The Rationale of Economics and Law in the Aftermath of the Crisis: A Lesson from Michel Foucault

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Economic and financial crisis – Institutional response and constitutional changes in the area of economic governance – Relationship between the European Union and the member states – Interpretation – Two concepts elaborated by Michel Foucault – 'Pastorship' and 'Discipline' – The deep sense of the new techniques of government in this area – The role of the Court of Justice – The position of national judges.

Introduction

The economic and financial crisis has generated a complex institutional response involving profound changes that are the focus of intense debate.[1] This paper examines the nature and the scope of some of these constitutional changes and in particular those concerning the relationship between the European Union and the member states in the area of economic governance. More specifically, it aims to analyse the role that legal and economic rationales play in this context.

Firstly, we will mention some characteristics of 'Integration Through Law', which has long represented the central element of the EU legal system, before moving on to look at the conceptual framework of the new economic governance that has progressively evolved alongside it. There will then be a brief reminder of the normative measures introduced in the wake of the crisis concerning the

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[1] For an overview on this theme *see*, for example, A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); K.A. Armstrong, 'The New Governance of EU Fiscal Discipline', 38 *EL Rev* (2013) p. 601.

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coordination of economic policies, the control over the draft budgetary plans of the member states and the mechanisms for financial assistance, as background for an interpretation using two concepts elaborated by Michel Foucault: 'pastorship' and 'discipline'. This should allow for an understanding of the deeper sense of the new techniques of government in this area which have ended up involving also the Court of Justice and the national judges. Finally, some brief remarks will be formulated on the possible reform of the system.

Given that this subject is both complex and very familiar, knowledge of some circumstances, normative data and facts is assumed. Our focus here is primarily on the instruments that concern the Euro zone.

'Integration through law' and the 'new governance'

The fundamental characteristics of European constitutional law are well-known. Firstly, the European Union is a Community based on the rule of law (Article 2 TEU), where '[n]either Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'. In fact, 'the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions';[2] a review which includes also the respect on the part of the institutions of the general principles of law and fundamental rights[3]. The European Court of Justice hence has a key function in protecting the rights of individuals.[4]

Secondly, European law has been able to find a balance (which has varied over time) between law, politics and economics. This balance is summed up in the familiar formula 'integration through law',[5] which means that it is the law itself

[2] ECJ 23 April 1986, Case C-294/83, *Parti écologiste 'Les Verts'* v *European Parliament*, para. 23; amongst subsequent judgments, *see for example* ECJ 25 July 2002, Case C-50/00, *Unión de Pequeños Agricultores* v *Council of the European Union*, paras. 38-40; ECJ 3 September 2008, Cases C-502/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, para. 281; GC 8 October 2008, Case T-411/06, *Sogelma* v *EAR*, paras. 36-37. On the '*Les Verts*' judgment, *see*, amongst others, K. Lenaerts, 'The Basic Constitutional Character of a Community Based on the Rule of Law', in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law* (Hart Publishing 2010) p. 293-315.

[3] ECJ July 2002, Case C-50/00 *Unión de Pequeños Agricultores* v *Council of the European Union*, para. 38.

[4] In general, amongst many, *see* L. Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', 6 *EuConst* (2010) p. 359-396; F.C. Mayer, 'Europa als Rechtsgemeinschaft', in G.F. Schuppert et al. (eds.), *Europawissenschaft* (Nomos 2005) p. 429-487; *see also* R. Dehousse, *The European Court of Justice* (Macmillan 1998), in particular chs. 2 and 3.

[5] J.H.H. Weiler, 'The Community System: the Dual Character of Supranationalism', 1 *Yearbook of European Law* (1981) p. 267-306.

that represents both the subject and the instrument of integration. The 'Community Method', referring to the division of tasks between the Commission, the Council and the European Parliament in the main decisional processes, together with the central role played by the Court of Justice (and national judges),[6] can be considered as a similar way to define these institutional dynamics.[7] In the majority of cases, the instruments typical of this model consist of binding legal acts[8] accompanied by the primacy and at times the direct effect of EU law within national legal orders.[9]

Thirdly, the EU legal system is characterised by institutional pluralism. The idea of 'deliberative supranationalism' helps to frame this dimension.[10] Briefly, according to this conception, EU law can increase the democratic potential of the States, ensuring that '"foreign" identities and their interests' be taken into account within their decision-making processes.[11] For example, the States cannot look after their own interests only, but they must respect the fundamental freedoms (which in turn are linked to other national legal systems and to that of the EU) and they must act in conformity with EU norms. In the same way, EU law must allow for the identification of rules and principles that make the compatibility and co-existence of different national constituencies possible. All this takes place through the adaptation of internal legislation to the needs of cooperation and commitment oriented towards problem resolution.

The idea of 'deliberative supranationalism' explains the reasons why in the EU legal system numerous legal instruments are provided for to resolve differences of opinion and of interests between the EU institutions, the European agencies, the States and the domestic authorities.[12] Such procedures are present in many areas

[6] *See* e.g. Commission, *European Governance – A White Paper*, COM (2001) 428 def, 5.

[7] R. Dehousse et al., *The 'Community Method': Obstinate or Obsolete?* (Palgrave Macmillan 2011).

[8] For a review, *see* J. Bast 'Legal Instruments and Judicial Protection', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart Publishing, Beck Verlag 2009) p. 345-397. This obviously does not exclude the fact that also the instruments of *soft law* can play an important role: *see*, for example, O. Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Wolters Kluwer 2013).

[9] J.H.H. Weiler, 'The Transformation of Europe', 100 *The Yale Law Journal* (1991) p. 2403-2483.

[10] C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', 3 *ELJ* (1997) p. 273; C. Joerges and J. Neyer, *'Deliberative Supranationalism' Revisited*, EUI LAW, 2006/20; C. Joerges, 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form', in C. Joerges and E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart Publishing 2011) p. 413 ff.

[11] Joerges and Neyer 1997, *supra* n. 10, p. 294.

[12] T. Börzel, 'European Governance: Negotiation and Competition in the Shadow of Hierarchy', 48 *JCMS* (2010) p. 191. It can happen that disagreements arise for which no specific rules of composition have been established by EU law; however, these are exceptional circumstances which, until today, have not called into question the overall resistance of the system. *See*, for example, the

of activity of the EU: the example can be used here of the ordinary legislative procedure, which contains a series of mechanisms aimed at settling disagreements between the Council and the Parliament (Article 294 TFEU). The same can be said of the executive activity: the concept of integrated administration (or *Verwaltungsverbund* or similar constructs)[13] – which revolves around the idea of collaboration in the various areas between national and European administrative bodies – can certainly be defined as an important set of legal devices aimed at transforming conflict (to repeat: differences of opinion or of interests) into cooperation.[14] Another example is the infringement procedure, whose pre-litigation phase represents 'a process of negotiation' aimed at facilitating friendly solutions to conflicts between the Commission and the member state concerned (Article 258 TFEU).[15] In all these cases, the conflict resolution procedure is aimed at reaching an acceptable balance between the different public interests.[16]

To sum up, legal devices have been pivotal in the governing of the political and economic dynamics of the EU. Despite a series of changes in the course of time, they have stabilised into the management of two types of pluralism: institutional and values.[17] The EU has always been a legal system oriented towards the market that at times has challenged national social legislation, but which has been able to guarantee a balance between unity and differentiation, very often de-dramatising the problem of democratic legitimisation of the EU legal system.[18]

However, for more than two decades there has been a progressive rise of 'new governance', in which the characteristics of the 'Community method'

decision of the Constitutional Court of the Czech Republic, which declared a judgment of the ECJ inapplicable: R. Zbíral, 'Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12 – A Legal revolution or Negligible Episode?', 49 *CMLR* (2012) p. 1475 ff, as well as J. Komárek, 'Playing With Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires, 8 *EuConst* (2012) p. 323-337. For an overview, *see* I. Pernice, 'The Autonomy of the EU Legal Order', WHI - PAPER 08/2013, p. 11.

[13] For all, *see* O.D.M.L. Jansen and B. Schöndorf-Haubold et al., *The European Composite Administration* (Antwerp 2011).

[14] L. De Lucia, 'Conflict and cooperation within European composite administration (between Philia and Eris)', 5 *Review of European Administrative Law* (2012) p. 43-77.

[15] ECJ 14 November 2013, Case C-514/11 P and 605/11 P, *LPN and Finland* v *Commission*, para. 63. *See* L. Prete and B. Smulders, 'The Coming of Age of Infringement Proceedings', 47 *CMLR* (2010) p. 9.

[16] In general terms, G. Majone, 'Delegation of Regulatory Powers in a Mixed Polity', 8 *ELJ* (2002) p. 319 ff.

[17] This is very clear, for example, in the jurisprudence and the legislation regarding the single market: *see* J.H.H. Weiler, 'The Constitution of the Common Market Place: Text and Context', in P. Craig and G. de Bùrca (eds.), *The Evolution of the Free Movement of Goods in the Evolution of EU Law* (Oxford University Press 1999) p. 349-375.

[18] *See* e.g. M.P. Maduro, *We The Court. The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998), especially chs 4 and 5.

(the centrality of the rule of law and the European Court of Justice, the use of binding legal instruments, the deliberative government of institutional pluralism, etc.) take on a minor role.[19] 'New governance' in general refers to a way to govern certain areas (of State competence) consisting prevalently of instruments of soft law.[20] However, it would be a mistake to compare the 'Community method' with 'new governance': in fact, the latter is often located within a legal framework established by *hard law,* where acts with different legal strength co-exist.[21] Amongst these techniques, for example, the definition by the Council of the objectives which the States must reach, the use of tools to measure the results achieved (statistics, indicators and benchmarking), and the exchange of best practices stand out, all of which are under the supervision of the Commission.[22]

In this environment the 'open method of co-ordination', foreseen by the Maastricht Treaty concerning the centralised management of the monetary union and aimed at guaranteeing a long-lasting convergence of the economic results of the member states, takes on particular importance.[23] In its original version, economic governance consisted of 'multilateral surveillance' of national economic policies, as well as the monitoring of excessive government deficits that could result – although an eventuality long-considered improbable[24] – in sanctions being applied to the non-complying member state.[25]

[19] K.A. Armstrong, 'The Character of EU Law and Governance: From "Community Method" to New Modes of Governance', 64 *Current Legal Problems* (2011) p. 179 ff; M. Dawson, 'Three Waves of New Governance in the European Union', 36 *EL Rev* (2011) p. 208 ff.

[20] C.F. Sabel and J, Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', 14 *ELJ* (2008) p. 271-327; D.M. Trubek and L.G. Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation', 13 *Columbia Journal of European Law* (2007) p. 539-564; G. de Búrca and J. Scott, *Law and New Governance in the EU and the US* (Hart Publishing 2006); J. Scott and D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', 8 *ELJ* (2002) p. 1-18.

[21] Armstrong, *supra* n. 19, p. 179-181.

[22] J. Arrowsmith et al., 'What Can "Benchmarking" Offer the Open Method of Co-ordination?', 11 *JEPP* (2004) p. 311-328; for a critical vision of the whole area, *see* C. Joerges and M. Weimar, 'A Crisis of Executive Managerialism in the EU: No Alternative?', Maastricht Faculty of Law Working Paper 2012/7; C. Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy', 30 *EL Rev* (2005) p. 461-489, J.H. Haahr, 'Open co-ordination as Advanced Liberal Government', 11 *JEPP* (2004) p. 209-230.

[23] P. Craig, *EU Administrative Law* (Oxford University Press 2012) p. 195-201; D. Hodson, 'Macroeconomic Co-ordination in the Euro Area: the Scope and Limits of the Open Method', 11 *JEPP* (2004) p. 231-248; D. Hodson and I. Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination', 39 *JCMS* (2001) p. 719-746.

[24] D. Hodson and I. Maher, 'Soft Law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact', 11 *JEPP* (2004) p. 798-813.

[25] Following the judgment of the ECJ 13 July 2004, Case C-27/04, *Commission* v *Council*, the Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the

EU legislation issued following the crisis has been grafted onto this different governance model, but it has made the instruments used much denser and more incisive.[26] As will be seen, some intuitions of Michel Foucault represent useful conceptual tools for understanding the scope of such changes.

The European response to the economic crisis

The European Union and the member states have adopted numerous measures to face the serious economic and financial situation that has been seen since 2008. Apart from the growing importance of the European Central Bank[27] and the interventions characterised by a marked intergovernmentalism (for example those regarding financial assistance), the new European economic governance has progressively been translated into complex substantial and procedural rules aimed at limiting the economic and budget policies of the member states.[28]

The transformations of economic governance

Without going into too much detail, we should mention here the European semesters (including the evaluation of the Stability and Convergence Programmes on the reaching of the medium-term objectives, as well as the National Reform Programmes)[29], the legal regulation of the monitoring of draft budgetary plans (and the eventual excessive deficit procedure)[30] and associated mechanisms

implementation of the excessive deficit procedure was made more flexible: see Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies. *See* the summary by Craig, *supra* n. 23, at p. 200.

[26] *See* Tuori and Tuori, *supra* n. 1, chs 2 and 7; for a different perspective *see* K.A. Armstrong, 'Differentiated Economic Governance and the Reshaping of Dominium-Law', in M. Adams et al. (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) p. 65-83.

[27] *See* Tuori and Tuori, *supra* n. 1, at p. 101-104 and 162-168.

[28] P. Craig, 'The Financial Crisis, the EU Institutional Order and Constitutional Responsibility', in F. Fabbrini, et al. (eds.), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015) p. 27-31; M. Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance', 53 *JCMS* (2015) p. 976-993; K. Lenaerts, 'EMU and the EU's constitutional framework', 39 *EL Rev* (2014) p. 753-769; K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, EUI Working Paper LAW 2012/28, p. 10 ff. *See also* the Communication from the Commission, 'Economic governance review. Report on the application of Regulations (EU) No 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013', COM(2014) 905 final.

[29] E.g. Tuori and Tuori, *supra* n. 1, p. 162-168.

[30] Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, Council Regulation (EC)

introduced by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so-called Fiscal Compact), the legal discipline of the prevention and correction of macroeconomic imbalances,[31] and that of the strengthening of economic and budgetary surveillance of member states experiencing or threatened with serious difficulties with respect to their financial stability.[32] These legal norms reflect forms of direct supervision (or intermediated by programmatic acts) over State policies. The decisional process has various steps:[33] a negative judgment of one member state can lead to consequences in proportion with the gravity of the situation; the worse the evaluation, the tougher the interventions that the State itself must implement under the surveillance of the Commission and the Council. In the most serious cases, as well as having to evaluate a series of documents (corrective action plans and economic partnership programmes), these institutions can require the State to adopt specific measures (for example Article 126(9) TFEU) and can impose sanctions if the State concerned does not undertake adequate actions to remedy the situation.[34] Taken together, these norms confer extremely wide surveillance powers on European institutions; these in fact go well beyond areas related to economic issues, and can potentially affect all national public policies.[35]

No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (consolidated version) and Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (consolidated version).

[31] Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

[32] Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

[33] *See* for example Art. 6, Regulation No. 1466/97 and Art. 3 ff, Regulation No. 1467/97.

[34] Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area.

[35] To cite two examples: in the report for 2015 on the last in-depth review on the prevention and correction of Italian macroeconomic imbalances, the Commission outlines the strengths and weaknesses of the national education system: Commission, 'Macroeconomic Imbalances. Country Report – Italy 2015', p. 61 ff (available at <ec.europa.eu/economy_finance/publications/occasional_paper/2015/pdf/ocp219_en.pdf>, visited 1 October 2016). In addition, the Council recommendations on the 2015 Italian national reform programme adopted on the 15 June 2015 (9246/15) inviting the Italian Republic to 'Adopt the planned national strategic plan for ports and logistics' (para. 2), and 'adopt and implement the pending laws aimed at improving the institutional framework and modernising the public administration. Revise the statute of limitations by mid-2015. Ensure that the reforms adopted to improve the efficiency of civil justice help reduce the length of proceedings' (para. 3), 'implement the simplification agenda for 2015-2017 to ease the administrative and regulatory burden' (para. 6). In general *see* A. Somek, 'Delegation and Authority: Authoritarian Liberalism Today', 21 *ELJ* (2015) p. 340 at p. 342-3.

Despite the fact that the Treaty has remained largely unchanged on this theme since 1992, secondary law (especially the so-called six-pack and two-pack) and the Fiscal Compact have had a significant impact on the previous constitutional architecture of the European Union. For example, for a long time the regulation of the coordination of economic policies (somewhat differently from the excessive deficits procedure) was considered as a basis solely of political commitments.[36] In this sense also the central role assigned to the Council was significant. The situation today has changed, above all due to a series of new sanctionary powers (in some cases not provided for in the Treaty) that the Council can exercise on the proposal of the Commission,[37] and to the 'reverse majority rule' which in many cases makes Council approval of the Commission proposals almost automatic[38]. Today the Commission therefore has a primary function.[39]

As a result, the position of the member states (especially those which are in difficulty) has undergone a considerable transformation. This is due to the fairly close surveillance activities which, however, in the majority of cases continue to manifest themselves as opinions and recommendations, or in non-binding acts or those with fleeting legal effects.[40]

Adjustment programmes and financial assistance

At a much more incisive level, and largely unprecedented in European law, are the forms of interference in the policies of the States which benefit from various types of financial assistance. Given that this argument is frequently taken up in the press, it is sufficient here to mention it very briefly.

Despite their differences, the three financial stabilisation mechanisms currently active in Europe – the European Financial Stabilisation Mechanism, the European Financial Stability Facility, the European Stability Mechanism – have in common

[36] F. Amtenbrink and J. de Haan, 'Economic governance in the European Union: Fiscal policy discipline versus flexibility', 40 *CMLR* (2003) p. 1075 at pp. 1081-1085.

[37] Communication from the Commission, *supra* n. 28, at p. 5-7.

[38] As is well known on the basis of this rule some Commission proposals can be rejected by the Council only with a certain majority: *see* Art. 4(2), (3) and (6), Reg. No. 1173/11; Art. 6(2), Reg. No. 1466/97; Art. 10(4), Reg. No. 1176/11; Art. 3(3), Reg. No. 1174/11; Art. 14(1) and (4), Reg. No. 472/13; Art. 7 Fiscal Compact.

[39] P. Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications', in M Adams et al. (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) p. 19 at p. 37.

[40] M. Dawson, *New Governance in the EU after the Euro Crisis: Retired or Re-born?*, EUI WP, AEL 2015/01; Armstrong, *supra* n. 1, at p. 614, maintains that the specific recommendation in Art. 121(2) TFEU has an almost legislative nature, as the non-compliance of the State can trigger a complex path culminating ultimately in the application of sanctions. However, little is said about the legal effectiveness of such acts.

the element of conditionality which is linked to the adjustment programme.[41] This area is now regulated by Regulation No. 472/13.[42] On the basis of Article 7 of this regulation, the member states that request financial assistance must ('in agreement with the Commission, acting in liaison with the European Central Bank and, where appropriate with the International Monetary Fund') put into place a macroeconomic adjustment programme, which must be approved by the Council acting by a qualified majority. The programme 'shall address the specific risks emanating from that Member State for the financial stability in the euro area and shall aim at rapidly re-establishing a sound and sustainable economic and financial situation and restoring the Member State's capacity to finance itself fully on the financial markets'; this is then further developed through the Memorandum of Understanding signed by the recipient and the Commission, which contains the conditionality (paragraph 2). In addition, a member state experiencing insufficient administrative capacity or significant problems in the implementation of the programme can ask for technical help from the Commission, which can form expert groups composed of members coming from other member states and other EU or international institutions. This technical assistance may include the establishment of a resident representative and supporting staff to advise authorities on the implementation of the programme (paragraph 8).

The Commission (in liaison with the European Central Bank and, where appropriate, the International Monetary Fund) follows closely the progress made in the implementation of the programme (paragraph 5). Amongst other things, the monitoring can lead to eventual modifications and updating of the programme or, in the case of non-compliance, subject to a Council decision, the interruption of the financing (even though this option is not explicitly mentioned; *cp*. paragraph 7).[43]

Two keys of interpretation: 'pastorship' and 'discipline'

This institutional scenario has been the subject of numerous interpretations[44]. For example, the question has been raised whether EU crisis legislation represents (also due to the recourse to international treaties) the abandonment of the Community

[41] *See* A. Baraggia, 'Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?', 4 *Cambridge Journal of International and Comparative Law* (2015) p. 268; Tuori and Tuori, *supra* n. 1, p. 89-101.

[42] M. Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"', 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2014) p. 61 at pp. 76-88.

[43] Ioannidis, *supra* n. 42, at p. 82.

[44] For example G. Martinico, 'EU Crisis and Constitutional Mutations: A Review Article', 165 *Rev. Estudios Politicos* (2014) p. 247-280; D. Chalmers, 'The European Redistributive State and the Need for a European Law of Struggle', 18 *ELJ* (2012) p. 667-693; M.P. Maduro, *A New Governance*

method and the orientation of the system towards new forms of intergovernmentalism[45] or semi-intergovernmentalism.[46] Or whether for national economic policies the open method of co-ordination is being surpassed by more hierarchical forms of coordination.[47] From a different point of view, the interpretation of these transformations in the light of some ideas of Carl Schmitt is recurrent, for example on the 'state of exception', the 'commissarial dictatorship', over the technical dominion.[48] Recently the thesis of Hermann Heller on 'authoritarian liberalism' has also been brought back into the light.[49]

Many of these interpretations encompass important aspects of the changes that have taken place, for example, by emphasising the authoritarian elements that have begun to pervade some areas of the EU institutional system.[50] However, two concepts illustrated by Michel Foucault could be useful in helping to understand, from a different point of view, some parts of the power dynamics and the relative consequences which the EU is currently experiencing. The concepts are those of 'pastorship' and 'discipline', which were formulated by Foucault to account for specific and incisive forms of the management of people.

Some preliminary clarifications are necessary, however. Above all, who the direct subjects of pastorship and discipline are in the cases considered below, must be defined. Despite the fact that we often refer to the member states, this obviously does not imply an adhesion to a rather improbable anthropomorphic idea of the State structure. The reference should be understood instead in the sense that the direct subjects of pastorship and discipline are essentially the national

for the European Union and the Euro: Democracy and Justice, Robert Schuman Centre for Advanced Studies Policy Paper No. 2012/11.

[45] F. Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective', 32 *Berkeley Jnl International Law* (2014) p. 64123, at p. 110-115; Lenaerts, *supra* n. 28, at p. 753-769; E. Chiti and P.G. Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis', 50 *CMLR* (2013) p. 683 at p. 685-690; U. Puetter, 'Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance', 19 *JEPP* (2012) p. 161.

[46] J.-P. Keppenne, 'Institutional report', in U. Neergaard et al. (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (*The XXVI FIDE Congress in Copenhagen, 2014)* (DJØF Publishing 2014) p. 179 at pp. 201-207.

[47] For example *see* A.J. Menéndez, 'The Existential Crisis of the European Union', 14 *German Law Journal* (2013) p. 453 at p. 515-517 and Armstrong, *supra* n. 26, p. 65-83.

[48] C. Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, ZenTra Working Paper in Transnational Studies No. 06/2012; more in general on this issue *see* the essays collected in P. Minkkinen et al. (eds.), *The Contemporary Relevance of Carl Schmitt* (Routledge 2015).

[49] *See* 3 *ELJ* (2015) and specifically the contribution of Somek, *supra* n. 35.

[50] S. Mezzadra, 'Seizing Europe. Crisis management, constitutional transformations, constituent movements', in O.G. Agustin and C. Idese (eds.), *Post-crisis Perspectives. The Common and its Powers* (Peter Lang Verlag 2013) p. 99-118.

executives (and to a lesser extent parts of parliament and the national élite). Obviously this model of power has important consequences also on the dynamics inside the member states (see *infra*).

This raises another delicate question though: is it possible to apply these concepts to a completely different environment from that for which they were originally conceived, i.e. to the relationship between the States and the EU? This issue is highly complex and cannot be dealt with in this paper. Notwithstanding the fact that social science scholars have been applying Foucauldian categories to international relations[51] and to the European Community[52] for many years, it is necessary to clarify that the purpose of this study is not to transpose schematically these two concepts to one part of European legal system (and to suggest a possible genealogy of the current economic governance), but simply to take inspiration from them (with the necessary adaptations) to shed light on some aspects of this system that, following other models, could be left in the shadows.

'Economic pastorship'

The new economic governance shows some forms of likeness to the Christian pastorship described by Foucault at the end of the 1970s.[53] For the French philosopher, pastorship constitutes a very particular form of government that developed between the third and eighteenth centuries – but 'doubtless something from which we have still not freed ourselves'[54] – typical of the Catholic church (and to a lesser extent the other Christian churches) and which, due to its characteristics, is completely different from the political government of people.[55]

[51] C. Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011); T. Fougner, 'Neoliberal Governance of States: The Role of Competitiveness Indexing and Country Benchmarking', 37 *Millennium* (2008) p. 303-326 ff.

[52] For example *see* L. Oberndorfer, 'A New Economic Governance through Secondary Legislation? Analysis and Constitutional Assessment: From New Constitutionalism, via Authoritarian Constitutionalism to Progressive Constitutionalism', in N. Bruun et al. (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart Publishing 2014) p. 25-54; M. Merlingen, 'Foucault and World Politics: Promises and Challenges of Extending Governmentality Theory to the European and Beyond', 35 *Millennium* (2006) p. 181-196; Haahr, *supra* n. 22, p. 209-230; S. Gill, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe', 3 *New Political Economy* (1988) p. 5-26.

[53] M. Foucault, *Security, Territory, Population. Lectures at the Collège de France 1977–78* (Palgrave Macmillan 2007) chs. 6-8; M. Foucault, *Omnes et Singulatim*: *Towards a Criticism of 'Political Reason'*, The Tanner Lectures On Human Values 1979/1980, <tannerlectures.utah.edu/_documents/a-to-z/f/foucault81.pdf>, visited 1 October 2016.

[54] Foucault 2007, *supra* n. 53, at p. 148.

[55] *See*, for an overview, B. Golder, 'Foucault and the Genealogy of Pastoral Power', 10 *Radical Philosophy Review* (2007) p. 157-176.

Summing up very briefly, pastorship represents a set of tools centred on a regime of truth, aimed at helping, persuading and directing the behaviour of those over whom it is exercised (the sheep) with the goal of ensuring their salvation. In the European regulations mentioned above, the pastorship function is carried out by a number of bodies, even though the predominant position of the Commission should not be overlooked.

The relationship between pastor, sheep,[56] flock, truth and salvation is highly complex. It can be translated in general into the teaching which happens 'through an observation, a supervision, a direction exercised at every moment and with the least discontinuity possible'.[57] In our context, truth takes on the form of *expertise* – a series of unquestionable principles and notions attributable to a specific economic doctrine – which represents the foundation of a highly complex surveillance mechanism over the economic policies of the States. There is also a more subtle dimension: the pastor on one hand must direct, in a general and permanent way, the conscience of the sheep; on the other hand, he extracts the truth from them.[58] He must therefore have a deep knowledge of each one of the sheep and their most intimate intentions. In this sense, it is sufficient to mention the continuous meetings held, and the economic documents (as well as other requested information) that the States must submit periodically to the Commission (as mentioned before: stability programmes, national reform programmes, medium-term national budget programmes). In this way there is a constant, lengthy control process with unlimited scope that comes very close to a kind of 'examination of conscience' that every national government must undertake in front of the Commission (a confession of all their aspirations).

This practice leads to a highly specific form of direction that can be summed up in the formula 'I want the other to tell me what I must will' (i.e. 'what I want'), which is clearly distinguishable from the juridical form of direction (through command: see *infra*).[59] In substance, 'the pastor is not a man of the law';[60] he is more similar to a doctor who takes on the responsibility for every case, giving the necessary care. It should be added that the worse the condition of the sheep (or the flock), the more urgent and intense the pastoral care will need to be.

Pastorship has therefore an individualising nature, in the sense that it aims at constructing a subject that, 'subjected to' a regime of truth (i.e. expertise), accepts

[56] It is useful to emphasise that comparing the States in economic difficulty to sheep seems somewhat better than comparing them to swine (P.I.I.G.S.).

[57] Foucault 2007, *supra* n. 53, at p. 181.

[58] Foucault 2007, *supra* n. 53, at p. 181. In more analytical terms *see* M. Foucault, *On the Government of the Living. Lectures at the Collège de France 1979-80* (Palgrave Macmillan 2014) ch. 12.

[59] Foucault 2014, *supra* n. 58, at p. 229.

[60] Foucault 2007, *supra* n. 53, at p. 174.

the authority of the pastor for the sake of their own salvation: obedience is aimed at training the individual to renounce their own egoism and their own interests.[61]

As a consequence, the action of the pastor 'will always be conjunctural and individual', as the sheep cannot all be treated in the same way: Each must be treated as a special case.[62] In order to do this, the pastor has to use a 'detailed economy of merits and faults'.[63] With reference to our theme, this could be applied to how the Commission manages the evaluation of possible macro-economic imbalances of the member states. The 'alert mechanism',[64] for example, allows for a very careful analysis, on the basis of a series of indicators, of every individual national economy in order to verify its health. Those States whose results are worrying are subjected to an 'in-depth review'. It is interesting to note how the Commission, on the basis of the economic results obtained in the previous year, has identified six levels (corresponding in turn to levels of monitoring and specific obligations for action), into which the States are classified every year, whilst at the same time giving them the chance to improve or worsen their position (depending on good behaviour).[65] The recent initiatives of the Commission intended to make the application of the parameters of the Stability and Growth Pact more flexible should also be mentioned here; this is a benefit which is, however, reserved only to those member states that promote reforms with the largest impact on their budget.[66]

Pastorship is, moreover, altruistic – the pastor turns all his attention to the others and never to himself – as it is exercised exclusively in the interest of the receiver.[67] This manifests itself in 'keeping watch', in the sense that the shepherd must be vigilant and prevent any possible misdeed or misfortune.[68]

[61] An argument quite close to this one has already been proposed by Joseph Weiler when, referring to European constitutionalism, he tells a parable whose conclusion is, amongst other things, that an act of submission can often be simultaneously an act of emancipation and liberation and that virtue is a habit of the soul and habits are installed by practice: J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, <jeanmonnetprogram.org/archive/papers/00/001001.html>, visited 1 October 2016.

[62] Foucault 2007, *supra* n. 53, at p. 174.

[63] Foucault 2007, *supra* n. 53, at p. 173.

[64] Art 3 ff, Reg. No. 1176/11.

[65] The classes are: 1) No imbalance; 2) Imbalances, which require monitoring and policy action; 3) Imbalances, which require monitoring and decisive policy action; 4) Imbalances, which require specific monitoring and decisive policy action; 5) Excessive imbalances, which require specific monitoring and decisive policy action; 6) Excessive imbalances, which require decisive policy action and the activation of the Excessive Imbalance Procedure: <ec.europa.eu/economy_finance/economic_governance/macroeconomic_imbalance_procedure/mip_reports/index_en.htm>, visited 1 October 2016.

[66] Communication from the Commission, 'Making the best use of flexibility within the existing rules of the stability and growth pact', COM (2015) 12 final.

[67] Foucault 2007, *supra* n. 53, at p. 178.

[68] Foucault 2007, *supra* n. 53, at p. 172.

In the European context the oblative nature of these functions is confirmed by the opinions and recommendations (always formulated by the Commission) directed at the individual States, for example in relation to documents that they must periodically submit; opinions and recommendations whose aim is that of warning, demanding and ultimately encouraging, on the basis of macroeconomic considerations, the improvement in the conditions of the member states which receive them, linked to the adaptation of their policies.

Another significant point must be noted here. The pastor acts contemporaneously both *omnes et singulatim.* On one hand he is responsible for saving the flock – a salvation, however, that could lead to extreme choices: 'The sheep that is a cause of scandal, or whose corruption is in danger of corrupting the whole flock, must be abandoned, possibly excluded, chased away, and so forth'.[69] On the other hand, every single sheep has the need for maximum attention. As a consequence, the merit of the pastor is precisely that he has constantly to struggle 'against these dangers, brought back the stray sheep, and that he has constantly to struggle against his own flock'.[70] Also this dual nature seems present in EU economic governance in which the Commission (and the Council in various forms) must always take care of the whole economic situation of the EU as well as that of the individual States. In this regard the example can again be used of the 'alert mechanism' which serves to identify economic imbalances in each State that could compromise the overall functioning of the EU economic and monetary union (or the EU itself).[71]

We need not linger on this theme, except to emphasise that at the centre of everything there is the subject, the State (or, better, its national governmental bodies), which on the one hand is bound to follow the pastoral teachings, and on the other hand is the only one responsible towards its citizens for its economic (and social) policies. This situation could be called the 'inversion of responsibilities'; in fact the pastor, the inspirer of the policies, remains – even in the case of a negative outcome – without political accountability towards the populations directly affected.[72] This can be explained by considering that salvation is not in the hands of the pastor, who can only operate with the maximum care, but who cannot guarantee that it will be reached.

[69] Foucault 2007, *supra* n. 53, at p. 169.

[70] Foucault 2007, *supra* n. 53, at p. 172.

[71] Arts 2-3, Reg. No. 1176/11.

[72] Foucault talks about 'sacrificial reversal' to refer to the principle under which the pastor must be willing to die to save his flock (Foucault 2007, *supra* n. 53, at p. 170). In our context this principle is not applicable due to, amongst other things, the democratic structure of the State systems. This is a structure which calls for the political responsibility of those governing towards their citizens. On the lack of consideration of democracy in the thinking of Foucault, *see* B. De Giovanni, *Alle origini della democrazia di massa. I filosofi e i giuristi* [*The origins of mass democracy. Philosophers and Lawyers*] (Editoriale Scientifica 2013) p. 224 ff.

One last observation. Given that this power model is specifically meant to influence national public policies,[73] it obviously directly interferes with the dynamics of national public opinion. In particular it often induces the ruling classes and the national élite (especially in the States in greater economic difficulty) to turn to public speeches that revolve around the statement: 'Europe is asking us to do this for our own good'. There is therefore a resort to formulas, typical of the *raison d'État*, aimed at asserting certain economic beliefs and at influencing the formation of public opinion (see also *infra*).[74]

The 'Discipline' of State sovereignty and financial assistance

The issue for those member states who benefit from financial assistance from other member states, the European Financial Stabilisation Mechanism, the European Stability Mechanism, the European Financial Stability Facility or the International Monetary Fund is more complex. In these cases, in fact, the influence of the financiers on the sphere of the States receiving assistance gives rise to a dynamic that comes close to a sort of 'discipline' over the sovereign state (or, to be more precise, over the national ruling classes).[75]

Foucault also dealt with discipline, which he described through a predominantly institutional vision with reference to the human body.[76] However, some of his ideas can be useful in clarifying some of the characteristics that the European legal system has taken on. Discipline, in a way which is no different from, but is more intense than, pastorship, represents the application of a specific science to individuals in order to make them stronger through gradual exercise within a specific timeframe. The related devices – which can be activated also on a voluntary basis[77] – have a latently therapeutic/pedagogical nature, as they are aimed at making the body and the soul 'docile' towards certain rules.[78] They operate, among others, through the following mechanisms: (1) the analytical regulation of behaviour ('anatomy of detail'); (2) 'hierarchical observation' that is the permanent and integral observation as well as the examination of individuals;

[73] For example J. Snell, 'The Trilemma of European Economic and Monetary Integration, and Its Consequences', 22 *ELJ* (2016) p. 157 at p. 164-167; M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis', 76 *MLR* (2013) p. 817 at p. 824-828.

[74] Foucault 2007, *supra* n. 53, at p. 275.

[75] See in general Oberndorfer, *supra* n. 52, at p. 37-38.

[76] M. Foucault, *Discipline and Punish. The Birth of the Prison* (Vintage Books 1995) especially the third part; M. Foucault, *Psychiatric Power. Lectures at the Collège de France 1973-74* (Palgrave Macmillan 2006), especially p. 39-92. For a different view *see* P.S. Gorski, *The Disciplinary Revolution. Calvinism and the Rise of the State in Early Modern Europe* (University of Chicago Press 2003).

[77] Foucault 1995, *supra* n. 76, at p. 222.

[78] E.g. G. Deleuze, *Foucault* (University of Minnesota Press 2006) p. 43.

(3) 'normalising judgement', which is founded on the juxtaposition of gratification/punishment in relation to the acceptance or the violation on the part of the subjects of the disciplinary rules;[79] the deviation from the standard gives rise to a rapid corrective intervention aimed at ensuring that the action of the subject conforms to the norm.

In this context, the norm takes on a central role. It is conceived by Foucault and by many other scholars[80] as a mechanism aimed to construct, through a series of tools, what is 'normal' (normalisation).[81] According to this meaning, the norm shows the opposition between normal and abnormal and its goal is to homogenise (and make more efficient) the individuals subject to the disciplinary regime. In other words, it represents a model of behaviour that the subject, through exercise, internalises and takes on as their own, in such a way that the discipline at a certain point will keep going through its own momentum.[82]

Coming back to the European Union, the mechanisms of financial assistance possess many aspects of the disciplinary model. To confirm this it is sufficient to read the *Memorandum of Understanding*, the inspection reports of the Commission, the International Monetary Fund and the European Central Bank, as well as the reports on the respect of the conditionality on the part of the recipient member states.[83] For example, in the case of Greece, the first Memorandum makes reference to numerous intervention areas (amongst which labour and health systems), with extremely precise indications on the measures to adopt, the means and the timings of implementation ('anatomy of detail'): e.g. the elimination of the payment of the 13th and 14th month wage payments for all workers and pensioners,[84] the publication of the audit reports on the costs in hospitals,[85] etc. All of which is subject to the continuous supervision of the EU troika ('hierarchical observation') that verifies the progress and the correct implementation of the measures, which in turn is linked to the release of the payment of the subsequent tranche of the loan (following the 'gratification/punishment' logic). Finally, it should be remembered that Greece is also assisted

[79] Foucault 1995, *supra* n. 76, at p. 180.

[80] For an overview *see* G. Canguilhem, *The Normal and the Pathological* (Zone Books 1991).

[81] P. Machery, *De Canguilhem à Foucault, la force des normes* (La fabrique editions 2009), especially ch 5; for a more general view, *see* D. Loschak, 'Droit, normalité et normalisation', in *Le droit en procès* (Presses Universitaires de France 1983) p. 51-77.

[82] Foucault 2006, *supra* n. 76, at p. 46-47.

[83] Documents available at <ec.europa.eu/economy_finance/assistance_eu_ms/intergovernmental_support/index_en.htm>, visited 1 October 2016.

[84] Memorandum on the economic and financial policies of 3 May 2010 (attached to the first adjustment programme for Greece), <ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf>, § 8, visited 1 October 2016.

[85] *Ibid.* § 13.

by a task force nominated by the Commission and responsible for giving technical assistance.[86]

However, beyond these similarities, there is also another aspect which should be stressed: the fact that this power dynamic has a markedly productive function as it 'builds' individuals on the basis of certain scientific knowledge.[87]

In order to better understand this, it should be remembered that the responsibility for conditionality (not only when referring to EU law) is the subject of debate. For example, there are those who believe in general that, due to its substantial unilateral nature (toward the community who suffer the effects), conditionality represents a form of exercise of international public authority (in our case Europe) that, as such, should respect certain procedural requirements (for example the participation of the civil society organisations in the decision-making process) and substantive ones (e.g. respect for human rights).[88] Others believe instead that the conditionality should be borne essentially by the recipient State, with the lenders remaining confined to the function of experts and consultants;[89] this seems to be the choice made for EU member states in financial difficulty.[90] Finally, there are those who assume that this responsibility for conditionality changes depending on the circumstances (e.g. the real progress of the negotiations, the actual conditions of the recipient State, urgent needs) and that the nature of the negotiation can in many cases mask a different substance.[91]

This difficulty in understanding the responsibility for conditionality derives most probably from the disregard for the deeper dynamics which are activated with this mechanism. In fact this issue cannot be separated from that of the 'ownership' of the beneficiary State, i.e. of the voluntary taking on of responsibility by the national government involved, for an economic policy programme (obviously corrective) that is realisable and which responds solely to the interests of

[86] Art. 7(8), Reg. No. 472/13. Previously, with reference to Greece, see the documents available at the following address: <ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm>, visited 1 October 2016.

[87] Foucault 1995, *supra* n. 76, at p. 135-139 and p. 194; M. Foucault, *Society Must Be Defended* (Picador 2003) p. 23-43; M. Foucault, *The History of Sexuality* (Pantheon Books 1978) Part V.

[88] A. von Bogdandy and M. Goldmann, *Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law*, <www.ssrn.com>, visited 1 October 2016.

[89] Ioannidis, *supra* n. 42, at p. 91-94.

[90] *See* e.g. the Second Economic Adjustment Programme for Greece. Occasional Paper of the Commission, March 2012, where it is stated that 'the ownership of the programme and all executive responsibilities in the programme implementation remain with the Greek Government' (p. 123). *See also* C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *EuConst* (2014) p. 393 at p. 396.

[91] E.g. Ioannidis, *supra* n. 42, at p. 103.

the State itself[92]; a programme which, due to its difficulty (e.g. in terms of social opposition) the State would not embark on spontaneously[93]. The assistance system (including that of Regulation No. 472/13) therefore requires that the State in difficulty agrees to implement (in its own interests and with help from, under the surveillance of, and with the approval of, experts) a path towards economic reforms, defined in an extremely analytical way (both in content and timing) that conforms to the disciplinary standard (and therefore to the relevant economic premises). It is exactly the voluntary and at the same time the disciplinary nature of these financial mechanisms that makes an interpretation in legal terms so difficult.[94] This clarifies why it is not possible to formulate general statements on the authoritative nature of conditionality: this characteristic depends in fact on many concrete factors. It should not be forgotten that the success of these interventions represents also the fruit of very close relationships (although substantially on unequal standing) that are created between the lending organisations and the States.

This power system serves to produce political ruling classes that, once the constraints deriving from the aid programme have expired, continue to follow 'a sound budgetary policy'.[95] In fact Regulation No. 472/13 contains the legal norms regarding the post-programme phase (Article 14) which has the purpose (in addition to protecting the interests of its creditors) also of checking that the discipline functions effectively on its own (i.e. that the normalisation process has been successful). Also in this case, a central role is played by the subject, which brings us, once again, to the 'inversion of responsibilities' mentioned above.[96]

A different way of governing

The model of pastorship and that of discipline can aid in the understanding of some of the power dynamics that can be found within the European Union.

Regarding pastorship, it is necessary first of all to highlight that the set of European legal norms issued in response to the crisis has led to radicalisation of the instruments of the 'Open Method of Co-ordination' used in the initial phases of the Economic and Monetary Union.[97] This in fact allows the EU institutions to interfere with national economic policies and financial budgets in a more extensive

[92] IMF, *Strengthening Country Ownership of Fund-Supported Programs*, 2001, p. 6, <www.imf.org/external/np/pdr/cond/2001/eng/strength/120501.pdf>, visited 1 October 2016.

[93] *See*, amongst others, IMF, *supra* n. 92, at p. 7 ff, as well as J.M. Boughton, *Who's in Charge? Ownership and Conditionality in IMF-Supported Programmes*, International Monetary Fund WP/03/191; Ioannidis, *supra* n. 42, at p. 89-102.

[94] With reference to the IMF and the World Bank *see* Tan, *supra* n. 51, chs. 4 and 7.

[95] *See* e.g. ECJ 27 November 2012, Case C-370/12, *Thomas Pringle* v *Government of Ireland, Ireland, The Attorney General*, para. 135.

[96] In this sense, but following a different conceptuality *see* Ioannidis, *supra* n.42, at p. 96-98.

[97] Snell, *supra* n. 73, at p. 164-169.

and incisive way than has been seen in the past[98] – clearly this is especially the case for the States in greatest difficulty. This has happened through the juridification of some rather vague concepts such as 'sound public finances', 'sound monetary conditions',[99] 'sound budgetary policy',[100] or 'competitiveness' –[101] concepts which hark back to the more general idea of the 'good economic health' of the member states. These are objectives that in previous years were left essentially up to the national political/democratic process within the coordination that took place in the heart of the Council. This juridification forms a 'hybrid' system, in which different instruments ('hard' and 'soft') operate simultaneously.[102] This system is, however, full of contradictions. In fact, as has been seen, on the one hand the legal rules present themselves as a thick layer which is wrapped around the macro-economic and fiscal behaviour of the States. On the other hand, primary law and above all secondary law give rise to a 'creeping de-legalisation', since in reality they 'create the space for discretionary political evaluations made by the post-democratic technocratic bodies in charge of their implementation'.[103]

The techniques of pastorship make these two aspects compatible through the tailoring of the rules of behaviour to the single States. However, the scope of the legal code is re-dimensioned. It becomes limited to the solely formal (essentially procedural) aspects of these decisional process, as all the rest is left to highly complex technical/economic evaluations. In other words, while regulation under public law is carried out on the basis of the juxtaposition between conformity/non-conformity (of conduct and acts) with respect to a legal norm and is founded therefore on the assessment of legitimacy/illegitimacy, the new governance instead revolves around evaluations, i.e. around the conceptual couple of the success/failure of the States' economic results and thus of planned and implemented policies.[104] To confirm this it is sufficient to read, for example, the documents of the Commission referring to the single States in the alert mechanism or its national stability and reform programmes.

[98] As already mentioned, however, the legal norms regarding the European semester allow the European Institutions to deal with almost every aspect of national policies. For all *see* Somek , *supra* n. 35, at p. 342-345; Dawson and de Witte, *supra* n. 73, at p. 824-828.

[99] Reg. No. 1176/11, recital 1.

[100] *Supra* n. 95, para. 135.

[101] Reg. No. 1176/11.

[102] Armstrong, *supra* n. 1, at p. 609-613.

[103] C. Joerges and S. Giubboni, *Europe's Crisis-Law and the Welfare State – A Critique*, WP CSDLE 'Massimo D'Antona' INT 109/2014, p. 12; F.W. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy', 21 *ELJ* (2015) p. 384, at p. 393-394.

[104] L. Bazzicalupo, *Il governo delle vite* [*The government of lives*] (Bari 2006) ch. 2; H.M. Ingram and D.E. Mann, 'Policy Failure: An Issue Deserving Analysis', in H.M. Ingram and D.E. Mann (eds.), *Why Policies Succeed or Fail* (Sage Publications 1980) p. 11-32.

It is worth looking at this point in more detail, with reference to the role that this form of governance attributes to economic and legal rationale.

If the evaluations made by the Commission regard primarily the economic results (obtained or hoped for) of a State, in reality, the sense of the present economic governance resides in the institutions of the market as 'the site of veridiction and the test of feasibility' of national governments, according to the well-known neo-liberal (or ordo-liberal)[105] teaching. This is because the 'democratic debt state' must necessarily have the trust of the markets (and hence of its creditors).[106] This statement is expressly confirmed in a passage from the *Pringle* judgment of the European Court of Justice which, despite concerning a different topic, here is highly significant: '… the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy … The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective – namely maintaining the financial stability of the monetary union'.[107]

If then the evaluation of public policies is generally defined as a learning process, confirmation is given that the legal norms on economic governance have put into place a system based on the knowledge – to a greater extent than on legal efficacy – managed by the pastor (to repeat: the intermediary between the sheep and salvation) who, examining the results obtained or projected, is able to support, encourage, warn (and when necessary also threaten) the State into following policies that can lead to success on the financial markets (in some cases winning over temptation). In other words, it is a device aimed – in the worst cases through forms of duress (for example through sanctions) – at mobilising the internal resources of the State (as already seen, also in terms of the influence on the very dynamics of national public opinion) to reach a certain standard of action and therefore certain economic results.

This brings us to the topic – much debated in literature – of the relationship between hard law and soft law in this context. The instruments with a low degree of juridification (e.g. opinions and recommendations of the Council and the Commission)[108] are undoubtedly the most appropriate in setting up an institutional framework centred around the self-regulation and self-responsibility of the single State, in which, moreover, the pastor has no direct responsibility

[105] Bazzicalupo, *supra* n. 104, at p. 46. In different terms *see* Armstrong, *supra* n. 26, at p. 76-77, which talks of 'governance by markets'.

[106] W. Streeck, *Buying Time. The Delayed Crisis of Democratic Capitalism* (Verso 2014) ch. 2.

[107] *Supra* n. 95, para. 135.

[108] In general Armstrong, *supra* n. 19, at p. 179-214; M. Dawson, *supra* n. 40.

towards the single States involved for the choices made. On the contrary, juridical power ascribes responsibility to those who formulate the command and confers on the recipient only an obligation of execution without the need to adhere to the choice: 'the political power [read: juridical power] wills in my place and imposes its will on me, whether I will or not'.[109] Thus it can be understood why this regulation is not based on the 'system of the law' but on the 'schema of salvation', i.e. on the virtues of the subject.[110] After all, the flexibility of such government instruments is coessential with the contingent (and at the same time permanent) nature of the evaluation. This depends on the fact that their result can change continuously according to the performance of each individual State, as well as external factors.

Also regarding the adjustment programmes, the juridical logic is in fact residual. This can be demonstrated in various ways, for example by recalling the uncertainties that exist regarding the legal effects of the Memorandum of Understanding and more specifically the current debate about whether they are, or are not, binding acts or whether they should be considered instead as political programmes to which governments receiving aid subscribe.[111] Without going into depth on this issue, it could be useful here to remember an important fact: the adjustment programmes in general provide for the splitting up of the payment of the loan and, as mentioned before, the release of each tranche is dependent on a positive evaluation from the Commission (in liaison with the European Central Bank) regarding the correct and timely actuation of the Memorandum (formulated as a therapeutic programme). It should therefore be clear that the execution of conditionality does not derive only from whether the Memorandum of Understanding is legally binding; it is actually a consequence of the economic need in which the State finds itself.[112] Also in this case, being based on the gratification/punishment model (whereby the subjects either accept or violate the disciplinary rules), disciplinary power prevails over the legal logic.

To sum up, current economic governance and the financial assistance programmes – even though in different forms – translate into complex, widespread and pervasive pressures exercised continuously over the States[113] in

[109] Foucault 2014, *supra* n. 57, at p. 230.

[110] Foucault 2014, *supra* n. 57, at p. 178-179.

[111] In this regard *see* the Opinion of A.G. Wathelet, ECJ 21 April 2016, Joined Cases C-105/15P to C-109/15P, *Mallis and Malli* v *Commission and ECB*, paras. 84-89. In literature *see* Kilpatrick, *supra* n. 90, at p. 407-416; Baraggia, *supra* n. 41, at p. 276-277.

[112] Even more so for the formulation of conditionality: in general see Ioannidis, *supra* n. 42, at p. 94-96.

[113] L. Bazzicalupo, 'Le mobili linee di confine nella normatività sociale e la indeterminatezza delle procedure' [*The blurred borderlines of social normativity and the indeterminate nature of procedures*], in A. Tucci (ed) *Disaggregazioni. Forme e spazi di governance* [*Disaggregations. Forms and spaces of governance*] (Mimesis 2013) p. 29-46.

order to convince them to follow certain economic doctrine. In other words, these recent normative interventions have institutionalised a regime of knowledge-truth (and hence power) – based on the concepts of stability, economic sustainability, competitiveness, containment of public debt and public deficit – that is difficult to question. So much so that, with the help of the logic of the emergency which accompanied the crisis ('integration through fear'),[114] a widespread common agreement on this has been established in national constituencies.[115] In this way a huge simplification of values has taken place, since certain economic objectives must prevail over all other values. Ultimately, the new economic governance has the overall scope of 'normalising' the policies of the member states, i.e. to overcome economic pathologies through the adhesion to determined rules (the 'frugal government') – the only rules that can assure a complete 'cure'.

One clarification is necessary here. Despite the fact that the majority of these rules are technical in nature, they are evidence of a clearly-defined economic doctrine that has progressively crystallised in the EU economic constitution.[116] Consequently, if political negotiations are not excluded (as they cannot be) in this environment, they must respect the limits laid down by this doctrine. This explains on one hand why choices made at intergovernmental level in this area are in most instances expressed using economic language (e.g. for admission into adjustment programmes); on the other hand, also at this level, strict procedural norms (e.g. the inverse majority) limit the scope of the negotiation. This circumstance clarifies, moreover, why the political discourse becomes heated at times. In fact, as demonstrated by the events in Greece, the political argument – when it does not conform to the dominant regime of truth – can easily become an issue of 'exit' from the Eurozone, i.e. involve the revocation of trust in the pastor, or the revocation of trust in the member state.[117] This is a clear consequence of the scarce significance of the 'voice'.[118] Allowing them a 'voice' would in fact be incompatible with the logic of 'pastorship', or 'discipline', which is founded on assumptions taken to be irrefutable, and is aimed at producing 'submissive' (political) subjects.

The above demonstrates clearly the difference between these governance models and that of 'integration through law' or, in other words, it demonstrates

[114] J.H.H. Weiler, 'Editorial: Integration Through Fear', 23 *European Journal of International Law* (2012) p. 1-5.

[115] This is true also in the States that receive financial aid, as was demonstrated by the Greek referendum in 2015 that saw almost 40% of voters in favour of the adjustment programme.

[116] J.-P. Fitoussi and F. Saraceno, 'European economic governance: the Berlin–Washington Consensus', 37 *Cambridge Journal of Economics* (2013) p. 479-496.

[117] *See* e.g. the declaration of the Eurosummit of 12 July 2015 (SN 4070/15).

[118] 'Voice is the mechanism of intraorganizational correction and recuperation': Weiler, *supra* n. 9, at p. 2411, and more in general A.O. Hirschman, *Exit, Voice, and Loyalty. Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970).

the crisis of European public law.[119] In contrast to the 'Community method', in this context institutional pluralism is not governed by legal procedures that allow for conflicts to emerge and be managed (following a deliberative logic), and there are no specific procedures provided for aimed at resolving differences of opinion between subjects (for e.g. a State, the Commission and the Council).[120] This is also true for jurisdictional conflict: for example, consider the exclusion of the infringement procedure (with its potential for conciliation) for excessive deficits[121] in favour of evaluation activities and eventual sanctioning powers (increased subsequently by the secondary laws) of the institutions;[122] the same can be said regarding the limitations in the competences of the European Court of Justice provided for in the Fiscal Compact concerning the non-compliance of the States.[123]

Many scholars state that the Maastricht Treaty and the regulation of the single currency were decisive in these changes and that, in general, they were the result of the neo-liberal (or ordo-liberal) imprint of European law (and of its opposition to social rights).[124] On this theme – which would be worth studying in greater depth – it is sufficient to observe here that for a long period, the EU legal system, despite its many problems and limits, has represented a factor of progress, in the majority of cases finding largely satisfactory institutional balances. But above all, the fact that the aspiration for integration, orientated towards solidarity between member states, has always been strongly present in the system should not be underestimated.[125] However, current economic governance, in contrast to the principles of equality between States, has produced a permanent, variable hierarchy between them on the basis of economic criteria (in terms once again of success/failure),[126] as is confirmed by the continuous call for competitiveness

[119] Craig, *supra* n. 39, at p. 28-30, who underlines the 'shift from legislation to contract' in this area.

[120] M. Dawson and F. de Witte, 'From Balance to Conflict: A New Constitution for the EU', 22 *ELJ* (2015) p. 204-222.

[121] Art. 126(10) TFEU; Armstrong, *supra* n. 1, at p. 604.

[122] Reg. No. 1173/11.

[123] The Fiscal Compact foresees specific competences of the ECJ only in case of failed compliance on the part of the States with Art. 3(2) of the Treaty itself (Art. 8). In prevailing opinion, the Court does not have the competence in the case of a concrete violation of the budgetary rules. For this, *see* R. Dehousse, 'The "Fiscal Compact": legal uncertainty and political ambiguity', in 33 *Policy Brief* (2012), available also at <www.institutdelors.eu/media/fiscalpact_r.dehousse_ne_feb2012.pdf?pdf=ok>, visited 1 October 2016.

[124] M. Everson, 'The Fault of (European) Law in (Political and Social) Economic Crisis', 24 *Law and Critique* (2013) p. 107-129.

[125] C. Joerges previously cited in n. 10; Maduro, *supra* n. 18, chs. 4 and 5.

[126] F. Fabbrini, 'States' Equality v States' Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination', 17 *Cambridge Yearbook of European Legal Studies* (2015) p. 3-35.

in the national systems, the comparison between the various levels of public debt (and consequent interest rates) or the indicators which the Commission must refer to in the area of the surveillance of the budgets or macro-economic imbalances.

Self-restraint of EU judges and pastoral evaluation of untamed national courts

This complex situation raises significant challenges, not only to the democratic principle,[127] but also to the rule of law which represents one of the foundations of the EU legal system.[128] It is no coincidence that the principles of direct effect and the primacy of EU law are unable to find a clear and precise place in this environment.[129] It is therefore natural that this power structure has significant consequences also for EU and national judges. The first are clearly showing self-restraint in the rights protection in this area; the latter, on the other hand, in some circumstances have experienced the evaluative criticism of the shepherd.

With regard to EU judges,[130] a significant self-limitation of the European Court of Justice concerning the States that benefit from economic assistance can be noted. For example, the Labour Tribunal of Porto asked the Court of Justice to interpret Article 31 of the Charter of Fundamental Rights in order to verify the legitimacy of some anti-crisis measures regarding public employment issued by Portugal in line with the economic and financial assistance programme. Manifesting a certain irritation, the Court denied any competence in this area, given that 'the order for reference did not contain any specific evidence to support the view that the law was intended to implement EU law'.[131] The same conclusion has been reached for analogous procedures.[132]

If this decision is perplexing for the extremely rigid application of the admissibility criteria for a preliminary ruling, it seems to be coherent with the disciplinary nature of the assistance programmes. In fact, being founded on the mobilisation of the subject's own energies (with the consequent 'inversion

[127] Streeck, *supra* n. 106, ch. 2.

[128] E.g. C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', 35 *Oxford Journal of Legal Studies* (2015) p. 325-353.

[129] Tuori, *supra* n. 28, at p. 33-35; Armstrong, *supra* n. 1, at p. 609-612.

[130] V. Skouris, *The Court of Justice and the Financial Crisis: New Treaties, New Competences, Future Prospects*, <www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/Keynote_Skouris__Vassilios.pdf>, visited 1 October 2016.

[131] ECJ 26 June 2014, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins* v *Fidelidade Mundial - Companhia de Seguros*, para. 19.

[132] ECJ 21 October 2014, Case C-665, *Sindicato Nacional dos Profissionais de Seguros e Afins* v *Via Directa - Companhia de Seguros SA*; ECJ 7 March 2013, Case C-128/12, *Sindicato dos Bancários do Norte and Others* v *BPN - Banco Português de Negócios SA*.

of responsibilities' mentioned above), it appears difficult to connect it back to Union law.[133] It will be necessary, however, to verify whether the analytical discipline contained in Regulation 472/13 can lead to a reconsideration of such statements by the judges (at least concerning procedural aspects).[134]

Obviously, the competence of national judges in ensuring the respect of the fundamental rights of citizens has remained unchanged also in regard to the execution of the adjustment programmes.[135] The influence that the new economic governance has had on their activities should not be overlooked, however. In particular, a distinction can be made between two categories of national judgements. The first are rulings that take into consideration the possible effects they could have on the economic context of the country.[136] This means that the judge not only gives space in the judgment to criteria of economic sustainability, but above all that such parameters prevail over the protection of rights. This jurisprudential realism seems to be widespread and today is probably supported by national ('preferably constitutional') norms for the implementation of the Fiscal Compact (Article 2, para 2). The pastor does not deal with such rulings, as they do not call into question – but on the contrary help the sheep towards – the path to salvation.

There have been some cases, however, of untamed judges who have limited themselves to protecting the rights of citizens, without due consideration for the economic consequences of their decisions. In these cases, the pastor feels duty bound to act and uses such decisions to formulate an unfavourable economic evaluation of the country, or at the least to intensify his pastoral care. Three examples may suffice to illustrate this point.

[133] M.E. Salomon, 'Of Austerity, Human Rights and International Institutions', 21 *ELJ* (2015) p. 521-545; G. Katrougalos, 'The Greek Austerity Measures: Violations of Socio-Economic Rights', *I.Connect*, 29 January 2013, <www.iconnectblog.com/2013/01/the-greek-austerity-measures-violations-of-socio-economic-rights>, visited 1 October 2016.

[134] *See* Opinion of A.G. Wathelet, *supra* n. 111, paras. 92-98. In general, *see* Lenaerts, *supra* n. 28, at p. 759, with a further bibliography; Kilpatrick, *supra* n. 90, at p. 403.

[135] *See* the essays collected in C. Kilpatrick and B. de Witte (eds.), *Social Rights in Times of Crisis in the Eurozone*, EUI Working Papers, Law, 2014/05.

[136] This is clear, for example, in some sentences of the Greek State Council that, on the basis of the principle of proportionality, considered a series of rather unfavourable measures for the implementation of the first Memorandum regarding pensions and the salaries of public employees as lawful in consideration of the serious crisis and the consequent prevalence of national and European public interest. *See*, for example, decision 668/2012: E. Psychogiopoulou, 'Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges' and M. Yannakourou, 'Challenging austerity measures affecting work rights at domestic and international level. The case of Greece', both in Kilpatrick and de Witte, *supra* n. 135, respectively at p. 5 ff and p. 19 ff; C. Akrivopoulou, 'Facing l'etat d'exception: The Greek Crisis Jurisprudence', *I.Connect*, 11 July 2013, <www.iconnectblog.com/2013/07/facing-letat-dexception-the-greek-crisis-jurisprudence>, visited 1 October 2016.

The first once again concerns Portugal.[137] With regard to the ruling of the Portuguese Constitutional Court which annulled a series of budget measures aimed at reducing public spending,[138] the EU Commission wrote: 'a necessary condition for the country's return to market financing will be the government's reaffirmed ownership and resolute implementation of the programme. However, the risks from further negative rulings by the Constitutional Court cannot be discarded and could make the government's plans to fully access the debt market from mid-2014 on significantly more challenging'.[139] But above all, this decision 'raised further doubts about the government's capacity to push through the necessary reforms. As a consequence, investors demanded higher premiums to reflect increased sovereign risk and Portuguese bond yields decoupled from other European sovereigns'.[140] Again with reference to some measures concerning the revision of public spending in the process of approval at the time, the Commission warned that if some of these are declared unconstitutional, the government, in order to reach the objectives agreed upon, would have to reformulate the budget, but that 'in view of the rapidly shrinking room for manoeuvre in identifying appropriate consolidation measures, this would imply increasing risks to growth and employment and would reduce the prospects for a sustained return to financial markets'.[141]

The Commission, therefore, held the Constitutional Court responsible for the risk of destabilising the economic resistance of the system and above all for discrediting the government in front of the investors, with possible consequences on the interest rates on public debt. All of this without any regard for the fundamental principles of a liberal democratic State or for the separation of powers and the independence of judges.

[137] Baraggia, *supra* n. 41, at p. 284-286; C. Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective*, EUI Working Paper, MWP 2014/25, p. 24-30; M. Nogueira de Brito, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis', J. Gomes, 'Social Rights in Crisis in the Eurozone. Work Rights in Portugal' and R. Cisotta and D. Gallo, 'The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal' all in Kilpatrick and de Witte, *supra* n. 135, respectively at p. 57, p. 78 and p. 85.

[138] Ruling of the Portuguese Constitutional Court 187 of April 2013, annulling some austerity measures of the 2013 Budget Act: *see* Fasone, *supra* n. 137, at p. 27-28; G. Coelho and P.C. de Sousa, 'La Morte Dei Mille Tagli', 139(3) *Giornale di diritto del lavoro e delle relazioni industriali* (2013) p. 527.

[139] *The Economic Adjustment Programme for Portugal. Eighth and Ninth Review. Occasional Papers 164*, European Commission, November 2013, § 6 and § 90 (p. 44), <ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp164_en.pdf>, visited 1 October 2016.

[140] *Ibid*. at para. 88 (p. 43).

[141] *Ibid*. at para. 30 (p. 20) and para. 88 (p. 43).

We should also mention here the decision of the Italian Constitutional Court No 70 of 2015, which struck down the rule excluding the higher retirement pensions from the annual revaluation increase. The Commission stated that the consequences of this judgment could be that 'the issuance of a report under Article 126(3) of the TFEU may be deemed warranted at a later stage' (i.e. the start of the procedure for excessive public deficit). Moreover, this was '[c]onditional on the Italian government taking the necessary measures in 2015 to appropriately compensate for the permanent impact of the above-mentioned ruling of the Constitutional Court so as to ensure that: (i) Italy remains under the preventive arm of the Stability and Growth Pact; (ii) an appropriate safety margin with respect to the Treaty reference value is preserved; and (iii) the medium-term objective is reached within the four-year horizon of the Stability Programme'.[142]

Without further discussing this complicated question, it is clear that the decision of the Italian Constitutional Court represents a negative aspect of the 'detailed economy of merits and faults' that, as said before, characterises the pastoral function; the pastor must therefore increase his surveillance.

Finally, in June 2015, the Greek State Council declared the reform of the pensions approved in 2012 unconstitutional.[143] From what can be understood from the press it was a decision which had significant economic impact. On this matter, the declaration of the Eurosummit on 12 July 2015 stated that in order to arrive at the conclusion of the Memorandum of Understanding (relating to the third aid programme), the Greek government must pledge, amongst other things, 'to carry out ambitious pension reforms and specify policies to fully compensate for the fiscal impact of the Constitutional Court ruling on the 2012 pension reform and to implement the zero deficit clause or mutually agreeable alternative measures by October 2015'.[144]

These examples demonstrate that, following this logic of government, neither the constitutional nor the administrative judge, but only the market and its 'trusted institutions' (and more generally only a certain economic doctrine) have the right to judge the economic actions of the national governments embarked upon with the help of the pastor. Ultimately, we are in the presence of the

[142] 'Recommendation for a Council Recommendation on the 2015 National Reform Programme of Italy and delivering a Council opinion on the 2015 Stability Programme of Italy', COM(2015) 262 final, § 9 and 10 respectively, <ec.europa.eu/europe2020/pdf/csr2015/csr2015_italy_it.pdf>, visited 1 October 2016. Along the same lines, see Recommendation of the Council on the 2015 Italian national reform programme.

[143] The reactions are available respectively at <www.keeptalkinggreece.com/2015/06/11/supreme-court-orders-greece-to-reverse-2012-pension-cuts-as-unconstitutional> and <www.latribune.fr/economie/union-europeenne/grece-les-coupes-dans-les-retraites-jugees-inconstitutionnelles-483130.html>, both visited 1 October 2016.

[144] Eurosummit declaration of 12 July 2015, p. 3.

dangerous decline of the principle of the rule of law, due to strong and unprecedented pressures that tend to impose the economic logic on the constitutional judges and judicial power in general.

Possible developments and conclusions

The situation produced by the new European economic governance is unsustainable from many points of view. For this reason in June 2015 the President of the European Commission, in close cooperation with the Presidents of the European Council, the European Central Bank, the Eurogroup and the European Parliament presented a high level commitment and an ambitious report entitled 'Completing Europe's Economic and Monetary Union'.[145] The document touches on a series of important questions for the short, medium and long term.

In this context two initiatives – intended to be implemented in the short term – are worth mentioning. In order to improve the convergence between the member states, the document proposes setting up independent Competitiveness Authorities at national level with the task of ascertaining, for example 'whether wages are evolving in line with productivity and compare with developments in other euro area countries and in the main comparable trading partners'. In addition, 'these bodies could be mandated to assess the progress made with economic reforms to enhance competitiveness more generally'.[146] These authorities should make up a European system. Moreover the evaluation of macroeconomic imbalances to encourage reforms and to report back to the whole Euro area should also be looked at in more depth. Secondly, the report touches on the issue of the responsibility for national budget policies. In this regard there is a proposal to set up a European Fiscal Board as an advisory body for the coordination and support of national fiscal councils (those provided for in the Fiscal Compact), with the task of evaluating national budgets in relation to the proposed objectives.[147] This body 'should form an economic, rather than a legal, judgement on the appropriate fiscal stance, both at national and Euro area level, against the background of EU fiscal rules'.[148] The Commission established it very quickly.[149]

[145] The Report is available at <ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf>, visited 1 October 2016.

[146] *Ibid.* at p. 8. *See also* Commission, 'Recommendation for a Council Recommendation on the establishment of National Competitiveness Boards within the Euro Area', COM (2015) 601 final.

[147] *Ibid.* at p. 14.

[148] *Ibid.* at p. 23.

[149] Commission Decision (EU) 2015/1937 of 21 October 2015 establishing an independent advisory European Fiscal Board.

This report cannot be analysed in detail here. However, the two proposals outlined above demonstrate how the aim is to expand the pastoral model (for example by strengthening the evaluation of macroeconomic imbalances). Perhaps we could even talk about a pastoral colonisation of domestic legal systems. The National Competitiveness Authorities represent in fact the transposition of the logic of the evaluation of public policies to an internal level. The same conclusions can be drawn for the European Fiscal Board, which should reinforce the role of the independent budgetary bodies already foreseen in the current law. This reform seems to be nurtured by the same institutional culture that inspired the present economic governance.

We are not in a position to suggest alternative solutions. However, beyond the dream of a real political union realised through democratic principles (which would result in a substantial strengthening of the EU budget and an increase in direct revenues) some more specific wishes can be formulated. Above all it must be hoped that any reform of the new governance is drawn up not on the basis of abstract models, but taking into due account the profound economic, historical and cultural differences between the States (of the Euro area);[150] that it would be founded on the basis of the logic of solidarity and not that of the economic trustworthiness of some European populations. Secondly, it seems fundamental that social rights should be clearly and solidly anchored in law at European level. This issue is extremely delicate. It is, however, undeniable that, especially in the countries that suffered most during the crisis, these rights have been overshadowed by the logic of economic salvation. What is needed instead is a definition – legally binding and therefore judicially enforceable – of a series of social rights which must be guaranteed to all citizens of the EU.[151] More generally, it seems essential to reflect on institutional solutions that allow democratic processes (both at national and European level) to compete with economic rationales for the exclusive dominion of the government of the States and the Union. This obviously would mean rethinking the roots of the current regulation of the single currency, which should be reconnected to the social situations of the member states and their respective dynamics.

The real challenge, however, lies in finding out whether such wishes meet with the favour of the majority of European voters.

[150] Streeck, *supra* n. 106, ch. 4.

[151] E.g. Scharpf, *supra* n. 103, at p. 400.