduring commitment should be freely given to competition law as a social good in itself; as a radical guarantor for an almost perfect (market) democracy and against authoritarian/anarchic accumulation of power by individuals or by the state.

The common good (2): judicial balancing of rights

> The European Common Interest can be found in (the, then) Article 4 of the European Union Treaty: 'qui insiste certes sur le principe d'une économique de marché où la concurrence est libre', and which commits the member states and the institutions of the European Union to 'l'instauration d'une politique économique fondée sur l'êtroite coordination des politiques économiques des Etats membres, sur le marché intérieur et sur la definition d'objectifs communs, et conduit conformément au respect du principe d'une économie ouverte où la concurrence est libre' (Report to European Parliament (2006), Commentary on the European Fundamental Rights Charter[20])

It is important not to forget that, for all of their political courage and respect for constituted democratic process, ordo-liberals are not democrats at core: their primary, liberal concern is for social order, not for social justice, a stance that led them to reject calls for a democratised, workers economy in post-war Germany.[21] At the same time, establishing a theme to which we shall return, ordo-liberals have always privileged 'experts', the 'brains-trust' above majoritarian impulses within

[18] Author's translation (Economic Ordering as a Problem of Economic Policy and a Problem of the Economic Constitution) of ‚Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung', in *Ordnung der Wirtschaft*, Band 1, (Edited by Franz Böhm, Walter Eucken und Hans Großmann-Doerth), Stuttgart, Berlin: Kohlhammer (1937), p57.
[19] See above n18 (Böhm 1937), p58.
[20] Dean Spielmann, 'Article 16 – Liberté d'Entreprise' in EU Network of Independent Experts on Fundamental Rights (eds), Commentary of The Charter of Fundamental Rights of the European Union (2006) 158 <https://sites.uclouvain.be/cridho/documents/Download.Rep/NetworkCommentaryFinal.pdf > accessed 12 September 2019.
[21] See, the discussion in Wiethölter, above n13.

the private law society. The private law society can only ever exist alongside a political sphere, but is still a technocratic, non-majoritarian realm, wherein decisions are reserved for expertise.

The technocratic nature of the governance of the private law society is one that also extends beyond economics to judicial oversight of the rule of law, and one which is arguably reproduced, even outside the reach of ordo-liberal and within more socialised iterations of the economic constitution. The commitment of the Weimar Constitution to the freedom to conduct a business, as well as a raft of workers' rights is correctly viewed as revolutionary in character, the first dispositive expression of an economic constitution. And certainly, Weimar marks a significant moment, with its first express modern normative dedication 'to individual economic freedom' (Article 151, paragraph one, sentence one), as well as Articles 151-156 which concomitantly established a social-economic order within Germany. A conscious, post-liberal approach to the combination of economic advance and the securing of welfare had found its way into a constitutional document. Nevertheless, we should perhaps not overreach or look at Weimar in isolation from long-standing, pre-political, or judicial processes of apportionment of economic rights, and their delineation against other (social-cultural) rights, as well as, and importantly so, against political interventions into the workings of the market economy.

Within the Weimar constellation, the 'principled obligation' to secure economic freedom contrasted starkly with the Constitution's 'subjective rights' to, say, religious freedom, and determined that the conduct of business within the nascent Republic would be unfolded within a legislative programme rather than be judicially-driven. The Constitution did not allow for or enable unfettered pursuit of entrepreneurial goals by means of establishment of 'individual economic freedom' as a subjective right. Instead, the legislative programme envisaged by the Constitution provided for the balancing of business freedoms, property rights and labour interests within a 'socialised economy'. Interestingly, the distinction between subjective and non-subjective rights within the Constitution mirrors judicial processes of extraction/identification of individual economic rights, as per the story told us by T.H.Marshall. The core point to note within this constellation, however, is one that a 'performative' right to economic activity – a right that trump all other aspects of human activity - is always a rarity, if it ever exists at all . Economic rights of subsistence might be and are viewed as subjective human rights, existential in character, but are nevertheless always subject to restriction not only in in simple legislative, but also in (non-majoritarian) judicial terms.

The conclusion that an escape from feudal society does not more generally equate with an escape from socially-constraining mores, and/or political process, is a second contextual limit upon the economic constitution, as well as upon the private law society, at least as far as they are each subject to the pre-political, adjudicative efforts of the rule of law, or the judicial balancing of the economic

freedoms of the individual against non-economic rights. This is a commonplace, a simple feature of legal organisation; a feature which is also apparent within the historic economic jurisprudence of the European Union, and, in particular, judicial treatment of Article 16 of the European Charter of Fundamental Rights (EuCFR), or the first post-national reiteration of Weimar's 'freedom to conduct a business'.

The inclusion of Article 16, or an express commitment to 'the freedom to conduct business', within the European Union's Fundamental Rights Charter was highly controversial, and understandably so: the freedom to conduct business, if construed as an unfettered release of individual entrepreneurial interests, would have the potential to destruct any form of European common interest in the co-ordination of the economic policies of the member states. For some commentators, a possible source for Article 16 within international law was Article 6 of the International Covenant on Economic, Social and Cultural Rights ('right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'), to which Article 1(2) of the European Social Charter is argued to be equivalent ('the right of the worker to earn his living in an occupation freely entered upon'). The settled jurisprudence of the Court of Justice has nevertheless tended to reproduce various of the member state constitutional traditions, using its case law to establish a very close relationship between the freedom to conduct a business (Article 16), and the freedom to pursue an occupation, now given force in Article 15.

This distinction as well as the relationship between the two rights matters: finding its implied place in the 'constitutional traditions' of the EU member states, whereby it is most commonly extrapolated by judges from constitutionally-secured rights to property and to work, the freedom to pursue a business is vitally distanced from them. Just like rights to work and to property, Article 16 may be reducible to a fundamental right of dignity (Articles 1 EuCFR), whereby human self-expression and self-sustenance is assured by means of secured pursuit of economic activity.[22] At the same time, however, and far beyond core, or 'existential', rights of freedom to conclude a contract, or to initiate economic activity, the freedom to conduct a business, in its broader performative character, is one which might also recognise the existence and approve of the entrepreneurial element within human affairs, establishing a positive right of individual economic empowerment which cannot but challenge notions of the common good more commonly expressed within social mores, political process and their shaping of market process.

[22] See the similarly cautious approach to business freedom adopted by the European Court for Human Rights, which has limited itself to the extrapolation of a nascent right to 'peaceful enjoyment of possessions' from the Convention's guarantee for property rights. According to the judgement in *Marckx* v *Belgium* [Series A no 31 (1979) 2 EHRR 330, para 50], Article 1 of Protocol no. 1 applies only to existing possessions and 'does not guarantee the right to acquire possessions'.

Seen in this light, the controversy around the inclusion and character of Article 16 of the Charter of Fundamental Rights necessarily encompassed a question of whether the freedom will be extended beyond a simple existential function, as long ago laid down by the European Court of Justice in its seminal *Nold* jurisprudence on freedom of contract;[23] whether it will be viewed as a 'subjective right', asserting the unrestricted entrepreneurial spirit of the individual European. Equally, a further question arises as to whether the freedom to conduct business under Article 16 is better understood as a principle forming a part of a far wider European Union commitment to a specific from of social-economic organisation; and, if so, which one – a social Weimar or some new, liberal constitutional utopia? Given the European Union's enduring commitment to establishment of an internal European market, or a 'highly competitive social market economy, aiming at full employment and social progress' (Article 3(3) TFEU), the answers to these questions might, at first glance, appear simple. Surely, just as in Weimar, the complex of rights in the Charter must seek to hold the Union to its own principled commitment to establish an economic and social order that balances labour and production interests within its long-standing system of 'embedded liberalism'.[24]

Nevertheless, the unique formulation of Article 16 within the Charter, or one which demands that the 'freedom to conduct business' is exercised 'in accordance with Union law and national law and practices', both reveals the high level of political compromise that has accompanied and dictated the form of its inclusion within the Charter, and hints at continuing discord within the member states, and between the member states and the Union about the exact nature of Europe's economic constitution, as well as its relationship with the social order. Economic constitutionalism remains multi-faceted, complex and surprising. It immediately striking, for example that, in the year of the Court's decision in *Nold* (1974), explicit national constitutional references to notions concomitant to the right to business freedom were sparse indeed and limited to the express recognitions found in the Constitutions of Ireland (1937), Italy (1949) and Luxembourg (1948) for 'rights of private (economic) initiative' in industry and commerce. In the meantime subsequent iterations of business freedom within national constitutions have reproduced the post-colonial, post-civil war or post-dictatorship patterns established in Ireland and Italy.[25] In each of these cases, the arena of personal economic initiative is contained within schemes of interwoven social and economic rights, which form a basis for legislative rather than judicial initiative, and thus also embodies, in its limitation, a founding commitment to establishment of a political economy, or socialised economic constitution,

[23] Case 4/73 *Nold*, [1974] ECR 491

[24] See report to the European Parliament, n20 above.

[25] Leaving Luxembourg aside – where emergence of commercial rights appears to owe to the post-medieval continental tradition of affording legal respect to emerging trades: see alsp for comprehensive discussion of the right to conduct business throughout Europe, H. Schwier, *Der Schutz der 'Unternehmerische Freiheit' nach Artikel 16 der Charta der Grundrechte der Europäischen Union* (Peter Lang 2012).

dedicated to resolution of past social conflict. Moving on through history and making allowance both for fundamental changes in guiding principles of economic organisation, as well as renewed emphasis upon the powers of (economic) civil society to repel dictatorial regimes, the freedoms to conduct business introduced by Spanish (1978) and Portuguese (1982 revision) Constitutions, in their distinct difference, reproduce the same trend. Subject to simple revision procedures (Spain) or limited to 'peaceful enjoyment of possessions' (Portugal), constitutionally-guaranteed commercial freedoms in Portugal and Spain may be characterised by their greater degree of market-orientation, but, in essence, remain principled components within economic constitutions of post-conflict settlement and social pacification.

To this degree, a more immediate source for the Court of Justice's evolution of a right to conduct business may therefore be suggested to have been the constitutional and general legal traditions of the remaining members states (and ex member states), in which implicit guarantees for commercial freedom have evolved: first, in the negative formulations of the atypical constitutional tradition of the United Kingdom, within the general stipulation of the rule of law that the individual elements of individual economic enterprise, such as contractual autonomy, may only be restricted by means of express legislative authority to do so; secondly, in the equally atypical French constitutional constellation, in the struggles of the Conseil Constitutionelle to establish a right to commercial freedom of 'constitutional rank'; and thirdly, in the adjudicative endeavours of national judiciaries in Austria, Germany, Greece, Sweden and Finland to extrapolate an implicit constitutional right to conduct business from explicit constitutional guarantees for human dignity, property, work, free association and professional freedom.[26]

In large part, therefore, in their material content, a founding template for the CJEU's initial concretisation of the freedom to conduct business – as well as its limitation through express authorisation – in notions of the freedom to engage in commercial activity and a right to contractual autonomy,[27] the constitutional traditions of the member states may, in general, be argued to support the construction of Article 16, supported by the European Parliament (see above) as a limited right of existential dignity within the context of a market society, broadly-defined.

A failed justice of universalism?

Constitutional simplism

> Legitimacy, if it is to be understood in rational terms, is no more than the satisfaction of preferences or, again in constitutional economic terms, the acceptance of reduced satisfaction of preferences pursuant to a structure that was agreed ex ante because of the anticipation of maximization of preferences. This is the Harsanyian, and Rawlsian, concept of stochastic symmetry. In other words, legitimacy is no more

[26] See above, n25.
[27] See below, Case T-52/09 *Nycomed Danmark* v *EMA*, [2011] ECR II-8133, as representative for a once dominant strand of case law.

than the acceptance ex post of the results of a mechanism that was designed, ex ante, to maximize aggregate preferences (Joel Trachtman 2007[28]).

Joel Trachtman has given us a striking model of economic constitutionalism for the post-national world. Rationalism is a guiding feature in his analysis, enabling him to break down constitutions into a series of constitutional functions which can be apportioned to different levels of governmental and post-national organisation in a world of constitutional pluralism. The analysis is useful allowing us to, at the very least, begin to conceive of the WTO as an economic constitution and to test its claim to a legitimacy that is founded in the negotiated/shared goals of its member states. However, the element of economic contractualism within Trachtman's analysis, or his assertion that members of the WTO will benefit from establishing certainty in their future economic relations perhaps reveals the 'thinness' of this concept of economic constitutionalism. In essence, Trachtman may be argued to be addressing a very old conundrum of post-national organisation, persuading states, or the economic interests within them, that co-operation forms which restrict their sovereignty are also a 'good' in and of themselves. As the historian Ernst Kantorowicz noted in his time, the degree of normative aspiration here is very limited indeed, non-extant even: 'power gives up some autonomy in exchange for submission to rules generally serving their interests. The submission to the rules legitimates the power embedded in the law'.[29]

Trachtman's is a simplistic vision of law: he fails to grasp that law is often an imperfect instrument, and international economic law is perhaps all the more so, maybe still captured within a founding age in the late 19th Century wherein US business interests and the governments that drew their power from them were persuaded to respect a new global order of commercial law with the promise that it would preserve and reproduce at international level, the privileges that they had accumulated in domestic law.

The simplification error, however, is not Trachtman's alone. Let us return to the topic of Article 16 of the European Charter of Fundamental Rights and the light that it sheds on the nature of the European economic constitution. Up until very recently, the jurisprudence of the CJEU continuously brought the realities of the private law society into sharp relief, detailing its subordinate position to social mores and political process:

> *'[T]he importance of the objectives pursued [in this case, protection of intellectual property] may justify restrictions which bring about even substantial negative consequences for certain economic operators' (EMA Case, paragraph 89[30]).*

[28] See above, n3.
[29] Paraphrased from Bryant G. Garth, 'Issues of Empire, Contestation and Hierarchy in the Globalization of Law', Moshe Hirsch and Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Elgar: Cheltenham 2018).
[30] Case T-52/09 *Nycomed Danmark v EMA*, [2011] ECR II-8133

The European case of EMA concerning an application made by a pharmaceutical company for annulment of a decision of the European Medicines Agency (EMA) requiring the applicant to undertake clinical trials in order to receive authorisation for a children's pharma-product is paradigmatic, and might be taken in support of the notion that internal market law is comparable with the liberalising vision of the economic constitution ascribed to the ordo-liberals. The right to conduct a business could be made justiciable under European law as a subjective right, as an entrepreneurial guarantee of market entry: 'the interpretation of Article 11(1)(b) of Regulation No 1901/2006 contained in the contested decision' did constitute 'a restriction of the right of pharmaceutical companies to conduct their business freely' (paragraph 91).

And yet, even in the simplest analysis, this 'subjective' business right is necessarily subject to a *Wesentlichkeits* (essential nature) test, as enunciated by the CJEU, or to the question of whether the assertion of a right to property would, under the facts, negate the freedom to conduct business in its substance. Further, however, the costs imposed by Community legislation might be 'onerous' but are still justified in legislative pursuit of a legitimate public interest, in this case intellectual property in pharmaceutical products, or protected innovation within the competitive process. The European judicial treatment of Article 16 thus appears better to mirror domestic German judicial elaboration of the ordo-liberal spirit of the *Grundgesetz* than many commentators might suppose; but this only because this has been in fact a far from simplistic process. German justices have distilled out an 'absent'[31] subjective right to conduct business from the Constitution's general guarantee for individual freedom (Article 2 (1) GG), but have also refused to extend the notion of the free exercise of a profession (Article 12(1) GG), in order to include a guarantee for a subjective right to free competition. Although the individual German should be protected from unwarranted state intrusion into their economic activities, such protection could not extend to a competition policy, where the primary role of defining and ensuring a free and fair competitive order would still fall to the political process, to government. Likewise, at the level of the overall constitutional order, the exercise of freedom within the Republic's economic order would also be balanced against, or distinguished from the 'social order', given recognition in the dedication of the *Grundgesetz* to the establishment of a *Sozialstaat*.[32]

Within the terms of this analysis, we may continue to doubt the real extent of the influence of German ordo-liberalism on European policy-making: *Ordnungspolitik*, or the policy of competition,

[31] The failure of the *Grundgesetz* to include an express provision, guaranteeing commercial freedom may be explained by the degree of suspicion exhibited within post-war Germany towards the social pluralism of the Weimar Constitution, which was deemed to have contributed to political instability. See. For far greater detail, H.Schweier, n25 above.

[32] See, H. H. Schweier, n25 above

may have only found its 'niche' position in the competition directorate in the early years of European integration.[33] Nevertheless, in the historic jurisprudence of the CJEU we can find echoes of the true complexities of ordo-liberal constitutionalism, its multi-faceted relationship with social mores and political process. This encompasses, on the one hand, the establishment of performative economic rights (the four freedoms), but, on the other hand, their balancing against other 'existential' rights, say the right to health; as well as their subordination both to the legitimate legislative aims of the European Union (eg,. vision of the character of competition) as well as to the welfare policies of the member states.[34]

Ideology…

> *Indeed, by restricting the employer's ability to dismiss the workers collectively, the rule at issue merely gives the impression of being protective of workers. To begin with, that protection is only temporary until the employer becomes insolvent. Even more importantly, workers are best protected by an economic environment which fosters stable employment. Historically speaking, the idea of artificially maintaining employment relationships, in spite of unsound general economic foundations, has been tested and has utterly failed in certain political systems of yesteryear. That provides confirmation that, in laying down an effective yet flexible protective procedure, Directive 98/59 affords genuine protection for workers, whereas a system of prior authorisation such as that at issue, which tellingly falls outside its scope, does not. (AGET IRAKLIS, [2016] EUECJ C-201/15, Opinion of the Advocate General).*

Far less well known than the renowned cases of *Pringle* or *Gauweiler*,[35] the CJEU case of *Iraklis* dating from 2015,[36] is nevertheless also an exemplary child of the European crisis regime that grew up after financial collapse and of the anchoring of its economic utilitarianism within European Law. In legal doctrinal terms, the judgment is immediately shocking for its assertion of a freedom to conduct business (Article 16 TFEU) above the political-social mores of the Greek state, and thus its reformulation of a subjective right of entrepreneurial economic activity which is difficult, if not impossible to curtail. The observations of the Advocate General to the case are particularly revealing however: faced with a Greek law requiring consultation with an independent 'Economic Council' of experts prior to mass redundancies in the concrete industry, the AG's argumentative language is one of economics and not of law. Shocking enough: critical outrage only grows however, in strength in view of the AG's economic fatalism. The Greek state is a naïve child to be lectured about the

---

[33] See n12 above.

[34] Granted, this was always a judicial struggle; but see, See, for example, the EMA judgement (note 30 above) where the Court expanded the scope of limitations to be applied to Article 16, holding that objectives pursued in the field of 'public health' could justify restrictions upon its exercise. Within this Judgment, the Court also implied that the more general norms established within the Charter would themselves enhance potential for its limitation. Above all, in its justification for the restriction of Article 16, the Court explicitly referred to the objective recognised in the second sentence of Article 35 of the Charter (right to health care), which states that 'a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.'

[35] See cases, Thomas Pringle v Government of Ireland and Others, ECLI:EU:C:2012:756 & Gauweiler, ECLI:EU:C:2015:400.

[36] Case C-201/15 Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis EU:C:2016:972

economic facts of life. Markets are a given of observable human interaction and will supply workers with optimal welfare within their own objective realities and the technical frameworks of European regulation that are derived from observation of the market. Voluntaristic human agency, or normative intervention within markets is revealed, in this AG's historical reading, to be a chimera akin to raging against the rising of the sun and doomed only to end in counterproductive failure.

Naivete, however, is clearly the AG's to own as he mislays vast swathes of successful industrial and economic policy from the New Deal to the present day. Yet, the mere fact that senior jurists so casually and confidently voice their childish reproductions of a dominantly utilitarian economic orthodoxy is disturbing indeed, hinting not simply at the totalising subjection of law to a new economic determinism, but also at increasing disjunction between law and liberalism, or law as mediator within a liberal market-making that takes seriously its mission to place markets in a normative context of governing.

…Or epistemological error?

It might be tempting to dismiss the AG's opinion in *Iraklis* as a mere matter of ideology, a misplaced politicisation of juridical function. Nevertheless, the departure from the (ordo) liberal approach to circumscribed promotion of performative economic rights might also be argued to have its roots in a deeper shift in European and global economic law, in the search for a universal formulation of economic justice, and a legal misunderstanding or epistemological error, which equates economic science and modelling with an inevitability of citizen welfare in the unfolding realities of post-national economic operation.

If law is not a simple instrument of private economic interest, as suggested by Kantorowicz, the departure from liberal mores, from the (ordo-liberal) aspiration to counteract the power of private economic interest in service of a politically-determined competitive order, as well as the rejection of democratically-legitimated economic institutions, might perhaps be justified in the mind of the international jurist by a search for a universal justice to assert above partisan political process in the post-national arena. If it is uncomfortable to accept that modern economic law at the global level has ceded to neo-liberal ideologies, we can still wonder whether law has perhaps misplaced its liberal-procedural way, misunderstanding the relevance of modern economic expertise and science, and straining established legal institutions to their limits.

Iraklis, is a transformational judgment: it found that although a notification law would not *per se* breach European legislative provisions on collective redundancies, the freedom of establishment distilled from Article 49 TFEU, or the freedom to conduct business (Article 16), the national measure at issue was not 'proportionate' to its stated aims of labour protection or economic management. In

its reference to proportionality however, *Iraklis* revealed its derivative relationship with the by now infamous *Viking* and *Laval* cases of the CJEU's more recent single market jurisprudence.[37] Affording direct horizontal effect to economic rights of establishment and services (Articles 49 and 56 TFEU), *Viking* & *Laval* stand as paeon to economic theories of 'allocative efficiency', subjecting democratically-legitimated processes of collective bargaining, or socially cohesive and democratically legitimated mores, to the negating influence of economically performative rights; at the same time, emptying all the legitimating meaning out of the legal test of proportionality.

Iraklis reproduces these errors: rejecting 'the interests of the national economy' (paragraph 72) as grounds for limitation of business freedom, the judgment nevertheless recognises a series of social rights, including labour protection, as fundamental rights within EU law. However, the rub comes in the balancing of those rights by means of a principle of proportionality. The Greek law was not proportionate since it was formulated in 'general and imprecise' terms. At core the proportionality test is reduced to an absolutist market access test: [I]n the absence of details of the particular circumstances in which the power in question [might] be exercised, the employers concerned [did] not know in what specific objective circumstances that power [might] be applied, as the situations allowing its exercise [were] potentially numerous, undetermined and indeterminable and [left] the authority concerned a broad discretion that [was] difficult to review' (paragraph 36). Politics is no longer a matter for democratic decision-making, rather it is now a negative externality; an indistinct check on the pursuit of consumer/producer welfare which it is difficult for business to anticipate.

Just as *Viking* and *Laval* are celebrated as confirming rights to collective bargaining and rights to strike within the European Union, *Iraklis* can be viewed as a continuity case, affirming that Article 16 will be delimited in service of the general interest in labour protection. Yet, just as the proportionality test in the earlier cases results in the assertion of an entrepreneurial right above constitutionally legitimated processes of labour organisation,[38] *Iraklis* asserts a notion of business certainty above democratically legitimated processes of economic review. Seen in this light *Laval*, *Viking* and now *Iraklis* might be argued to represent the apotheosis of an aggressively liberating strand within internal market jurisprudence, which, by seeking to balance economic rights with social rights in accordance with the principle of proportionality, undermines more traditional, liberal or socialised, concepts of economic constitutionalism, which always regarded each order as separate

[37] Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti [2007] ECR I-1079 & Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet [2007] ECR I-11767.

[38] See, for analysis, Ch.Joerges & F.Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', (2009) 15:1 *European Law Journal* 1-19,

from one other; orders whose guiding values/purposes were to be established in isolation (within the European and national jurisdictions) from one another. Far from re-affirming social rights and democratic process, the Court has undermined social principles, illegitimately subjecting social rights to the economic imperatives which arise in the act of the balancing of social and economic rights, or to its pursuit of a concept of economic rather than social justice that emphasises protection for notion of 'competitive labour advantage'.

Trading the common good: an economic constitutionalism of respect and approximation

The epistemological error, the mistaken submission to the shift in understanding of the place of the market within social organisation, a post-liberal (neo-liberal?), post-democratic conception which posits a natural common good in an economic science of rational action and welfare maximisation, is damaging to law and legal method. What is more fatal for respect for the rule of law than a balancing exercise in proportionality, which is inevitably and always weighted in favour of individual entrepreneurial acts, the primacy of performative economic acts above all other human interests? The same would hold true, were the law not mistaken in its uncritical translation of economic modelling into economic determinism, were the modelling of economic science to be anything more than that, a simple propositional methodology with no claim to governing legitimacy; were it instead in fact rather than in a neo-liberal imagination, a key to a natural materialism with an inbuilt conduit to universal welfare. Utilitarian legal legitimacy is always elusive; the law, especially in its constitutional form, is always also just as surely called upon to respond to the full range of individual, plural and collective interest, to promote the *ought* rather than the *is.*

This point was never lost on the ordo-liberals. Refusal to be complicit within an '[I]dolatry of the factual,' was always and remains a core feature of the school of thought:[39] the private law society and its brains trust were counterfactuals, normative goods to be fought for through rhetorical persuasion (1930s) or political debate (1940s); by the same token, ordo-liberal expertise never laid claim to its own justice in material reality, rather, its liberal justice was one of an effort to create a common good in the preservation of social order within a price mechanism which was constructed as antithesis to the exercise of power. The point, however, should not be lost on us either: economic constitutionalism may, in some manifestations, have sought to preserve the relations of a pre-political private sphere, but it has never existed outside a vision of the common good, and/or a firm legal understanding of the relationship of the economy to seats of (democratic) political process/direction. And all of this for good reason: legal legitimacy is perhaps autonomous, self-

[39] See Böhm in 1937 (see above n18, p72), his dismissal of 'the wholesale worship of naked fact'; but also, far more recently, Mestmäcker, Ernst-Joachim, 'A Legal Theory Without Law - Posner v. Hayek on Economic Analysis of Law' (2008). Available at SSRN: https://ssrn.com/abstract=1168422.

referential in nature, but for exactly that reason cannot allow itself to be dominated by the claim to material universalism of a foreign outlook (economic science), cannot allow itself to be diverted by utilitarianism from its own normative mission.

We cannot conceive of the economic constitution in isolation from social mores, the common good, or the political constitution, a particular problem with regard to the post-national sphere of economic organisation; or perhaps not where the contemporary weakening of the WTO is understood to be not simply a matter of US frustration with China, its refusal to depart from a slow programme of state-managed market innovation, but is also precipitated by the growth of regionalism, bilateral and regional trade agreements, or efforts to reproduce the (social and political) advantages of European Union on other continents. The development is striking; the growth in regional institutions of economic (and social/political) integration is an exponential one.[40] Today, this growth is also taking place against the backdrop of financial, sovereign debt, pandemic and environmental crises, and the weakening of the dominance of welfare economics, as well as what might perhaps be argued to be a second post-colonial moment, precipitated by growing dissatisfaction with the failure of global trade to supply global justice.

The latter point may be speculative; but it is nevertheless beyond doubt that amongst a highly differentiated set of regional trade arrangements, we find groups or institutions, such as the G90 or African Union who have as their political aim a re-assertion of the search for global equality, also as regards preservation of the local social and political relations within which economic activity is embedded. Kang's observation is tellingly revealing: the policy of the WTO, as it has unfolded in law has determined that 'trade liberalization in a globalized world' no longer refers simply to competition between economies but has precipitated competition 'but between social systems'.[41]

Drawing on the works of Karl Polanyi, an increasing number of legal scholars have also remarked upon the degree to which the system of economic integration centred around the WTO has revealed in a new and intense manner the sets of social relations within which traded goods and services reside. As consequence, they have argued in favour of a return to a legal understanding of the economy as embedded in social (and political) relations which should, in their turn, be respected in legal process: property and economic rights are not material goods in themselves but constructed by the mores, including legal mores, in which they are secured.[42] The economic particularism inherent to this model recalls this analysis to a world of nation states with their own (post-conflict, post-dictatorial) combination of social and economic interests embedded within the political constitution,

[40] See above, n1 for detailed discussion.
[41] See above, n1.
[42] See above n5.

their own programme for the pursuit of a – more or less socialised – market within the political economy. We cannot pre-empt the evolution of the social, economic and political mores of a new world of regional integration; but, we can avoid our own epistemological errors in the effort to structure legal relations between states and post-national institutions within the pursuit of global trade, not only rejecting false universalisms in the idolatry of the facts of global trade, but also refraining from the spurious claim to global pursuit of economic constitutionalism: a claim that cannot be made good within the normative legal idiom, but which can act as a cloak for the illegitimate exercise of power, a paradoxical undermining of the thinking of ordo-liberalism, or the most developed of all forms of economic constitutionalism.

Certainly, the urge to universalism cannot and should not be expunged from law, even in its substantive rather procedural than form. Yet, beyond a mission to secure existential rights of economic security within a broader human rights discourse, international economic law should surely withdraw from its absolutism, must cede that it is a law of an global economic order rather than a law which is a global economic constitution, must work – as law always has – to delineate the law of the private market sphere, to balance its rights against other social rights and interests and to respect the intersection of that market with the extant and emerging (political) constitutions of nation states and regional organisations.

.