The Great Recurrence. Karl Polanyi and the Crises of the European Union

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Abstract: In his seminal 1944 book “The Great Transformation”, Polanyi describes the rise and fall of liberal capitalism during the long 19th century. Many have realized that Polanyi has a lot to tell about the European Union in the aftermath of the financial crisis. The paper begins with an overview of Polanyi’s historiography of the failure of 19th century liberal capitalism and his account of the four elements that helped liberal capitalism thrive, while precipitating its collapse - the idea of the self-regulating market, the gold standard, international peace, and liberal constitutionalism. Thereafter, the paper describes the particular transformations that these four elements underwent in the course of European integration and after the financial crisis, with a particular focus on the case law of the Court of Justice. The paper argues that their current constellation has a destructive potential that exceeds the economic dimension of the Union and might pave the way for a much greater failure, one that might defeat Europe’s greatest success: the establishment of peace. Ultimately, the paper assesses current reform proposals in light of these insights and makes a number of proposals for re-embedding the economy in society.

* Goethe University Frankfurt and Max Planck Institute for Comparative Public Law and International Law, goldmann@jur.uni-frankfurt.de. This paper is the substantially revised and expanded version of a keynote given at the doctoral meeting of the Budapest conference of Fédération Internationale de Droit Européen (FIDE). A French language version of the keynote was published in the proceedings of the FIDE conference. I would like to thank the organizers and especially Petra Lea Láncos for the occasion to think about these issues. For valuable feedback I am indebted to participants at the Budapest conference, at workshops at Birkbeck College London, Universidad de Cartagena de Indias, Università degli Studi di Torino, as well as to Kanad Bagchi, Armin von Bogdandy, Iris Canor, Francesco Costamagna, Sergio Dellavalle, Anuscheh Farahat, Christian Joerges, Silvia Steininger, and Neil Walker. The anonymous reviewer deserves recognition for the most helpful comments that an author could wish to obtain, and Benjamin Arens and SeoYoung Shin for their research assistance.
Introduction

In his seminal 1944 book “The Great Transformation”, Polanyi describes the rise and fall of liberal capitalism during the long 19th century. In a nutshell, he argues that liberal capitalism failed because markets that were supposed to be self-regulating were in fact not self-regulating. This had fatal consequences. The idea of the self-regulating market was entangled with three further characteristic elements of liberal capitalism – the gold standard, international peace, and constitutionalism. According to Polanyi, the combination of these four elements precipitated the fall of liberal capitalism.¹

I am not the first to realize that Polanyi has a lot to tell about the recent financial crisis and its aftermath. For example, Michelle Everson and Christian Joerges have analyzed how the European Union has turned money, labour and nature into fictitious commodities in the run-up to the crisis.² Nancy Fraser has investigated why we cannot expect a counter-movement to globalization like the labour movement in the 19th century.³ I consider it worthwhile to follow up on such analyses. I will apply Polanyi’s methodological toolbox to the European Union and explore whether the law and politics of the European Union have given rise to an entanglement of the modern-day equivalents of these four elements as constitutive parts of globalization, which might entail fatal consequences.

In the first part, I will describe Polanyi’s historiography of the failure of 19th century liberal capitalism and his account of the four elements that helped liberal capitalism thrive, while making it doomed at the same time. In the second part, I will describe the particular transformations that these four elements underwent in the course of European integration. In the third part, I will analyze the role of these four elements during the financial crisis and what I believe to be the destructive potential of their current constellation. Accordingly, and this will be my thesis, we should not only be concerned about the state of the European economy, but also about how the current entanglement of the four characteristic elements of liberal capitalism might pave the way for a much greater failure, one that might defeat Europe’s greatest success: the establishment of peace. I conclude with some suggestions as to how the European Union

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1 Karl Polanyi, The great transformation: The political and economic origins of our time (first published 1944, 2nd edn, Beacon Press 2001), ch. 1 and 2.
might wish to avoid such a consequence and achieve a more resilient shape against the backdrop of recent reform proposals.  

Before I move to the first part, a few disclaimers are in order. First, I will not approach the law of the European Union from an internal perspective that is first and foremost interested in the legality of a certain act. Rather, in line with Polanyi’s epistemology, I will carve out law in context, i.e. law in the interplay between politics, the economy, and society. My hope is to derive some general insights about the role of law in the stabilization of a market order that might inform the current reform process.

Second, let me be candid about my belief that history does not repeat itself. There are remarkable differences between 19th century liberal capitalism and the variety of capitalism adopted for the European Union since the 1970s in the era commonly known as globalization. Also, social structures like Polanyi’s four elements do not determine historical outcomes completely. It requires acting individuals to transform a potential disaster into an actual one. However, if we do not look at history and learn from past mistakes, we might sleepwalk into another human, political, economic and social catastrophe.

Part I. The Great Transformation – The Rise and Fall of Liberal Capitalism

1. The Rise of Liberal Capitalism

Polanyi argues in *The Great Transformation* that the “long” 19th century lasting from the French Revolution to the First World War experienced unprecedented levels of peace, stability, and growth. This resulted from the rise of liberal capitalism and a worldwide expansion of economic activity. Nevertheless, liberal capitalism suffered from a construction error. The way in which 19th century society and politics established and entrenched liberal capitalism bore the seed of its eventual decline, leading straight to the First World War, the mother of all catastrophes of the 20th century, and from there to fascist and communist rule and the Second World War. According to Polanyi, this was due to the fatal entanglement of four elements characterizing liberal capitalism.

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7 Polanyi’s work has been the subject of fierce criticism, especially by historians who see the development of markets as an evolutionary process rather than as a deliberate institution. See, e.g., the constructive critique by Charles P Kindleberger, “The Great Transformation” by Karl Polanyi’ (1974) 103 Daedalus 45, who accuses Polanyi of overlooking the social effects of the industrial mode of production; or the polemical critique by Christiane Eisenberg, ‘Embedding markets in temporal structures: a challenge to economic sociology and history’ (2011) 36 Historical Social Research/Historische Sozialforschung 55, who claims that the origins of markets
The first of these elements was the paradigm of the self-regulating market. This idea stemmed from the enlightenment, the era in which self-interest for the first time became acceptable as a moral principle and driver of human behavior. As Adam Smith famously held,

“[i]t is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.”

19th-century liberals thought that an economic order based on self-interest was self-regulating, a kind of natural order. The state should take a back seat in economic affairs, much unlike under the previous mercantilist era. While it might provide charity for the poor to prevent them from starvation, it should otherwise refrain from regulating the economy. “Laissez-faire” was the order of the day.

To make markets operate better and increase their efficiency, they should be international in scope. That would allow each nation to play out her competitive advantages, increasing the aggregate benefit for all. But international trade was believed to require stable exchange rates. Governments should not have the possibility to distort competition and rid themselves and their citizens from debt by devaluing their currency. This led to the second element, the gold standard. The gold standard tied the value of each participating currency to the price of a specified amount of gold, and states committed to issue only as much currency as they had gold in their vaults.

But international trade and the gold standard would only work if a third condition was put in place: international peace. Thus, compared to the preceding century, the 19th century experienced an unprecedented era of peace. Conflicts were mostly local, taking place in weak, peripheral states or the colonies. The major European powers largely avoided confrontations on the battlefield. After the Napoleonic Wars, during the period of restauration, the great powers were busy setting up international markets that would cater for the needs of a growing number of people, also to dispel the specter of revolution. This required peace. Metternich established the Holy Alliance for that purpose. It ensured peace until the revolutions around the middle of the century temporarily created a less stable environment.
with notable confrontations such as the Crimean war. Stability resumed again after the Franco-German war of 1871, and lasted until the outbreak of the First World War.\textsuperscript{11} During that period, financial markets took over the promotion of the peace interest from politics. By then, financial markets had gained considerable control of politics, in particular through “haute finance”:\textsuperscript{12} a handful of individuals that funded both states through a new international market for sovereign debt that financed the emerging welfare state, and private enterprises that provided much-needed employment opportunities. Again, the great powers simply could not afford to wage war against each other.

During that period, the economically potent segments of society availed themselves of another means to entrench their economic interests and prevent market intervention: \textit{Liberal constitutionalism}. The constitutions adopted during the second half of the 19th century made fiscal and budgetary authority dependent on parliamentary consent. Fundamental rights, especially the right to property, and a rising public law regime provided further checks on governmental interventions in the market, even if legal review of governmental action was the exception rather than the rule at the time.\textsuperscript{13}

\section*{2. The Fall of Liberal Capitalism}

How did the whole 19th century edifice of liberal capitalism collapse and end up in the disasters of the 20th century? According to Polanyi, the crucial mistake of liberal capitalism was the attempt to disembed the economy from society – to consider not just the market for products, but the entire economy as autonomous and self-regulating, and to commodify in that belief labour, nature (or land), and money regardless of the social consequences that this might cause.\textsuperscript{14}

Take labour markets as an example. The rise of labour markets terminated traditional occupational conditions in families, clans, guilds, workshops, and other contexts that had provided trust, solidarity and security. It transformed work into a commodity that became marketable irrespective of many of those social relationships. Filling the void and the ensuing insecurity would have required state interventions in the market to re-establish trust, solidarity and security. But that was exactly what the free market paradigm sought to avoid.

Indeed, the need for regulatory intervention might have been underestimated because past labour regulations had often been very poorly designed, causing disastrous effects. Polanyi’s principal example

\textsuperscript{11} Polanyi (n 1) 7.
\textsuperscript{12} Ibid., 10.
\textsuperscript{13} On the rise of constitutionalism during the 19th century, see Dieter Grimm, \textit{Constitutionalism: Past, present, and future} (Oxford University Press 2016) 89 et seq.
\textsuperscript{14} Polanyi (n 1), 71 et seq.; 210 et seq.
in that respect is the so-called Speenhamland law, a court ruling according to which the counties had to top-up the wages of rural workers up to a certain minimum. It introduced an incoherent kind of labour market. On the one hand, people had to earn a wage to receive the topping-up by the government. On the other hand, the regulation stifled any incentive to bargain for higher wages, which would only have reduced governmental subsidies. It thus prevented the formation of trade unions whose negotiating weight would have improved the lot of the masses of unskilled workers. The consequence was mass poverty, so that not only liberals, but also the working population themselves welcomed the abolishment of the Speenhamland law and the establishment of an entirely unregulated labour market.\textsuperscript{15}

This kind of unregulated liberal capitalism produced many social problems. Wages finally rose in the late 19th century,\textsuperscript{16} together with the emergence of the welfare state. But that came too late to dampen social tensions, and to prevent disaster from happening. In fact, these tensions ultimately generated calls for protectionist policies, hence, for economic disintegration. For example, Britain introduced the “Made in Britain” label to fend off competition from Germany, then the new kid on the block of industrialized economies. With economic disintegration on its way, the peace interest originally sustained by international trade declined. Tensions about colonial spheres of influence provided further potential for conflict. The fragile balance of power, Metternich’s and Bismarck’s legacy, began to falter. Constitutional constraints were too weak to provide meaningful resistance against the pull towards disintegration, and Europe sleepwalked into World War One.\textsuperscript{17}

Only the gold standard survived that episode. Indeed, after it had been suspended during the war, the gold standard was re-established as the only element of the pre-war constellation. Many considered it as necessary for the resuscitation of the economic order. But the gold standard required free trade, which did not come back to life. Rather, nationalistic, protectionist economic policies carried the day, triggering one economic catastrophe after the other during the not-so-roaring twenties, until it all fell apart in the Great Depression.

As we now understand, the gold standard fueled the fire in several respects.\textsuperscript{18} At the beginning of the Great Depression, it helped spread the crisis. When the Federal Reserve raised interest rates in 1928 to cool down an overheated economy, other states had to follow to prevent capital flight, even though it

\textsuperscript{15} Ibtd., chapter 7. The Speenhamland law failed because of the mistaken belief in the “iron law of wages”, i.e. the theory that wages would always tend towards the minimum wage as long as a growing population made the workforce increase – and that population growth would only decline if wages were low enough.


\textsuperscript{17} Christopher M. Clark, The sleepwalkers: How Europe went to war in 1914 (Allen Lane 2012) 121-167.

\textsuperscript{18} Anticipating such disasters: John Maynard Keynes, A Tract on Monetary Reform (Macmillan 1924) 127-8.
stalled their economy even further.\textsuperscript{19} Then, at the height of the crisis during the early 1930s, the gold standard hindered quick fixes. It prevented states from depreciating their currency to regain a competitive advantage and from inflating away their debts.\textsuperscript{20} The only choice they had was – austerity: cuts in public spending and wages while leaving taxes high – measures that only increased the crisis, especially if all states tried to do it at the same time.\textsuperscript{21} States ended up saving themselves to death. When the United States discontinued the gold standard in 1933, it was all too late. Hitler had risen to power, and the rest is history.

\textbf{Part II: The Great Integration – Europe from 1950 to 2015}

Again, I should emphasize that history does not repeat itself. But one might repeat the mistakes of the past. Polanyi observed four crucial factors whose particular combination turned out to be responsible for the rise and fall of 19\textsuperscript{th} century liberal capitalism. It therefore seems worthwhile to track the development of these four factors during the post-war period and analyze the risks inherent in their present constellation.

\textbf{1. Postwar Embeddedness}

First, as concerns \textit{international peace}, in the post-war period, Western European integration began on diametrically opposed terms. What had been a means to an end became an end in itself: the United States, the United Kingdom and France had an overwhelming peace interest. Not just to rebuild a war-ridden Europe, but also to fend off the threat of communism. Economic integration became the means to that end. Integration meant the common administration of crucial resources: coal steel, and atomic energy, not the establishment of a free market for those goods. As Walter Hallstein said, “We are not integrating economies, we are integrating politics”.\textsuperscript{22}

Certainly, the peace interest driving European integration did not amount to a complete demise of the market paradigm. The European Economic Community (EEC) indeed foresaw the development of a common market, a liberal counterweight to the more Keynesian welfare state policies. The latter fell into


\textsuperscript{20} Barry Eichengreen and Jeffrey Sachs, ‘Exchange rates and economic recovery in the 1930s’ (1985) 45 \textit{The Journal of Economic History} 925.


\textsuperscript{22} Quoted after Derek W Urwin, \textit{The community of Europe: A history of European integration since 1945} (Routledge 2014) 76.
the responsibilities of the member states, whose political institutions were deemed to possess the required legitimacy for that task. However, even the liberal element of that arrangement, the common market, did not simply remove any strings attached to market forces, but had to be built systematically by the EEC.

This was a slow process. The Commission governed it by harmonizing rules and standards for goods and services – at least up until the empty chair crisis stalled the Commission’s enthusiasm. Capital did not move freely at that time, in line with the Bretton Woods system that relied on strong capital controls. Common macroeconomic policies remained a distant goal. None of that was problematic, as the degree of market integration achieved at the time sufficed to allow for enormous growth under benign macroeconomic circumstances. Such an economic order did not require fully-fledged market liberalization. Hence, *Van Gent en Loos* and *Costa ENEL* did not strike down governmental regulation in favor of free markets. Rather, they ensured the supremacy of European law over contradicting domestic law. The market was largely embedded in politics and hence in society. Early European integration thus featured a healthy mix of free trade and governmental regulation that would control social distortions deriving from the market and entice solidarity. This mix reflects the idea of “Soziale Marktwirtschaft”, a highly popular concept from Germany. By contrast, the common market was a disappointment to ordoliberals, who had hoped that it would depoliticize the economy to a greater extent and allow them to overcome state interventionism.

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25 Urwin (n 22) 84ff.
26 Case C-26/62 Van Gend & Loos v Administratie der Belastingen [1963], ECLI:EU:C:1963:1.
27 Case C-6/64 Costa v E.N.E.L. [1964], ECLI:EU:C:1964:66.
30 See the dispute between Hallstein and Erhard recounted in Franz-Ulrich Willeke, ‘Die europäische Integration aus ordoliberaler Sicht’ in Heidelberger Jahrbücher (Springer Berlin Heidelberg 1994) 227 <http://dx.doi.org/10.1007/978-3-642-79348-6_13>
2. The Return of the Market Paradigm

Then something happened: the rise of the free market paradigm. It was a political project that began with the crises of the late 1960s and 1970s. It transformed the subservient role of the market to the peace interest of the post-war period and ended up emancipating the market from politics and society.

The political project was universal. It enlisted conservatives, liberals and social democrats alike among its supporters. It began long before Reagan and Thatcher embarked on their political projects, turning upside down the economic compass of their states as well as of international organizations with high macroeconomic leverage like the Organization for Economic Cooperation and Development, the International Monetary Fund, and the World Bank. In 1979, Helmut Schmidt and James Carter established what is now known as the G7. Everybody seemed to agree: Market liberalization would devise the way out of the economic crises of the 1970s. It helped that the cold war had become less menacing, thanks to the process started in the Conference on Security and Cooperation in Europe. This reduced the significance of the peace interest at the basis of European integration to the benefit of economic interests.

The rise of the market paradigm precipitated major changes in European law. In contrast to van Gent and Costa ENEL, Dassonville and even more so Cassis de Dijon advanced a free market paradigm. Dassonville prepared the ground by subjecting any governmental regulation to an examination whether it was causing discrimination to importers from other member states. Cassis boosted the market paradigm full throttle. Progress in market integration no longer depended on the Institutions – for imported goods, member states just had to accept the product regulations set by their peers, unless they could invoke a rare exception. This imposed strict legal limits on member states’ political range of maneuver to regulate the economy. In fact, “integration through law” (as opposed to politics) became the slogan of this period. Without any change to the treaties, the pro-active use of the fundamental freedoms and competition law blew a breach in domestic regulation for the advancement of the market.

31 The most consequent implementation of neoliberal policies took place in Chile: Karin Fischer, ‘The influence of neoliberals in Chile before, during, and after Pinochet’ in Philip Mirowski and Dieter Plehwe (eds), The road from Mont Pèlerin: The making of the neoliberal thought collective (Harvard University Press 2009) 305.
33 Case C-8/74 Procureur du Roi v Benoît and Gustave Dassonville [1974], ECLI:EU:C:1974:82.
34 Case C-120/78 Rewe v Bundesmonopolverwaltung für Branntwein [1979], ECLI:EU:C:1979:42.
35 Seminal: Mauro Cappelletti, Monica Seccombe and Joseph HH Weiler, Integration through law: Europe and the American federal experience, vol 1 (Walter de Gruyter 1986). Everson and Joerges (n 2) 645; 19 et seq.
36 Everson and Joerges (n 2) 645; Martin Höpner and Armin Schäfer, ‘Integration among unequals: How the heterogeneity of European varieties of capitalism shapes the social and democratic potential of the EU’ (2012) MpiFG Discussion Paper No 12-5, 19 et seq.
After the fall of the wall, market liberalism moved to yet another level. The peace interest behind European integration could eventually take a back seat. The end of history seemed in sight, and nothing would prevent or oppose the free play of forces in the new internal market that came with the Maastricht Treaty. The following decades brought immense progress in European law, not least thanks to the 1986 Single European Act, which facilitated the adoption of harmonization measures by qualified majority.\(^{37}\) This facilitated the exercise of the four freedoms. The ECJ contributed its part by recognizing that the freedom of establishment comprised the right of a corporation incorporated in one member state to establish a branch in another member state and carry out all its activities through that branch.\(^{38}\) While such measures removed market barriers, the protection of public interests did not experience a comparable level of Europeanization. This concerns especially taxation. While the ECJ had recognized the right of member states to prevent companies from moving towards another member state for tax purposes in 1988,\(^ {39}\) the mentioned expansion of the freedom of establishment undermined just that possibility to enforce tax law.\(^ {40}\) Moreover, the freedom of movement of capital enabled constructions like the now-infamous “Double Irish with a Dutch Sandwich”, a legal construction involving several letterbox companies to reduce the tax rate to a negligible level.\(^ {41}\)

To take market integration to another level, the Maastricht Treaty effectively established a gold standard for the European Union, as it came to be called, the Euro.\(^ {42}\) The Euro was supposed to reduce transaction costs and, more importantly, advance economic integration and help to overcome macroeconomic imbalances.\(^ {43}\) However, the Euro also allowed financial markets to gain more control over politics. In particular, it made borrowing more affordable and more attractive for countries in the periphery of the Euro area. All of a sudden, they could borrow in a strong currency that was credibly resilient to inflation and politically motivated devaluations. This, however, increasingly exposed the borrowers to market

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37 Art. 100a EC (Maastricht Treaty), now Art. 114 TFEU.
38 Notably Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen [1999], ECLI:EU:C:1999:126; Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [2002], ECLI:EU:C:2002:632; Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd [2003], ECLI:EU:C:2003:512.
39 Case C-81/87 The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC [1988], ECLI:EU:C:1988:456.
42 Everson and Joerges (n 2) 646 on the role of law in the monetary union.
43 Jürgen Habermas, ‘Im Sog der Technokratie: Ein Plädoyer für europäische Solidarität’ in Jürgen Habermas (ed), Im Sog der Technokratie: Kleinere politische Schriften XII (Suhrkamp 2013) 87.
discipline. Indeed, it was the whole purpose of the no-bailout clause in Art. 125 TFEU to ensure market discipline over member states’ budgets. A clear case of the commodification of public finance.\footnote{\textsuperscript{44} Cf. Alexander Ebner, ‘Transnational markets and the Polanyi problem’ in Christian Joerges and Josef Falke (eds), \textit{Karl Polanyi: Globalisation and the potential of law in transnational markets} (Hart 2011) 35.}

In that endeavor, the legal arrangement for the Eurozone greatly relied on the fourth of Polanyi’s elements, \textit{constitutionalization}. The aftermath of the Maastricht treaty is the period when we began to think about the European Union in terms of a constitution, whether described as a constitutional compound (“Verfassungsverbund”)\footnote{\textsuperscript{45} Ingolf Pernice, ‘Die Dritte Gewalt im europäischen Verfassungsverbund’ (1996) 31 Europarecht 27.} or a structure characterized by constitutional pluralism.\footnote{\textsuperscript{46} Neil MacCormick, ‘Beyond the Sovereign State’ (1993) 56 The Modern Law Review 1; Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 The Modern Law Review 317.} However, the European constitution of the time differed significantly from the idea of a constitution bequeathed from the 19th century. That idea refers to the normative framework of a polity which establishes, first, an institutional framework enabling government to exercise power, and second, limits to the powers of government in the form of fundamental rights guarantees.\footnote{\textsuperscript{47} Karl Loewenstein, \textit{Political Power and the Governmental Process} (1957) 123 et seq.; Giovanni Sartori, ‘Constitutionalism: A Preliminary Discussion’ (1962) 56 The American Political Science Review 853, 859; Grimm (n 13) 89-124.} Not only did the European constitution lack an explicit, binding codification of human rights until 2009, the case law of the ECJ notwithstanding. The European constitution also comprised a number of provisions that are supposed to limit the powers of government, but without a corresponding freedom. Rather, they entrench the disciplining power of the markets over politics.\footnote{\textsuperscript{48} Kaarlo Tuori, \textit{European constitutionalism} (Cambridge University Press 2015) 174ff. (“macroeconomic constitution”); Oliver Eberl and Florian Rödl, ‘Kritische Politische Ökonomie und radikale Demokratietheorie: Eine Begegnung auf der Suche nach der postneoliberalen Weltrechtsordnung’ (2010) 43 Kritische Justiz 416, 417-18 (“new constitutionalism”).} These provisions include the Maastricht criteria, a bunch of rather contingent benchmark requirements for joining the Eurozone;\footnote{\textsuperscript{49} Protocol on the convergence criteria referred to in Article 109j of the Treaty establishing the European Community, OJ C 191/85 of 29 July 1992.} provisions on budgetary discipline detailed in Art. 126 TFEU, including sanctions in case of violations; and the requirement of independent central banks in accordance with Art. 130 TFEU.

None of these provisions guarantees private liberty negatively understood as a space where the government has to keep out. But all of them create zones free from democratic politics where the state is subject to private market power, or to the power of an independent central bank whose monetary policy operations rely on the market. One could go as far as to say that while constitutions in the 19th century ensured elected politicians’ right to govern, the European constitution passed parts of that right to the market.
Ironically, the German Federal Constitutional Court has never let its concerns regarding the democratic deficit of the Economic and Monetary Union prompt it to demand tearing down the constitutional barrier between democratic politics and the markets established by these provisions. To the contrary. It has hailed precisely these barriers, which entrench a market paradigm, as the katechon of domestic democracy.

Granted, subsequent treaties introduced constitutional provisions that had the potential to strengthen the democratic legitimacy of the exercise of the Union’s power, now entrenched in Art. 9 to 12 TEU. For example, the Treaty of Maastricht introduced the co-decision procedure and Union citizenship. But the co-decision procedure does not apply in the crucial field of the Economic and Monetary Union. Here, markets continue to be shielded against democratic politics. Moreover, while the ECJ recognized the non-accessory character of Union citizenship as early as in Grzelczyk, Union citizenship has had a hard time to fully emancipate itself from the freedom of movement and become a right that did not depend on a person moving to another member state. When it finally did so in Ruiz Zambrano, it did not take long for the court to partly repeal its bold step in Dereci, and later strip Union citizenship of its social promise, its ability to open unrestricted access to the welfare state in other member states, as happened in Dano. Certainly, one might argue that the EU should not enable abuses of the welfare state. But that just shows how the market paradigm has become prevalent. If one understands peace in a substantive sense as including social peace and a certain level of solidarity, Dano lays bare the cracks in the idea of European integration as a peace project.

But how about human rights protection? Surely one should not gloss over the development of a Strasbourg-inspired human rights jurisprudence in Luxemburg, culminating in the integration of the Charter of Fundamental Rights into binding primary law, clearly one of the most significant constitutional transformations of the Union. Does not human rights protection in the European Union reflect the classical idea of a constitution? Is not the adoption of a human rights charter concomitant with the foundation of a polity based on the mutual recognition of a group of individuals as free and equal, a group that henceforth may ensure peace and solidarity among its members?

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50 BVerfGE 89, 155, 200 (Maastricht); 97, 350, 370 (Euro).
51 Cf. Everson and Joerges (n 2) 647.
52 BVerfGE 132, 195, 243, 248-9 (ESM).
53 Now Art. 294 TFEU.
54 Now Art. 9 TEU and Art. 20 TFEU.
56 Case C-34/09 Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm) [2011], ECLI:EU:C:2011:124
57 Case C-256/11 Murat Dereci and Others v Bundesministerium für Inneres [2011], ECLI:EU:C:2011:734
58 Case C-333/13 Elisabeta Dano and Florin Dano v Jobcenter Leipzig [2014], ECLI:EU:C:2014:2358
As a matter of fact, the ECJ’s human rights adjudication reflects the switch from an embedded market model to the free market paradigm. Early milestone cases—such as Internationale Handelsgesellschaft,\textsuperscript{59} Nold,\textsuperscript{60} Hauer,\textsuperscript{61} and even Mulder\textsuperscript{62}—still followed the postwar pattern of market embeddedness. Under pressure from Karlsruhe and other domestic courts, the European Court of Justice had reluctantly recognized fundamental rights as part of the Communities’ primary law. But the Court did not go out of its way to defend the interests of private market actors. Rather, in most of these cases, it held that the Community interest in regulatory intervention prevailed over private economic interests. Fundamental rights thus became a vehicle for the Court to preserve its claim to primacy over domestic courts.\textsuperscript{63} That changed significantly when the Court began using fundamental rights to reign into domestic law, desiring to remove barriers to trade that stemmed from the implementation of European law at the domestic level.\textsuperscript{64} Fundamental rights thus became enlisted in the spread of the free market paradigm, instead of forming a heroic defense line against oppressive government measures. In fact, the Court established a close rhetorical\textsuperscript{65} and intellectual connection between fundamental rights and fundamental freedoms. This trend reached a first peak in Schmidberger.\textsuperscript{66} Although the Court considered Austria’s non-action against protests on the Brenner transit route justified, it effectively put fundamental freedoms on a par with fundamental freedoms, using its proportionality test to exercise tight control over the degree to which the freedom of opinion might interfere with the market.\textsuperscript{67} The trend culminated in the Viking and Laval judgments, which executed a decisive blow to the freedom of collective bargaining as far as the Union legal order is concerned,\textsuperscript{68} “turning asymmetries in social protection between States productive as ‘comparative advantages.’”\textsuperscript{69}

\textsuperscript{60} Case 4/73 Nold v Commission [1974], ECLI:EU:C:1974:51.
\textsuperscript{61} Case 44/79 Hauer v Land Rheinland-Pfalz [1979], ECLI:EU:C:1979:290.
\textsuperscript{62} Case 120/86 J. Mulder v Minister van Landbouw en Visserij [1988], ECLI:EU:C:1988:213.
\textsuperscript{65} A google search for the phrase “fundamental rights and fundamental freedoms” prompted 324,000 results. A google search for the combined terms “fundamental rights and freedoms” and “Europe” even rendered 637,000 results.
\textsuperscript{66} Case C-112/00 Schmidberger v Austria [2003], ECLI:EU:C:2003:333.
\textsuperscript{67} That control was corroborated by the fact that the Court had previously held France responsible in an analogous case, cf. Case C-265/95 Commission v France [1997], ECLI:EU:C:1997:595.
\textsuperscript{68} Case C-438/05 International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti [2007], ECLI:EU:C:2007:772., see also Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets afdelning 1, Byggettan and Svenska Elektrikerförbundet [2007], ECLI:EU:C:2007:809.
The aftermath of September 11 offered the European institutions the chance to level-up their understanding of human rights and mature into beacons of human rights protection irrespective of any market interests. Looking back, however, one gets the impression of a missed opportunity. Certainly, human rights prevailed after all in many cases, but that the struggle was harder than expected. Take Kadi. One of the most outrageous assaults on civil liberties in decades. Yet the Court of First Instance found it very difficult to simply carry out a human rights assessment of the acts in question and chose a reductionist approach by focusing on *jus cogens* alone.  

Melloni raised similar concerns with regard to the European Arrest Warrant. The elevation of the Charter of Fundamental Rights to the level of primary law had little practical effect. Fundamental rights protection in Luxemburg remains weak and unreliable, especially when the case is – just – about fundamental rights, and not about free markets.

Certainly, I do not doubt the sincerity of those working at the Court of Justice of the European Union and their commitment to human and fundamental rights. And there were some victories, indeed. For example, the data retention directive was quashed, the right to be forgotten was upheld against Google, and Mr. Schrems prevailed over Facebook. But the latter two judgments concerned two non-European enterprises that enjoy quasi-monopolies in extremely important markets. To force them to observe certain standards appears as relevant for the establishment of fair competition as for the protection of privacy. And the judgment against the data retention directive has had effects that make it as beneficial for privacy as for business interests, given the enormous costs of data retention.

Yet there is a notable exception to the rule of market-driven human rights adjudication: anti-discrimination law. It started with equal pay prescriptions that had an economic background – avoiding unfair competition. In the course of several treaty revisions, and in a process that sometimes went two

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70 Case C-402/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], ECLI:EU:C:2008:461

71 Case C-399/11 Stefano Melloni v Ministerio Fiscal [2013], ECLI:EU:C:2013:107.


73 In this vein, arguing that fundamental rights protection in the European Union leads to (economic) empowerment, not to emancipation: Alexander Somek, ‘The Individualisation of Liberty: Europe’s Move from Emancipation to Empowerment’ (2015) 4 *Transnational Legal Theory* 258.

74 Joined Case C-293/12 and C-594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and natural Resources and Others and Kärntner Landesregierung and Others [2014], ECLI:EU:C:2014:238.

75 Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González [2014], ECLI:EU:C:2014:317.

76 Case C-362/14 Maximillian Schrems v Data Protection Commissioner [2015], ECLI:EU:C:2015:650.
steps forward and one backwards, anti-discrimination law in the EU has indeed emancipated itself from these origins.

The record of the Strasbourg Court is better inasmuch as it has been strongly committed to the peace ever since and not to market forces. Nevertheless, the European Convention on Human Rights and Fundamental Freedoms does not recognize socio-economic rights at all. And the accession of new member states after 1990 coincided with budgetary restrictions at the Council of Europe, constraining the ability of the Strasbourg Court to ensure human rights right at the time when it was most needed.

Outside courtrooms, human rights and democracy became a disguise for aggressive foreign policy, going hand in hand with economic interests. Like – though I should emphasize again that history does not repeat itself – like in the 19th century, war was relegated to the periphery. To the dusty deserts of godforsaken gulfs, where the Bushs and Blairs, the Powells and Powers did the utmost to defend their country – or was it just their economic interests? – at the borders of the Hindukush, as a German defence minister had it.

Sailing on top of all that were the modern revenants of “haute finance”. They engaged in a myriad of transactions on lightly regulated, international financial markets, benefitting from the absence of exchange rates within the Monetary Union, and catering to the financial needs of states deadlocked by the opposing forces of tax competition and constitutional budget rules, to the appetite for credit of large parts of the population in the West deprived of many formerly public services, and also to the thirst for money of a financial sector offering products that had few connections with the real economy. They were as different from old “haute finance” as an Italo-Western differs from an old-style Western: unattached, merciless, and post-heroic. Some good ones were among them, true, but more often than we liked, the bad and ugly ones prevailed. The rest is history.

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78 See now Art. 19 AEUV and the secondary law adopted on this basis.
80 Samantha Power, A problem from hell: America and the age of genocide (Basic Books 2002).
82 It seems that this deadlock contributed to the rise of public-private-partnerships in infrastructure investments, which help states manage the deadlock in the short term, but increase their bill in the long term. See Jens K. Roehrlich, Michael A. Lewis and Gerard George, ‘Are public–private partnerships a healthy option? A systematic literature review’ (2014) 113 Social Science & Medicine 110, 114.
Part III: The Great Recurrence

Again, the rise of largely disembedded markets entailed fatal consequences. It is almost trite to state that the existence of free, insufficiently regulated markets was an important factor for the occurrence of the financial crisis. This prompts the question whether Europe has been doing better this time than after the First World War. How have the modern-day equivalents of Polanyi’s four elements done since the crisis? Have they accelerated the crisis as a consequence of a similarly fatal entanglement?

First, *the free market paradigm* has been somewhat attenuated in many policy areas by more stringent regulation. Tax coordination and transparency have been greatly improved. Credit rating agencies have been regulated. CRD IV and CRR impose strict capital requirements on banks, and the Banking Union tries to break the vicious circle between banking crises and sovereign debt crises.

However, in the short term this has only led to a scarcity of credit, as banks need to step up their capital or try to clean their balance sheets of risky loans to protect their capital. In fact, market integration has actually been declining since the near-death experience of the economic order in 2008. The old European economic order characterized by current account and capital account surpluses of the “northern” states and corresponding deficits by the “southern” states has been challenged; intra-EU28 trade fell considerably as a result of the crisis, especially in the crisis-ridden states, reaching a low in 2012 at the height of the eurozone crisis. The northern states have increased their trade with third countries since

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86 Source: Eurostat <http://appsso.eurostat.ec.europa.eu/nui/show.do?query=BOOKMARK_DS-063319_QID_4576759_UID_-3F171EB0&layout=TIME,C,X,0;GEO,L,Y,0;INDIC ET,L,Z,0;SITC06,L,Z,1;PARTNER,L,Z,2;INDICATORS,C,Z,3;&zSelection=DS-063319PARTNER,EU28;DS-063319SITC06,TOTAL;DS-063319INDIC ET,PC_TOT_IMP;DS-063319INDICATORS,0BS_FLAG;&rankName1=PARTNER_1_2,-1_2&rankName2=SITC06_1_2,-1_2&rankName3=INDIC-ET_1_2,-1_2&rankName4=INDICATORS_1_2,-1_2>.
contraction or stagnation prevailed in the states of the periphery. Even more dramatic has been the public backlash against economic integration. Not all segments of society benefitted equally from free markets. The disadvantaged, whether on the political left or right, push for market disintegration, whether in the form of Brexit, or the resistance against the Transatlantic Trade and Investment Partnership (TTIP) or other treaties intended to re-establish, and supersede, the pre-crisis level of economic integration.

Despite tendencies towards economic disintegration, the Eurozone, the contemporary equivalent to the gold standard, remains. It has served as an amplifier that spreads the crisis from one country to the other, just like the gold standard before and during the Great Depression. This has created a need for several rounds of bail-outs, which entailed socially disruptive austerity in the states of the Eurozone periphery. The trouble is, however, that austerity does not help if adopted in a deep, structural crisis that requires profound changes, and even less so if all member states of one integrated economic space adopt such policies at the same time. Also, as Polanyi observed with respect to the emergence of pasture and the wool production in England, economic transformations are all the more disruptive to society the faster they occur, leaving the people who lose their jobs and businesses with no time to adjust to changed circumstances. The European Central Bank, under much criticism from the economic orthodoxy, tries to prevent the worst effects of the present transformation by its controversial expansionary monetary policies. It has been argued that this is merely buying time.

With the pressure of market integration taken off its shoulders and the economic constrains amplified by the Eurozone, liberal constitutionalism shows its true face. On the one hand, European constitutionalization still restricts economic policy, including deficit spending at the domestic level. The Fiscal Compact obliges member states to adopt deficit brakes as constitutional requirements; the Two-Pack and Six-Pack stipulate further requirements for domestic budgetary policy, and so do the

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88 Blyth (n 21).
89 Polanyi (n 1) 39-40.
90 Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag [2015], ECLI:EU:C:2015:400.
91 Streeck (n 81).
92 Cf. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012.
independent fiscal institutions promoted by the Commission. Complaints about the democratic deficit of the ensuing structure abound.

On the other hand, fundamental rights, the element of constitutionalism that should protect citizens, not the market, and ensure social peace, remained at the margins. It took the ECJ several attempts before it recognized the significance of fundamental rights for the resolution of the sovereign debt crisis in *Ledra*. In that case, the public interest again prevailed over property rights. But the public interest was redefined in a decisive way. In *Nold, Hauer* and other cases from the early period of European fundamental rights adjudication, the Court gave preference to regulatory intervention by the Commission in the interest of socio-economic policy goals that embedded the market in society. In *Ledra*, the Court ratified a scheme for the stabilization of financial markets at great social cost. In addition, while the *Ledra* case devised an effective legal remedy for investors who lost property rights in a sovereign debt restructuring, by virtue of Art. 263(4) TFEU, citizens affected by austerity measures adopted in the wake of such a restructuring are having a much harder time to request the Court to review the conformity of memoranda of understanding with their fundamental rights. Strategies to attack domestic austerity measures and approaching the Court by way of a preliminary reference have to confront the difficulty that they do not strictly implement EU law as memoranda of understanding are non-binding. Fundamental rights protection is therefore rather scarce to come by where it would matter most these days.

The same is true with respect to labour law, where the Court produced a sequel to *Viking* by pitching once again the European economic constitution against collective labour rights. In *FNV Kiem* the Court prohibited the collective organization of self-employed persons, in that case of freelance orchestra musicians that fought for employment conditions comparable to those of their colleagues in permanent positions. Instead of recognizing the freedom of collective bargaining to this new quasi-working class of precarious freelancers, the Court applied competition law.

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98 Cf. Case C-128/12 Sindicato dos Bancários de Norte v Banco Português de Negócios SA [2013], ECLI:EU:C:2013:149, Case C-264/12 Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial [2014], ECLI:EU:C:2014:2036.
100 Case C-413/13 FVM Kiem v Netherlands [2014], ECLI:EU:C:2014:2411.
As if this was not enough, the political forces that instigate popular wrath against the failures of globalization and surf on its wave into the highest offices ironically discovered the rule of law and the enforcement of fundamental rights as a target of their nationalistic furor – and not the economic and regulatory causes nourishing such failure. It has now become a bitter rite of passage for aspiring authoritarian governments to take steps to weaken their constitutional courts as soon as they enter office. The Polish government savaged the Constitutional Court by refusing to appoint elected judges and to promulgate the Court’s decisions. The Hungarian constitutional court, once brought under government control, declared the redistribution of migrants by the Council to be in violation of Hungary’s constitutional identity. Unexpected support for the backlash against the rule of law came from the UK, despite its long rule of law tradition. It has seen the ECtHR and the ECJ being made subject of populist attack – not to mention the abusive treatment of its very own highest judicial personnel following Miller. One certainly cannot claim that the activist use of fundamental rights adjudication to re-embed the market in society would have prevented such outbursts. But it might be easier to rally support for the rule of law if it was perceived as crucial for embedding the economy in society.

To recap, while the stagnation and political backlash against trade undermines the economic and social basis of European integration, the sovereign debt crisis and liberal constitutionalism undermine European solidarity and restrict the range of measures available to dampen the effects of the crisis. In this situation, one might wonder what the effect will be on the fourth of Polanyi’s elements, international peace. There is no open war in Europe’s center at this moment – but the conflict in Eastern Ukraine brought us a revival of the cold war. One might assume that the crisis-ridden Union did not seem strong enough to deter Russian intervention. Further, Europe is now experiencing in the most dramatic way the consequences of America’s and its own foreign policy failures. The rise of ISIS and the refugee crisis is testament to the ineffectiveness of democratic interventionism since the 1990s. And the 2016 deal with Turkey about the return of refugees, unstable as it may be, is based on the logic of do-ut-des, an exchange of people against money. Peace in that constellation is no end in itself, but a question of money, a function of our economic interest not to further destabilize Greece and other weak member states at the periphery, not the other way round. This is much to the taste of the vulgar, economistic ethics advocated by a dramatically rising right-wing populist movement – arguably the biggest transnational political movement since socialism, which is slowly becoming another threat to the peace. All that might sound

103 R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union, [2017] UKSC 5, on appeals from [2016] EWHC 2768 (Admin) and [2016] NIQB 85.
familiar – only that this time is indeed different inasmuch as, given the prevalence of financial services over industrial production in the economy, counter-movements face a severe structural disadvantage.104

What now? The Reform of the European Union

Again, history does not repeat itself. But we do have reason to be concerned about repeating past mistakes, given that the four characteristic attributes of economic liberalism identified by Polanyi again form a constellation that looks highly unstable. Like the gold standard in the 1920s, the euro survived a crisis that damaged the market which the currency is supposed to integrate, leading to seemingly never-ending, now constitutionally entrenched austerity. It is currently an open issue whether constitutional orders in Europe are resilient enough to protect democracy and human rights against a wave of nationalistic populism.

In this precarious situation, I would like to make a few tentative proposals. They are guided by the four elements whose interaction Polanyi showed to be pivotal. The first one is international peace, understood here not only negatively as the absence of war, but also positively as the effective enjoyment of liberty by every individual.105 This kind of peace should again become the end to which Europe’s economic integration is the means. For that purpose I propose to take seriously Polanyi’s most basic insight and to re-embed the economy in society. This entails two ramifications for the reform of the European Union.

The first ramification affects the finalité of the Union. Europe must not be reduced to a free trade zone, but needs to be emphatically understood as a political project that requires a relatively high degree of solidarity. Otherwise, it is likely to disintegrate because of the tensions generated by a market with the potential to disembend social relations, but without effective political control. The idea to reduce the Union to a single market should therefore be laid to rest.106 It is untenable that member states wish to benefit from the single market while rejecting policies that address important risks for European solidarity, whether they originate in the market or not. This applies to the attitude prevalent in some hard-currency countries which demand that fiscal discipline be observed while turning a blind eye on the dire social consequences and divisive effects of such policies. The same is true for the attitude of member states which refuse to share the burden of the refugee crisis. One cannot demand economic integration while discarding solidarity. If solidarity erodes, little would tame the unfettered forces of the market.

The first ramification also gives rise to doubts about the idea of a core Europe moving ahead with integration at a faster pace, creates the risk of center-periphery tensions. Under the threat of

104 Fraser (n 3) at 123-4.
106 Cf. European Commission (n 4) 18.
marginalization, the periphery might try to undercut the standards of the center, prompting the latter to take action against the countries in the periphery. Less divisive seems a scenario under which the Union would greatly expand its range of activities to increase solidarity, but this scenario might be the least feasible one. Decades of de-solidarization cannot easily be undone. As a compromise, the Union might choose to refocus its activities and enhance cooperation in fields with great benefits from supranational co-operation like the economic and monetary union, migration and border management, or technological development, while unwinding harmonization in more mundane areas.107

The second ramification of the idea to re-embed the economy in society is the need to strengthen the democratic legitimacy of independent and technocratic European institutions. If economic integration is to work for society, then someone needs to be able to define the interests of society in a legitimate way. As the debate about Europe’s democratic deficit has been ongoing for several decades,108 there is no scarcity of ideas. Antoine Vauchez has argued that the Union institutions which are not driven by member state governments, but enjoy a comparatively high level of independence and expertise like the Commission, the CJEU, and the ECB – and one should add the “Troika” for the surveillance of member states receiving ESM support – are not only the most powerful institutions, but also those subject to the comparatively lowest levels of democratic control.109 While differences in the kind and intensity of public authority exercised by different institutions justify different levels of legitimacy for them, the present repartition of democratic legitimacy among the institutions seems to reflect the inverse of the repartition of public authority.

Subjecting the institutions to closer control by the European Parliament would cure some of the deficit. Certainly, there is little reason to idealize the European Parliament’s democratic legitimacy. There is no European public sphere like there are domestic public spheres. However, stepping up the role of the Parliament in the selection and control of decision-makers in the ECB, the Commission, and the Court, and equipping it with a right of initiative, might in turn enhance Europe-wide discourse on crucial policy choices in which the different options are represented by different candidates. Also, strengthening the role of Parliament would be the most convenient and promising way of replacing divisions along national borders by divisions along cross-national groups, such as the traditional cleavages between centre and

107 Id., at 20-25.
109 Antoine Vauchez, Démocratiser l’Europe (Seuil 2014).
periphery, or between capital and labour.\textsuperscript{110} Certainly, this reform would require an ordinary revision of the treaties in accordance with Art. 48 (2)-(5) TEU. But would the people in member states with an obligatory referendum oppose a measured, transparent reform that brings the European institutions closer to them? Would such a reform stir the same eurosceptic, anti-elite and anti-government sentiment as the failed Constitutional Treaty? Populists would certainly oppose that reform as they draw their lifeblood from the failure of non-populist politics. But how would they find support for a platform that opposes the slaying of arcane institutional traditions?

Moving on to Polanyi’s second element, it is submitted that Europe as a political project requires a different form of \textit{constitutionalization}. Not a super-state, but one that is able to confront market powers for the benefit of its citizens based on democracy, human rights and the rule of law.\textsuperscript{111} Constitutionalization thus needs to ensure the coherent interplay of free markets and regulatory interventions to ensure their embeddedness.

This calls for a much stronger recognition of social rights at the European level. The Court needs to go beyond \textit{Ledra}\textsuperscript{112} and enforce the economic and social rights of the citizens affected by austerity – the very rights that its own charter recognizes in its title on solidarity,\textsuperscript{113} not only those of wealthy depositors. Indeed, the commission has revealed a plan for adding a social pillar to the union to breathe new life into these provisions.\textsuperscript{114} It is not enough to further democratize the Union, as desirable as this might be. Rather, there need to be some backstops in the form of social rights and policies preventing politics from becoming a vehicle of unfettered market interests. Hearing the signals, in its recent \textit{AGET Iraklis} judgment, the Court recognized the social function of the freedom to conduct a business and accepted limitations of that freedom in order to ensure a high level of employment, as required by Art. 151 TFEU, and to protect workers against unjustified dismissal in accordance with Art. 30 of the EU Fundamental Rights Charter.\textsuperscript{115} Along similar lines, in \textit{Erzberger},\textsuperscript{116} the Court defended the German rules on the representation of workers in companies’ supervisory bodies against the freedom of movement – despite

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\textsuperscript{112} Cf. above (n 97).

\textsuperscript{113} Charter of Fundamental Rights of the European Union, Arts. 27-38.

\textsuperscript{114} Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Launching a consultation on a European Pillar of Social Rights’ (Communication) COM(2016) 127 final.

\textsuperscript{115} Case C-201/15 Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis [2016], ECLI:EU:C:2016:972.

\textsuperscript{116} Case C-366/15, Konrad Erzberger v TUI AG [2017], ECLI:EU:C:2017:562.
the Commission expressing the view that these rules should be overturned.\textsuperscript{117} These decisions show that a more social constitution does not necessarily depend on treaty amendments. Rather, it requires a rethinking of the way in which the law is applied. Note that important steps during the rise of the market paradigm since about 1970 occurred through re-interpretations of the treaties. It is time to change the direction of that trend.

Progress in the constitutionalization of the European order will, however, only succeed if the Union and the member states pull on the same string. The member states are crucial constituents of the Union, which derives its legitimacy as much from the member states as from the citizens.\textsuperscript{118} A more democratic, social constitution for Europe will therefore only succeed in hedging the disembedding tendencies of markets if it is fully realized at the member state level.\textsuperscript{119} In that respect, the insufficiency of the Rule of Law Framework for the European Union\textsuperscript{120} is not only a risk to democracy and the rule of law as such, but also an obstacle to the project of re-embedding the economy in society.

Coming now to the third of Polanyi’s elements, the \textit{gold standard}, it seems obvious that little would be gained by market integration through a common currency if it led to political disintegration, as it has been the case since the beginning of the European sovereign debt crisis. Assuming that winding down the Euro would constitute too high a risk for peace and prosperity, how can the Eurozone be transformed into a politically integrative institution? It has often been proposed to upgrade the Economic and Monetary Union into a fully-fledged economic union including Eurobonds or other redistributive components. That would require much closer cooperation in matters of fiscal policy up to the point where domestic budgetary decisions require approval at the European level.\textsuperscript{121} Unless such procedures take place in a truly democratic setting, they might turn out to be heavily divisive.\textsuperscript{122} It therefore seems apposite to look for alternative or complementary measures that would stabilize fiscal policy in the Eurozone. One option

\begin{footnotes}
\footnotetext[118]{Armin von Bogdandy, ‘Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung: Gängige Missverständnisse des Maastricht-Urteils und deren Gründe (BVerfGE 89, 155 ff.)’ (2000) 83 \textit{Kritische Vierteljahresschrift} 284.}
\footnotetext[119]{R. Daniel Kelemen, ‘Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union’ (2017) 52 \textit{Government and Opposition} 211.}
\footnotetext[121]{Cf. Herman Van Rompuy and others, ‘Towards a genuine economic and monetary union’ (2012) 5 European Council, 5 December 2012 <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf> accessed 21 April 2017. Remarkably, this has been proposed throughout the political spectrum, yet with decisive differences regarding the democratic character of such a fiscal union. See Habermas (n 43).}
\footnotetext[122]{In their 2015 report, the five presidents therefore hasten to emphasize that the envisaged fiscal stabilization function will not amount to permanent transfers. See Jean-Claude Juncker and others, ‘Completing Europe’s economic and monetary union’ (2015) European Commission <https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf> accessed 22 April 2017, 15.}
\end{footnotes}
would be to repair the root causes of the crisis and address macroeconomic imbalances, including cases of excessive current account surplus. As there is no exchange rate between the Eurozone members to counterbalance such situations, politics need to reduce them, and solidarity requires all member states to bear the burden equally. Instead of imposing sanctions on those with excessive current account surpluses or deficits, it might be a smarter option to require the former to contribute to investments in the entire Union, including investments in research and education and the provision of risk capital. This might be a politically more acceptable approach than that of the policeman which imposes strict discipline on countries on the basis of often doubtful growth projections. Another option would be to increase revenue and prevent the free movement of capital from undermining the tax base by effectively reducing tax competition and closing persisting loopholes by harmonization measures in accordance with Art. 115 TFEU.

As concerns the last of Polanyi’s elements, market integration needs to foster prosperity without disrupting solidarity. This requires, first and foremost, sound regulation. As far as financial markets are concerned, the Banking Union has been a great start, but it is still incomplete. It lacks a common deposit guarantee scheme, and a truly common resolution fund. And the more supervisory power remains exclusively in the hands of domestic authorities, the more cracks might appear in the administrative structure that embeds a rather coherent financial market in society. As it stands now, a new crisis might bring the whole edifice to a collapse.

A more resilient Banking Union might also restore confidence and boost investment, together with a Capital Markets Union. Further, international trade and investment agreements might actually contribute to economic growth, provided that their negative effects, both financial – especially for the less educated, less wealthy – and regulatory, would be counterbalanced by appropriate measures, including effective and

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democratic regulation, fair taxation, and the recognition of the rights of vulnerable groups and their economic interests.\textsuperscript{127}

Finally, European economic integration might facilitate long-term solutions to the recent refugee influx into Europe, as it would support their integration into the labour market. What would better unite Europe’s peace interest with its market integration and make the latter serve the former than this? The policy response to the financial crisis therefore needs to go hand in hand with that to the refugee crisis. Not in a \textit{do-ut-des} fashion that instrumentalizes refugees for economic ends, but by instrumentalizing economic integration and making it work for Europe’s peace interest. In that respect, generous freedom of movement rights for refugees\textsuperscript{128} would assign new value to this crucial, but recently much defied pillar of European integration, vindicating its significance and advantages for the non-privileged.

Granted, many of these ideas deserve much closer study. Yet on the whole, do they appear unfeasible? Many thought this was the case regarding the courageous attempts of the founding fathers of European integration to re-embed the economy in society after the Second World War. They knew that democratic regimes devoid of economic potential and unable to achieve social integration might falter quickly. This should be a warning to us all.
