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EDITORIAL

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# Not seven, but eleven? European crises or "new normal"?

Not seven but (almost) eleven years after the first "non-conventional" monetary measure implemented by the European Central Bank,[1] European institutions have (again) proclaimed that the European crises are over.[2] The growth of economic activity is regarded as herald of a radical turn in the fortunes of the old continent, and especially of the Eurozone. A strong coming tide is expected, boosted by the expansive economic policies implemented by other big blocs, most outstandingly the US. All boats—we are told—will be lifted, even the much-battered Greek ship. After not only sweat, blood, toil and tears, but also public spending cuts, tax increases and a dramatic wage devaluation, it is possible (even if far from certain) that the government of the Hellenic Republic would be allowed to go "off programme" by the end of the summer.[3]

One swallow (even if it would be a real swallow) does not make a summer, though. It would be silly to deny that aggregate data point to economic growth, or for that matter, to deny that such growth is likely to continue in the coming months. There are, however, very good reasons to assume that we may be at the end of the beginning, not the beginning of the end of the European crises.

To start with, the economic figures are far from reassuring. Europe may be growing, but whose growth is it? If the 1970s brought us stagflation, or the odd combination of stagnation and inflation, the second half of the 2010s have brought us another (and rather ancient) problematic combination, in the form of growth and rising income and wealth for the selected few, and ever shrinking purchasing power and declining fortunes for the restless many. This is especially, but not exclusively, the case of the Eurozone periphery. Unsurprisingly so. The "structural reforms" that were tested in the Eastern transition to capitalism,[4] then applied (*en douceur*) in Germany[5] and (harshly) in Southern Europe increase "competitiveness" at the cost of devaluing wages.[6] No new wave of investment (private or public) is in sight,[7]

[1]'Central banks' aggressive moves stun markets', *Financial Times*, 9 August 2007, available at https://tinyurl.com/y7djx2zs (accessed 27 February 2018).

[2]J.C. Juncker, 'State of the Union address', 13 September 2017, available at https://tinyurl.com/y93b7ryl (accessed 27 February 2018). Among the many words pointing in that direction, perhaps the most telling passage is the following: "We are now in the fifth year of an economic recovery that really reaches every single Member State".

[3]'Greece seeks to calm Brussels' bailout fears', *Financial Times*, 18 February 2018, available at https://tinyurl.com/y9sd5y6p (accessed 27 February 2018).

[4]P. Ther, *Europe since 1989*, trans. C. Hughes-Kreutzmüller (Princeton University Press, 2016); V. Giacché, *Anschluss: L'Annesione. La riunificazione della Germania e il future dell'Europa* (Imprimatur, 2013).

[5]M. Promberger, 'Nine Years of Hartz IV—A Welfare Reform Under Scrutiny', (2005) 35 *Cuadernos de Relaciones Laborales*, 35–63, available at https://tinyurl.com/yb29u2v2 (accessed 27 February 2018).

[6]G. Celi, A. Ginzburg, D. Guarascio, and A. Simonazzi, *Crisis in the European Monetary Union: A Core-Periphery Perspective* (Palgrave, 2018).

[7]Cf., e.g., the data reported in C. Lapavitsas, T. Mariolis, and C. Gavrielides, 'Eurozone Failure, German Policies, and a New Path for Greece', Rosa Luxemburg Stiftung, pp. 30ff, available at https://tinyurl.com/yarp42lu (accessed 27 February 2018). Spain, and to a lesser extent Italy, have experienced a (moderate) recovery of investment, which is still well below pre-2007 levels.

  

while the stagnation of salaries remains the rule.[8] Under such a framework productivity gains have been mainly the product of making fewer workers produce more while paying them less. The secular pattern of growth of the capital share in national incomes in European countries is telling in this regard. To add insult to injury (or perhaps one should say debt to debt), the holdership of public debt has become heavily concentrated, contrary to what was the case in the 1970s and 1980s. As a result, there is a big overlap between the "winners" of the "competitive devaluations" and those who have made profits out of the high real interest rates paid by Eurozone periphery states on account of the debt issued during the peak years of the fiscal crises.[9]

By the same token, the imbalances within the Eurozone have not been redressed. The new "competitiveness" of the external sector of the Eurozone periphery results from a marked increase of exports to third countries, not from internal rebalancing. Some countries (Germany and the Netherlands) have surpluses well beyond the (asymmetric) ceiling of 6%, which was supposed to be indicative of a major macroeconomic imbalance. As a result, the Eurozone as a whole, which was roughly in balance with the rest of the world during the first decade of the EMU, now runs a massive surplus. At its core we find, to put it in Rumpolesque form, the surplus-which-shall-not-be-mentioned, i.e., the German surplus. It is hard to deny that the size of the overall Eurozone surplus can be drastically reduced were the very favourable present exchange rate of the euro to change.[10] Quite obviously, such change, to a rather large extent, is beyond the control of the Eurozone, if only because the rest of the world is not in a currency union with the Eurozone. Were exports to shrink, we may well be confronted with a replay of the 2010 scenario, updated and enlarged.

Moreover, and perhaps even more decisively, the very asymmetric nature of the aggregate growth being experienced by Eurozone countries is fuelling, not quieting, political discontent. The emerging socio-economic cleavages are facilitating challenges to the national and European political orders. In particular, the so-called "populist" wave is far from remitting.

The exhilaration that invaded pundits and scholars alike after the electoral victory of Emmanuel Macron in the French Presidential elections was more reflective of the desire for "good news" than indicative of the breadth and depth of his victory. His crowning was largely the product of an electoral system made in the image and semblance of the first President of the Fifth Republic. The electoral strength of Macron may well have translated in a hung Parliament in a parliamentary system with strong proportional representation. That would have rendered perhaps more obvious the discontent with present European and national policies (if the distinction between the two is still a valid one) among French voters.[11] So much so that a clear split has emerged between those favouring continued membership of the Eurozone and those willing to jump back into national monetary sovereignty.

Pretty much the same argument can be extended to developments in Germany. After more than a decade of *große Koalitionen*, a radically altered political system has emerged from the general elections held last autumn. The collapse of the "traditional" parties has resulted in a political dynamics no longer different from that driving developments in the Eurozone periphery since the beginning of the crises. Saatchi & Saatchi might yet be tempted to produce a visual image conveying the fact that the so-called German model is not working, despite the low levels of official unemployment. No amount of institutional engineering, electoral system reform or, for that matter, not even the transformation of the *große Koalitionen* into a permanent feature is likely to be able to turn the tide in the coming years.

[8]With the exception of Portugal, where the incumbent government introduced specific measures aimed at stimulating internal demand through boosting wages. Leaving aside the judgment that such a policy deserves in abstract, it remains to be seen whether, given the structural framework resulting from Eurozone membership and present Eurozone policies, this policy allows for playing differently the structural austerity game. It is not unreasonable to be doubtful.

[9]S.B. Hage, *Public Debt, Inequality and Power* (University of California Press, 2016).

[10]Part of the surplus may be the result of highly specialised exports. But not all the surplus is so composed. And even for the most specialised goods, there is a point at which a price rise would reduce sales.

[11]See, e.g., the sober analyses of Emannuel Todd and Hervé Le Bras, *Le Mystère français* (Seuil, 2013); and Hervé Le Bras, *Le Nouvel Ordre Électoral: Tripartisme contre démocratie* (Seuil, 2016).

By the same token, the sheer incapacity of the government led by Theresa May to make its mind on what Brexit means, even less of defining a consistent negotiating strategy, is regarded by many as evidence of the folly of exiting the European Union. That may be so, but it is far from obvious whether the failure of Cameron's and May's cabinets is not in itself a symptom of an underlying and wider malaise, which will persist even if there were to be a second Brexit referendum; indeed, even if (and that is a big if) the British electorate would finally decide to stay in the Union. Leaving aside the obvious question of why not organise then a third referendum, we may be well advised to start approaching Brexit as a symptom, and to figure out *what* it is a symptom of.

We are thus confronting both structural economic and political uncertainties which, if one is allowed to turn Fukuyama's metaphor upside down, have resulted in the end of the end of history. History is back, perhaps full of promise, although for the time being we mainly see dangers lying in wait for us. On the "back" of the many failures of the really existing political orders, an exclusionary wind has started to blow with force over European politics. That should concern us, and deeply so. The civilizational achievements reflected in the laws enforcing the principle of equality before the law or committing European states to provide shelter to refugees are in danger. That should be said, and boldly so. Any discourse that smacks of a return to the most inglorious and vile chapters in the European past should be opposed head on. But perhaps it is also necessary to remain clear-headed about cause-and-effect relationships. From that perspective, it would be self-deluding to confound the (very legitimate) reasons why many voters favour the reaffirmation of political control over policy, especially socio-economic policies, with the (very illegitimate) reasons why some voters favour exclusionary, if not racist, political proposals. Some political actors may try to weave both sets of reasons into one single cloth, but these two policy planks are made of very different materials. Moreover, why persist on characterising anybody opposing present policies as "populist" (an adjective which is ill-suited even as an insult),[12] instead of distinguishing neatly those who flirt, or explicit endorse, racist, xenophobic and/or fascist positions? It is high time we engaged in the analysis of the underlying causes of the European malaise, instead of oscillating between lamentation and pontification.

It would be silly to pretend that you would find the answers to the questions implicit in the preceding pages neatly packed and summarised in this, or for that matter, any other academic journal. What you will find in this issue, as in many previous and future ones, are contributions that take seriously the cultural, political and socio-economic context resulting from the European crises. Eleven not seven years on, it is necessary to go beyond the description and assessment (important as they are) of the developments that challenge the European political and economic orders, and engage in a consideration of the extent to which the institutional, procedural and substantive elements that we associated with crises and crisis government have become a structural part of such orders. Eleven not seven years afterwards, expecting a "return to normalcy" has become simply hopeless. The European Union, the Member States and European law have already changed. The question is how, why, and in which sense.

There is a close relationship between crises and asymmetries. Not only the structural causes of social, economic and cultural crises tend to be found in different asymmetries, but the very impact of the crises tends to be deeply asymmetric. That is also true of the (still ongoing) European crises. As just pointed out, the marked trend upwards in socio-economic inequality was indeed accelerated by the crises (very especially in the Eurozone periphery). Radical transformations in the content and, if one is allowed the term, the very *grammar* of labour law are both cause and consequence of the punctual decisions and structural reforms taken and adopted in the name of containing the crises. In the contribution that opens this issue, **Giubboni** combines down to earth attentiveness to the concrete and specific changes in the case law (and the deafening silence of the European law-maker) and the way in which European law is practised, with theoretical sophistication when drawing the wide picture of the trends he discerns in the transformation of the European legal discipline of labour relations. (Asymmetric) economic and monetary union, plus the shock resulting not from enlargement as such, but from the specific way in which enlargement was implemented, unleashed a process of radical redefinition of the point and purpose not only of European labour law, but of labour law itself. Such transformation is summarised in a nutshell in a trio of rulings of the European Court of Justice

[12]Marco Revelli, *Dentro e contro: Quando il populismo è di governo* (Laterza, 2015).

(*Viking*,[13] *Alemo-Herron*,[14] *AGET Iraklis*[15]) that redefine labour law in the image and semblance of private property and entrepreneurial freedom. What is at stake is thus not merely the degree to which specific rights would be protected, but the very *identity* of a labour law premised on the characterisation of the worker as a person, which in turn requires *the autonomy* of labour *law* and of labour *laws*, the carving up of a legal space which shelters labour relationships from functional pressures that, as we learned the hard way in the past, result in the breaking down not only of any viable social contract, but of the very social tissue.

The questions that **Harding** tackles in his article are not dissimilar from Giubboni's. On the basis of his path-breaking research on the identity of those litigating before the European Court of Justice (and thus having a chance to shape and mould the agenda and the very understanding of the law and of the world of Luxembourg judges), he analyses a key component of European law: rights. Harding considers the way in which rights are constructed and reconstructed. A key finding emerges: The European "rights culture" collapses into one single broad concept of very different types of rights. Economic freedoms and fundamental rights are thus made part of one single concept, *tous confondus*. But, and this is a question very much worth asking, are there good normative reasons to do so? Are there even legal-dogmatic reasons to do so given the very literal tenor of the Treaties, that keeps on containing in different chapters the discipline of the right to free movement of goods and the other economic freedoms, or that does not contain express reference to economic freedoms among the fundamental rights making up the Charter of Fundamental Rights of the European Union?

That such concerns are not exclusive to public lawyers is proven by **Bagchi**'s timely revisiting of the once mighty projects to harmonise European contract law. It is certainly the case that the endemic attention deficit on the side of institutions may result in a rather silent burial of such projects. But the author rightly observes that it may be too early to reach such a conclusion. With the benefit not of hindsight but of the quiet resulting from the slowing down of the legislative plans, Bagchi warns the reader of the dangers implicit in assuming that a harmonised contract law could be a fitting vehicle for legal and economic integration in Europe. While the normative core of contractual norms is made up of universal premises, and consequently, such premises underpin all European contract law systems, the realisation of such values requires attentiveness to the socio-economic, cultural and political context. The dream of harmonisation may produce not only monsters, but divergent monsters, precisely the opposite of the outcome that is said to be pursued. May I be allowed to add that it would not be the first time in European integration that the search for convergence results in divergence.

As this issue goes to press, the Commission has concluded that there is a serious risk of a "breach of the rule of law" in Poland.[16] Whatever the practical outcome of the proceedings, the very taking of such decision by the Commission requires us to consider again not only what the European Union is, and what it stands for, but also what are the conditions of membership in the Union, and when they are fulfilled (or breached). **Janse** revisits the foundational period of the European Communities to elucidate the specific historical conflicts through which membership conditions came to be forged. The author shows that the dominant narrative, according to which the process of "constitutionalisation" of the Communities would have transformed what (originally) were economic criteria into political ones, is far too simplistic. By means of focusing on the bid to membership of Franco's Spain and the reaction of the Communities to the Greek colonels' *golpe*, Janse reminds us of the close intertwinement of political and economic criteria from the very foundation of the Communities.

Last, and certainly in this case not only not least, but certainly most, the reader will find **Olsen**'s reconstruction and analysis of the key relationship between accountability and political order in Europe. In pure ELJ fashion, Olsen

[13]C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772.

[14]C-426/11, *Mark Alemo-Herron and Others v. Parkwood Leisure Ltd*, ECLI:EU:C:2013:521.

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

[16]See the instructive 'Commission action on the Rule of Law in Poland: Questions & Answers', 20 December 2017, available at https://tinyurl.com/yddhbyn9 (accessed 27 February 2018).

goes beyond the standard terms of the debate in narrow legal-dogmatic analyses and proposes that we reconsider the debates on accountability from a fresh perspective. Essential in his view is to distinguish, without drastically separating, three different types of debates on accountability: (1) routine debates, where the overall political, normative and technical framework is taken for granted, and which tend to unfold in a rather silent and non-dramatic fashion; (2) political debates which assume the basic soundness of the relevant political order, but which result in political contestation within that order; (3) and debates where accountability checks are an intrinsic part of a wider debate and challenge to the political order. Given the unsettled (and sometimes unsettling) character of the European political order, the latter are of essence. Very especially in the aftermath of the European crises, which have revealed the rather fragile normative and functional basis on which the transformation of the European political order has unfolded. Olsen's perspective allows us to make sense of the deep ambivalence of accountability debates, either indicative of the growing legitimacy of the European political order of sorts that is evolving; or vehicles of fundamental challenges to its legitimacy; or both at the same time. In the very persuasive view of this author, this calls for renovating research not only on the conditions under which a European political order can be established, but on the point and purpose of such an order. An order that is not necessarily the best that we can imagine in abstract, but rather one that is actually achievable; not necessarily the one that would be possible if a new human being would see the light (whether Marxist, *oeconomicus* or *europaeus*), but one that takes seriously the limits of human reasons and foresight. A reasonable European political order, in brief. A perspective which, I take leave to add, is not the one informing the present cacophonic debates labelled again "on the future of Europe".

The "extra track" of this issue takes the form of **Bartl**'s reply to two engaged and engaging criticisms of her 2015 article on Internal Market Rationality. Debate is what academia is about, and debating is what a journal should foster and celebrate. The author explores further the concept of "internal market rationality" as well as the parts of which it is made, throwing new light on the structural transformation of the Union in the last three decades. A light that, if one is allowed to add, results from the previous clashes of lights, and which will be empowered by further discussions, hopefully hosted in this journal.

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