

# The Economic Constitution under Weimar: Doctrinal Controversies and Ideological Struggles

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## Introduction

On the Old Continent, be it in French<sup>1</sup> or English<sup>2</sup> scientific literature, the advent of the notion of ‘economic constitution’ as a relevant and operative concept appears to be essentially linked to the history of European integration.<sup>3</sup> Since the sovereign debt crisis, the doctrinal debates on this ‘European economic constitution’ seem, however, to constantly return to the controversies that marked the history of the Weimar Republic (1919–1933).<sup>4</sup> This is nevertheless hardly surprising to the observer who considers that, beyond the remote scholastic<sup>5</sup> or physiocratic<sup>6</sup> influences, the concept stems first

- 1 Institut d’Études Juridiques Européennes (ed.), *La constitution économique européenne: actes du cinquième colloque sur la fusion des communautés européennes organisé à Liège les 16,17 et 18 décembre 1970*, Liège/The Hague, Martinus Nijhoff, 1971; L.-J. Constantinesco, « La constitution économique de la C. E. E. », *Revue trimestrielle de droit européen*, 1977, vol. 13, n° 2, pp. 244–281.
- 2 W. Van Gerven, U. Scheuner and J.D.B. Mitchell, « The Optimal Economic Constitution of the European Community with Reference to the Economic Constitutions of the Member States », *Common Market Law Review*, 1976, vol. 13, n° 2, pp. 215–221; see also, albeit two decades later, the important article of Manfred Streit and Werner Mussler: « The Economic Constitution of the European Community: From Rome to Maastricht », *Constitutional Political Economy*, September 1994, vol. 5, n° 3, pp. 319–353.
- 3 See *infra* in this volume, Part 2 – *The European Economic Constitution. From Micro to Macro*. Professor Léontin-Jean Constantinesco’s article (« La constitution économique de la République fédérale allemande », *Revue économique*, 1960, vol. 11, n° 2, pp. 266–290) is an exception. But this exception is due specifically to Professor Constantinesco’s knowledge of the German doctrinal debates.
- 4 See, in particular, the *special issue* of the *German Law Journal* (2015, vol. 21, issue 3, pp. 285–429) devoted to “Hermann Heller’s Authoritarian Liberalism”.
- 5 W. Decock, *Le marché du mérite. Penser le droit et l’économie avec Léonard Lessius*, Brussels, Zones sensibles, 2019; S. Piron, *L’occupation du monde*, Brussels, Zones sensibles, 2018; S. Piron, *Généalogie de la morale économique. L’occupation du monde*, tome 2, Brussels, Zones sensibles, 2020.
- 6 B. Herencia, *Physiocratie et gouvernementalité: l’œuvre de Lemercier de la Rivière*, Paris, Université Paris Ouest Nanterre La Défense, 2011; B. Herencia, « Recherches pour une constitution physiocratique », *Annales historiques de la Révolution française*, 2014, n° 378, pp. 3–28. See also *supra* in this volume, P. Steiner, « Les Physiocrates, l’économie politique,

and foremost from the vigorous legal-economic discussions that animated German academic scholars in this turbulent interwar period<sup>7</sup>.

It therefore becomes opportune, if not necessary, to scrutinize this critical time, which witnessed the elaboration of some of the major structural themes of contemporary economic constitutionalism. In this period of particularly intense intellectual ferment,<sup>8</sup> which reflected the considerable political issues at stake in the newly founded German democracy, the *Wirtschaftsverfassung* (i.e. 'economic constitution') crystallized the struggle between competing political conceptions of the legal and economic ordering of society. In a context characterized by the 'social question' – exacerbated by the constitution of the proletariat into a leading political force and the progressive institutional democratization of parliament – and with the advent of Soviet socialism in the USSR and fascist corporatism in Italy as alternatives to the economic and political liberal regime, the Weimar Republic (1919–1933) constituted a favourable ground and the main place for scientific controversies and political debates on these issues.

After a brief description of the economic structure of the Weimar Constitution (1.), the divergent interpretations of the *Wirtschaftsverfassung* developed by the socialist (2.), conservative (3.) and liberal (4.) legal theories will be investigated in more detail. The analysis of the theoretical controversies reveals, however, real ideological struggles: behind the *a priori* scientific debate on the Weimar 'economic constitution' lies nothing less than the fundamental issue of the (de)politicization of the economic order (5.).

## 1 The Economic Structure of the Weimar Constitution: Economic Freedoms, Social Rights and Democratization of the Economic Order

The Constitution of the German Reich (*Verfassung des Deutschen Reichs*), better known as the 'Weimar Constitution' or *Weimarer Reichsverfassung*

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l'Europe », and *infra* in this volume, H. Rabault, « Le Concept de Constitution économique : émergence et fonctions » and P. C. Caldwell, « The Concept and Politics of the Economic Constitution ».

7 K. W. Nörr, « 'Economic Constitution': On the Roots of a Legal Concept », *Journal of Law and Religion*, 1994, vol. 11, n° 1, pp. 343–354; D. Jungbluth, *Die Entwicklung des deutschen Wirtschaftsverfassungsrechts: Von Weimar bis zum Investitionshilfeturteil*, Wiesbaden, Springer, 2018.

8 P.C. Caldwell and W. Scheuerman (eds.), *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic*, Boston/Leiden/Cologne, Humanities Press, 2000.

(WRV), was adopted on 31 July 1919 and proclaimed on 11 August 1919.<sup>9</sup> Both its drafters<sup>10</sup> and (German<sup>11</sup> and foreign<sup>12</sup>) contemporary exegetes described this new basic law as a great ‘compromise’: between legislative parliamentarism and executive presidentialism, between Jacobinism of the Reich and federalism of the Länder, or between the secularization of the state and the influence of the churches. But also, and perhaps above all, between opposed social and economic ideologies.

After the provisions devoted to the organization of the state, which were developed in its First Title, the Constitution proclaimed in Title II the ‘Fundamental Rights and Duties of Germans’. As noted at that time, this second part represents “a vast plan for social reorganization, for individuals, groups, religious communities, education and economic life”.<sup>13</sup> The provisions on the ‘order of economic life’ (*Ordnung des Wirtschaftslebens*) were placed at the end of this Second Title, in Section V, but they nevertheless imply nothing less than the “irruption of the economy into the center of constitutional law”<sup>14</sup> and thus provide the fundamentally new (and potentially revolutionary) element of the Weimar Constitution.<sup>15</sup>

9 Die Verfassung des Deutschen Reichs (‘Weimarer Reichsverfassung’), 11 August 1919, *Reichsgesetzblatt* 1919, n° 152, S. 1383–1418. Unless otherwise specified, I refer in this contribution to the English translation by E. M. Hucko: « Constitution of the German Reich of 11 August 1919 », in *The Democratic Tradition: Four German Constitutions*, Oxford/New York/Munich, Berg, 1987, pp. 149–190. For a detailed presentation of this constitution and of the Weimar context, see: C. Gusy, *Die Weimarer Reichsverfassung*, Tübingen, Mohr Siebeck, 1997.

10 See the debates in the German National Constituent Assembly (*verfassunggebende deutsche Nationalversammlung*), available at: <https://www.reichstagsprotokolle.de/index.html> (last consulted on 12 February 2022). See, among numerous examples: K. Beyerle (Zentrum), *Verhandlungen der verfassungsgebenden Deutschen Nationalversammlung*, vol. 326, Stenographische Berichte, 19. session, p. 465.

11 C. Schmitt, *Constitutional Theory*, Durham/London, Duke University Press, 2008, pp. 82–88 (original ed.: *Verfassungslehre*, Munich/Leipzig, Duncker & Humblot, 1928).

12 R. Brunet, *La constitution allemande du 11 août 1919*, Paris, Payot, 1921, esp. pp. 319–325.

13 E. Vermeil, *La constitution de Weimar et le principe de la démocratie allemande*, Strasbourg, Istra, 1923, p. 55.

14 H. Rabault, « La notion de constitution économique: éléments d’introduction », *Politeia. Revue semestrielle de droit constitutionnel comparé*, 2018, n° 34, pp. 207–235, esp. p. 220.

15 P. Fauchille, « Préface », in M.A. Schreiber-Fabre, *Constitution de la confédération allemande du 11 août 1919*, Paris, Arthur Rousseau, 1920, pp. v–xi, esp. p. vii; R. Brunet, *La constitution allemande du 11 août 1919*, *op. cit.*, pp. 324–325.

Hence, while the 19th century constitutional charters merely enshrined civil liberties and liberal or ‘bourgeois’ fundamental rights,<sup>16</sup> the Weimar Constitution added social (and even socialist) concerns. The very wording of the first paragraph of Article 151 WRV, which opens this Section on ‘economic life’, heralds the balance – and compromises – underlying the subsequent provisions:

The regulation of economic life must correspond to the principles of justice, and be designed to ensure for all a life worthy of a human being. *Within these limits*, the economic freedom of the individual must be guaranteed.<sup>17</sup>

Throughout all the provisions of the fifth Section, the fundamental principles of economic liberalism, though confirmed, are embedded and enclosed in objectives of (distributive) social justice (“designed to ensure for all a life worthy of a human being”).<sup>18</sup> In this respect, “Freedom of trade and industry is guaranteed *in accordance with the laws of the Reich*” (Art. 151 (3) WRV) and the “principle of freedom of contract shall prevail in economic relations, *in accordance with the laws*” (Art. 152 (1) WRV).<sup>19</sup> From an inviolable individual right to liberty unless otherwise provided by law, the Constituent

16 Hence Karl Marx’s famous criticism of the limited, and therefore insufficient, nature of these formal human rights in the article « *Zur Judenfrage* » in the only volume of the *Annales franco-allemandes* in 1844 (English translation available at: <https://www.marxists.org/archive/marx/works/1844/jewish-question/>; last consulted on 12 February 2022). Against a somewhat superficial and overly hasty reading of the text, it should however be noted that Marx did not conclude that these ‘bourgeois’ rights are useless; he calls for the extension of these abstract rights to concrete equality, in order to achieve full and complete emancipation (D. Bensaïd, « “Dans et par l’histoire”. Retours sur la Question juive », in *Sur la Question juive*, Paris, La Fabrique éditions, 2006, pp. 74–135, esp. pp. 89–94). This is corroborated by later texts (see in particular the section « The Paris Commune » of the pamphlet on *The Civil War in France*, 1871, available at: <https://www.marxists.org/archive/marx/works/1871/civil-war-france/index.htm>; last consulted on 12 February 2022).

17 Art. 151 (1) WRV.

18 L. Guihéry, « La constitution économique de la République de Weimar: comment tenter de concilier choix individuels et préférences collectives? », *Revue française de droit constitutionnel*, 2021, n° 1, pp. 207–225 – although we remain sceptical, to say the least, about some of the conclusions drawn by the author regarding the influence of the ‘economic constitution’ in the Nazi takeover. See also *infra* in this volume, P.-C. Müller-Graff, « The Idea of an Economic constitution (Wirtschaftsverfassung) in German law ».

19 Our translation; emphasis added.

Assembly thus moved on to a freedom recognized (only) within the limits of the law. The semantic shift hardly modifies the core of the situation, but the change of perspective nevertheless entails more than purely symbolic consequences: the individuals are (re)integrated into the economic order as citizens, i.e. as members of the political community, which implies both specific rights for workers and additional duties for the owners of the means of production.

Enshrined at the first level are what are now commonly referred to as ‘economic and social rights’,<sup>20</sup> such as the right to social security and insurance (Art. 161 WRV), or to labour law (Art. 157 WRV) – which is explicitly extended to “intellectual work [...] of discoverers, inventors and artists” (Art. 158 (1) WRV). These economic and social rights are recognized as formal, abstract and programmatic rights,<sup>21</sup> but they are also concretely protected by the recognition of a special ‘freedom of association’,<sup>22</sup> namely that for the “protection and improvement of labour and economic conditions” (Art. 159 WRV).<sup>23</sup> Hence, the union freedom is thus constitutionally enshrined in the Weimar Constitution.

Regarding, on the other hand, the specific duties attached to this ‘economic life’, it can be first observed that, from a general and formal point of view, “it is the moral duty of every German, without prejudice to his personal liberty, to use his intellectual and physical powers as the welfare of the community requires” (Art. 163 (1) WRV).<sup>24</sup> Furthermore, this social commitment affects the most prominent liberal right: the right to private property. Although Article 153 WRV recognized this right, it also stated that “the ownership of property entails obligations” and that “its use must at the same time serve the common good” (Art. 153 (3) WRV). Besides, Art. 155 (3) WRV adds that “the cultivation and full utilization of the land is a duty the landowner owes to

20 O. De Schutter, *Economic, Social and Cultural Rights as Human Rights*, Cheltenham (UK)/Northampton (Massachusetts, USA), Edward Elgar, 2013; see also: H. Rabault, « Une “république sociale”? Le paradoxe des droits ‘économiques et sociaux’ », in S. Gambino (ed.), *Diritti sociali e crisi economica Problemi e prospettive*, Torino, G. Giapichelli editore, 2015, pp. 133–143.

21 The rapporteur of Section V of Title II, Hugo Sinzheimer, states himself that these ‘rights’ are not “rights in the strict sense” (H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *Verhandlungen der verfassungsgebenden Deutschen Nationalversammlung*, Bd. 328, Stenographische Berichte, 62. Sitzung, p.1749). See *infra*, Subchapter 2. *The advocacy of the Wirtschaftsverfassung as a social democracy: Sinzheimer and the social-democratic doctrine.*

22 Generic freedom of association is already recognized in Art. 124 WRV.

23 Our translation.

24 Our translation.

the community” and that “[i]ncrement in value of the landed property, not accruing from any expenditure of labour and capital upon the land, shall be devoted to the uses of the community”.

But the fifth Section is not limited to these rather vague statements of principle. These are extended and materialized by the provisions governing expropriation. Its general principle is laid down in Article 153 (2) WRV, in quite a unique wording for a liberal constitutional order:

Expropriation may be effected only for the benefits of the general community and upon the basis of law. It shall be accompanied by due compensation, save in so far as may be otherwise provided by a law of the Reich. In case of dispute as to the amount of compensation, resort may be had to legal proceedings in the ordinary course, unless a law of the Reich otherwise determines. [...]

Compared to the liberal model of expropriation as enshrined in Art. 17 of the *Déclaration des Droits de l'Homme et du Citoyen* of 26 August 1789, which provides this exception only in the event that “public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid”,<sup>25</sup> the Weimar provision alters and erodes each of its constituent elements to such an extent that it could (potentially) overturn and subvert the very principle. Expropriation is no longer permitted in cases of “public necessity”, but for the “benefit of the general community”; compensation is no longer required *ex ante*, and the only remaining condition is for the compensation to be “fair” or “due” (*angemessene*); above all, this compensation condition is only required “save in so far as may be provided by a law of the Reich”. In other words, the Constituent Assembly empowered the legislature to nationalize private property, without compensation if need be.

This generic provision was further extended in the (potentially) highly interventionist Art. 155 and 156 WRV, respectively devoted to the legislative empowerment of land collectivization and socialization of private enterprises. Furthermore, while Art. 164 WRV states that “[t]he independent middle class in agriculture, industry and commerce, shall be encouraged by legislative and administrative measures and shall be protected against exploitation and oppression”, the very next (and last) provision of Section v, namely the *Räteartikel* (‘article of the councils’), provides for a federal economic organization

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25 Declaration of Human and Civic Rights of 26 August 1789 (available at : <https://www.conseil-constitutionnel.fr/en/declaration-of-human-and-civic-rights-of-26-august-1789>; last consulted on 12 February 2022).

based on ‘workers’ councils’ (*Arbeiterräte*), but with a somewhat ‘corporatist’ perspective, since it is coupled with ‘economic councils’ (*Wirtschaftsräte*) bringing together representatives of employers, workers or even consumers.<sup>26</sup> On top of this institutional structure lay the ‘Economic Council of the Reich’ (*Reichswirtschaftsrat*), which was in principle vested with consultative prerogatives, but also and above all with the right of legislative initiative in the Reichstag.

The result is a rather unique constitutional configuration that blends liberal economic principles with social objectives and with a significant number of *potentially* collectivist provisions. The Weimar *Wirtschaftsverfassung* was thus the result of political compromises that sought to reconcile opposites, resulting in an unstable balance that could tip to one side or the other depending on how the legislature chose to implement it. Against this background, the concept of ‘economic constitution’ gave rise to an intense doctrinal debate, reflecting both strong theoretical positions and more or less latent strategic intents, which must be put into perspective to better grasp the underlying issue of both the theoretical and ideological struggles.

## 2 The Advocacy of the *Wirtschaftsverfassung* as a Social Democracy: Sinzheimer and the Social-Democratic Legal Doctrine

The first scholar to attempt to develop a concept of ‘economic constitution’ that could be both theoretically relevant and positively operable for the Weimar Republic was none other than the main author of Section V on *Wirtschaftsleben*: Hugo Sinzheimer, founding father of German labour law<sup>27</sup>

26 Following the defeat of the Spartakist movement (the *Freikorps* entered Berlin on 11 January 1919 and Rosa Luxemburg and Karl Liebknecht were assassinated on 15 January 1919) and the absence of the Communist Party in the elections to the Constituent Assembly of 19 January 1919, these ‘workers’ councils’ should not however be confused with the model of the Russian ‘Soviets’ or with a political democracy built from these economic and workers’ councils: they are not intended to replace the traditional parliamentary bodies, but rather to complement those institutions considered by the Marxist revolutionaries as ‘bourgeois’.

27 On Sinzheimer’s influence on labour law in Germany, see: E. Livneh, « Hugo Sinzheimer – The Father of German Labour Law », *Israel Law Review*, 1975, vol. 10, n° 2, pp. 272-276; O.E. Kempen, « Hugo Sinzheimer – Schöpfer des kollektiven Arbeitsrechts in Deutschland », *Arbeit und Recht*, 2015, vol. 63, n° 7, pp. G13-G16; O.E. Kempen, *Hugo Sinzheimer Architekt des kollektiven Arbeitsrechts und Verfassungspolitiker*, Frankfurt am Main, Societäts Verlag, 2017.

and Social-Democrat Deputy of the National Constituent Assembly.<sup>28</sup> In his famous speech as rapporteur of the economic Section at the 62nd session of the National Assembly on 21 July 1919,<sup>29</sup> Sinzheimer pointed out that individual economic freedom had to be constitutionally enshrined, but to be subordinate to and oriented towards a social function.<sup>30</sup> Although he acknowledged that the constitutional provisions setting out this social orientation have no direct effect, he emphasized their programmatic content, which remains particularly important, to the extent that it expressed a *Rechtsanschauung*, a 'legal philosophy', and thus gave the constitution its specific meaning.<sup>31</sup> He added that "from this point of view, one of the most important sentences of the draft Constitution is Section 1 of Article 156 (WRV), which contains the idea of future socialization".<sup>32</sup>

Above all, the very heart of the project lies in the "anchoring of the councils in the constitution"<sup>33</sup>: the *Räteartikel* (Article 165 WRV), together with the provision on the expropriation and socialization of strategic economic sectors (Art. 156 (2) WRV), lays down "the foundation of an economic constitution"<sup>34</sup> – to which most of his rapporteur's speech was devoted. In Sinzheimer's words, "the fundamental idea of the council movement is the establishment of a proper and specific economic constitution alongside the

28 K. W. Nörr, *Die Republik der Wirtschaft: Recht, Wirtschaft und Staat in der Geschichte Westdeutschlands*. Vol. I: *Von der Besatzungszeit zur Großen Koalition*, Tübingen, Mohr Siebeck, 1999, pp. 15–18; K. W. Nörr, « Auf dem Weg zur Kategorie der Wirtschaftsverfassung: wirtschaftliche Ordnungsverstellungen im juristischen Denken vor und nach dem Ersten Krieg », in K. W. Nörr, B. Schefold and F. Tenbruk (eds.), *Geisteswissenschaften zwischen Kaiserreich und Republik zur Entwicklung von Nationalökonomie, Rechtswissenschaft und Sozialwissenschaft im 20. Jahrhundert*, Stuttgart, Steiner, 1994, pp. 423–452, esp. pp. 443–452; C.M. Herrera, « Constitution et transformation, de Weimar à nos jours », *Revue française de droit constitutionnel*, mars 2021, n° 1, pp. 227–248, esp. p. 235.

29 H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *Verhandlungen der verfassungsgebenden Deutschen Nationalversammlung*, Bd. 328, Stenographische Berichte, 62. Sitzung, S. 1748–1752 (reprinted in: H. Sinzheimer, « Die Grundbeziehung zwischen Staats- und Wirtschaftsleben (1920) », in H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden*, vol. 1 (edited by O. Kahn-Freund and T. Ramm), Frankfurt am Main/Cologne, Europäische Verlagsanstalt, 1976, pp. 364–372; also available on: [https://www.reichstagsprotokolle.de/Blatt2\\_wv\\_bsb00000012\\_00295.html](https://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000012_00295.html); last consulted on 12 February 2022).

30 H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *op. cit.*, p. 1748.

31 *Ibid.*, pp. 1748(D)–1749(A).

32 *Ibid.* p. 1749(A).

33 *Ibid.*, p. 149 (D).

34 *Ibid.*



constitution of the state, which has the task of solving questions of economic organization by drawing on the economic forces themselves”.<sup>35</sup> The relations between labour and capital, which define economic life, are certainly characterized by their opposition (*Gegensatz*),<sup>36</sup> but they also involve a community (*Gemeinschaft*) of interests converging towards production.<sup>37</sup> It was therefore precisely the task of the economic councils (*Wirtschaftsräte*) “to involve all the parties concerned with production in order to increase productivity”.<sup>38</sup> This required the territorial (Art. 165 (3) WRV) – and, if necessary, sectoral (Art. 156 (2) WRV)<sup>39</sup> – organization of economic stakeholders, i.e. workers and employers, but potentially also “other categories of interested parties” such as consumers.<sup>40</sup>

The question then arose as to how far would and should the economic competences and political functions of these *Wirtschaftsräte* go, and especially of the *Reichswirtschaftsrat*. In this respect, the rapporteur noted from the outset that the regulation of working conditions and wages must remain the competence of free professional associations (trade unions and employers’ associations), which are the only ones to possess “the necessary flexibility and adaptability” to face the evolution of specific economic needs.<sup>41</sup> Besides, the institution of the councils should not take precedence over parliamentary political bodies: the two “extremes” should be discarded, that is, on the one hand, the revolutionary solution of the dictatorship of the councils

35 *Ibid.*, p. 1750(A). This assertion is a *leitmotiv* in the thoughts of the social-democratic legal scholar, as evidenced by his writings gathered in: H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden*, vol. I (edited by O. Kahn-Freund and T. Ramm), Frankfurt am Main/Cologne, Europäische Verlagsanstalt, 1976 – and especially: « Über die Formen und Bedeutung der Betriebsräte (1919) », pp. 321-324, esp. p. 321; « Das Räte-system (1919) », pp. 325-350, esp. p. 327; « Rätebewegung und Gesellschaftsverfassung (1920) », pp. 356-363, esp. p. 357.

36 H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *op. cit.*, p. 1750(A). This justifies the establishment of workers’ councils (*Arbeiterräte*), which are supposed to provide (manual and intellectual) workers with public law representation aimed at defending their own interests, similar to the chambers of commerce (*Handelskammern*) for the employers.

37 See also: H. Sinzheimer, « Über die Formen und Bedeutung der Betriebsräte (1919) », *op. cit.*, p. 322; H. Sinzheimer, « Das Räte-system (1919) », *op. cit.*, pp. 329-330.

38 H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *op. cit.*, p. 1750(B).

39 *Ibid.*, p. 1750(C). See also: H. Sinzheimer, « Das Räte-system (1919) », *op. cit.*, p. 331.

40 H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *op. cit.*, p. 1750 (C).

41 *Ibid.* at 1751(A). See also: H. Sinzheimer, « Das Räte-system (1919) », *op. cit.*, p. 332; H. Sinzheimer, « Rätebewegung und Gesellschaftsverfassung (1920) », *op. cit.*, esp. p. 356.

(*Rätediktatur*),<sup>42</sup> which is contrary to democracy because it does not include all citizens;<sup>43</sup> and, on the other, the reactionary project of a corporatist parliament through the institutionalization of these councils as a third legislative chamber, which would lead to an over-politicization of the economy.<sup>44/45</sup> It follows that the councils, “organs of economic democracy”,<sup>46</sup> must have “an influence on politics, but no decision-making power in politics”.<sup>47</sup> This influence was to be achieved through the obligation of parliament and government to consult the Economic Council of the Reich on social and economic affairs, but also and perhaps more importantly through the right of legislative initiative of the *Reichswirtschaftsrat*, which would empower the latter to propose bills on these social and economic matters by itself and to defend them directly before the *Reichstag* (Art. 165 (4) WRV).<sup>48</sup> The aim was “to bring about a sound and organic interaction between the political and economic spheres of life”.<sup>49</sup>

As summarized by Ruth Dukes, Sinzheimer’s aim was to “conceive of a ‘constitution’ that would allow for a satisfactory balance between the autonomous regulation of the economy by the economic actors themselves, on the one hand, and state oversight or guardianship of the common interest on the

42 H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *op. cit.*, p. 1751(B).

43 See also: H. Sinzheimer, « Das Räte-system (1919) », *op. cit.*, esp. pp. 325–326. More generally, on democratic approaches in constitutional theories in the Weimar period, see: P.C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism*, Durham/London, Duke University Press, 1997.

44 H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *op. cit.*, p. 1751(C). According to Sinzheimer, this would lead to “grasping the entire politics from an economic point of view” and thus to giving up “politics based on ideas”. See also: H. Sinzheimer, « Das Räte-system (1919) », *op. cit.*, pp. 335–336 and 343–344.

45 Regarding this democracy of the economic councils conceived as equally opposed to the ‘establishment of a dictatorship of councils’ (*Errichtung einer Rätediktatur*) and to the ‘introduction of a corporatist parliament’ (*Einführung eines berufsständischen Parlament*) based on a ‘chamber of labour’ (*Kammer der Arbeit*), see: H. Sinzheimer, « Über die Formen und Bedeutung der Betriebsräte (1919) », *op. cit.*, pp. 321 et. seq.

46 H. Sinzheimer, « Das Räte-system (1919) », *op. cit.*, p. 327.

47 H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *op. cit.*, p. 1751(C). Hence the fact that the potential socialization of private enterprises is not within the competence of the councils but of the state (i.e. the parliament) (H. Sinzheimer, « Das Räte-system (1919) », *op. cit.*, p. 334).

48 See also: *ibid.*, pp. 329–337.

49 H. Sinzheimer, « Fünfter Abschnitt, Art. 148: Bericht », *op. cit.*, p. 1751(D). See also: H. Sinzheimer, « Das Räte-system (1919) », *op. cit.*, p. 339.

other”.<sup>50</sup> His concept of economic constitution must therefore be understood as referring “to the various laws that allowed for the participation of labour, together with other economic actors, in the regulation of the economy: not only terms and conditions of employment, but also production – what should be produced and how”.<sup>51</sup>

However, Sinzheimer himself emphasized that the achievement and fulfilment of this economic constitution required a major legislative undertaking, which in turn required coordinated and voluntary action by the working class.<sup>52</sup> In other words, if “the foundation for the reign of political democracy has been urgently erected in Weimar, [t]he work of social democracy is still to be accomplished”.<sup>53</sup> It was therefore the task of the political democracy of Weimar to implement this social democracy and economic constitution through the establishment of a unified labour law controlled by a labour administration (*Arbeitsverwaltung*), the creation of an industrial administration (*Industrieverwaltung*) in charge of economic recovery and, above all, the setting up of workers’ and economic councils.<sup>54</sup>

Yet, the legislature did not fully embrace this ambitious project. It made only limited use of the numerous possibilities offered by the Economic

50 R. Dukes, « Hugo Sinzheimer and the Economic Constitution », in *The Labour Constitution: The Enduring Idea of Labour Law*, Oxford, Oxford University Press, 2014, pp. 12–32, esp. p. 13.

51 *Ibid.*

52 H. Sinzheimer, « Das Räteystem (1919) », *op. cit.*, pp. 335 and 340.

53 H. Sinzheimer, « Die Zukunft der Arbeiterräte (1919) », in *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden*, vol. I, *op. cit.*, pp. 351–355, especially p. 351 (“*Der Notbau für das Reich der politischen Demokratie ist in Weimar errichtet worden. Das Werk der sozialen Demokratie ist noch zu schaffen*”); free translation).

54 *Ibid.*, pp. 354–355; H. Sinzheimer, « Rätebewegung und Gesellschaftsverfassung (1920) », *op. cit.* On the notion of ‘economic democracy’, see also the book edited by Fritz Naphtali, Director of the Research Center for Economic Policy (*Forschungsstelle für Wirtschaftspolitik*) of the General Federation of German Trade Unions (*Allgemeinen Deutschen Gewerkschaftsbundes*), to which Sinzheimer also contributed: F. Naphtali (ed.), *Wirtschaftsdemokratie: Ihr Wesen, Weg und Ziel*, Berlin, Verlagsgesellschaft des Allgemeinen Deutschen Gewerkschaftsbundes, 1928, available at: <https://archive.org/stream/WirtschaftsdemokratieIhrWesenWegUndZiel/Naphtali1928-Wirtschaftsdemokratie#page/n3/mode/2up> (last consulted on 12 February 2022). For a more recent discussion of the links between the ‘economic democracy’ and the ‘economic constitution’, see: C. Zacher, *Die Entstehung des Wirtschaftsrechts in Deutschland: Wirtschaftsrecht, Wirtschaftsverwaltungsrecht und Wirtschaftsverfassung in der Rechtswissenschaft der Weimarer Republik*, Schriften zum Wirtschaftsrecht, Berlin, Duncker & Humblot, 2002, pp. 228–234.

Section of the Constitution.<sup>55</sup> Only certain (strategic) areas of the economy, such as coal mines and potash industry were brought under state control.<sup>56</sup> Furthermore, the system of economic and workers' councils was never set up in the form originally prescribed in Article 165 (2) and (3) WRV.<sup>57</sup> On one hand, the Economic Council of the Reich was only established in a 'provisional' form by the Order of 4 May 1920, without any right of legislative initiative and without the supportive structure of the district economic councils.<sup>58</sup> On the other hand, the *Betriebsrätegesetz* of 4 February 1920 only established the workers' councils (*Arbeitsräte*) at the lowest level, i.e. the company level (*Betriebsräte*),<sup>59</sup> but not at the district or Reich level, as provided for in the *Räteartikel* of the Constitution.

Although barely established by the legislative power, social democracy also faced strong judicial opposition, even from the *Reichsarbeitsgericht* (Reich labour court),<sup>60</sup> as the fate of the *Betriebszweck* ('enterprise objective')

55 D. Jungbluth, *Die Entwicklung des deutschen Wirtschaftsverfassungsrechts: Von Weimar bis zum Investitionshilfeturteil*, *op. cit.*, p. 32.

56 K. W. Nörr, *Die Republik der Wirtschaft: Recht, Wirtschaft und Staat in der Geschichte Westdeutschlands*. Vol. I: *Von der Besatzungszeit zur Großen Koalition*, *op. cit.*, p. 17. This socialization was carried out by the Constituent Assembly itself, as a result of the general strike that defeated the 'Kapp putsch': *Sozialisierungsgesetz*, 23 March 1919 RGL. 1919, p. 341; *Kohlenwirtschaftsgesetz*, 23 March 1919 RGL. 1919, pp. 342–344; *Kaliwirtschaftsgesetz*, 29 April 1919, RGL. 1919, pp. 413–415; *Elektrizitätsgesetz*, 31 December 1919, RGL. 1920, pp. 19–26. See also: R. Brunet, *La constitution allemande du 11 août 1919*, *op. cit.*, pp. 304–318.

57 C. Zacher, *Die Entstehung des Wirtschaftsrechts in Deutschland*, *op. cit.*, p. 50.

58 *Verordnung über den Vorläufigen Reichswirtschaftsrat* (Decree on the Provisional Economic Council of the Reich), 4 May 1920, RGL. 1920, n° 99, pp. 858–869. See also: D. Jungbluth, *Die Entwicklung des deutschen Wirtschaftsverfassungsrechts: Von Weimar bis zum Investitionshilfeturteil*, *op. cit.*, pp. 56–60. For a nuanced analysis of the influence of this Economic Council of the Reich on the economic policy of the Weimar Republic, see: F. Hederer, « How to Handle Economic Power? Law-making and the Reich Economic Council in Weimar Germany », *Management & Organizational History*, vol. 14, n° 4, 2019, pp. 366–381.

59 *Betriebsrätegesetz*, 4 February 1920, RGL. 1920, n° 26, pp. 147–174. This institution was abolished in 1928 (*Gesetz zur Äbänderung des Betriebsrätegesetzes*, 28 February 1928, RGL. I 1928, p. 46). For a compendium of all the legal provisions adopted in relation to these workers' councils between these two laws, see: D.G. Flatow and D.O. Kahn-Freund (eds.), *Betriebsrätegesetz vom 4. Februar 1920 nebst Wahlordnung, Ausführungsverordnungen und Ergänzungsgesetzen (Betriebsbilanzgesetz, Aufsichtsratsgesetz und Wahlordnung): unter Berücksichtigung des Gesetzes vom 28. Febr. 1928*, 13th ed., Berlin/Heidelberg, Springer, 1931.

60 Established by the *Arbeitsgerichtsgesetz*, 23 December 1926, RGL. 1926 I, n° 68, p. 507, on the basis of Article 157 (2) WRV stating that "the Reich will frame a uniform labour law".

clearly attests. Established by the Workers Council Act of 4 February 1920 as a means of opening up companies to objectives other than the purely financial (employers') interests,<sup>61</sup> this 'enterprise objective' was subsequently interpreted in the opposite direction by the labour courts, who made it coincide with the usual aim of profit maximization – justifying, where needed, the limiting of the action and claims of workers' representatives.<sup>62/63</sup> Similarly, based on some civil law doctrinal theories, the *Reichsgericht* (Reich Court, i.e. the Supreme court of the Weimar Republic) (re)interpreted in a very liberal way the limits of the right to private ownership and the possibilities of expropriation set in Art. 153 WRV. Following this case law, the German judges were inclined to consider that any limitation (Art. 153 (1), 2nd sentence WRV) had to be qualified as an expropriation (Art. 153 (2) WRV) then requiring compensation,<sup>64</sup> so that, according to David Jungbluth, "the (especially civil) case law and legal science had thus *de facto* assumed the role of the constitutional legislator and retrospectively 'corrected' the constitutional content – in the sense favoured by the economics".<sup>65</sup>

61 According to Article 1 (1) of the *Betriebsrätegesetz* of 4 February 1920: "In order to safeguard the common economic interests of the employees [...] vis-à-vis the employer and to assist the employer in fulfilling the enterprise's objectives (*Betriebszwecke*), workers councils shall be established in all enterprises which usually employ at least twenty employees" (our translation).

62 See: O. Kahn-Freund, *Das soziale Ideal des Reichsarbeitsgerichts: Eine kritische Untersuchung zur Rechtsprechung des Reichsarbeitsgerichts*, Mannheim/Berlin/Leipzig, Bensheimer, 1931 (translated in: O. Kahn-Freund, « The Social Ideal of the Reich Labour Court – A Critical Examination of the Practice of the Reich Labour Court », in R. Lewis and J. Clark (eds.), *Labour Law and Politics Weimar Republic*, Oxford, Blackwell Publishers, 1981). See also: R. Dukes, « Hugo Sinzheimer and the Economic Constitution », *op. cit.*, pp. 21-22.

63 In this respect, the interwar controversy about the *Betriebszweck* echoes the more recent debates around the notions of 'corporate social responsibility' and 'corporate governance' – and the reinterpretation of those concepts by some liberal scholars, notably Milton Friedman (M. Friedman, « The Social Responsibility of Business is to Increase its Profits », *The New York Times Magazine*, 13 September 1970). See: R. Aydogdu, « La Corporate Social Responsibility, le droit par-delà le marché et l'État (partie 1) », *Revue pratique des sociétés – Tijdschrift voor Rechtspersoon en Vennootschap (RPS-TRV)*, 2016, n° 16, pp. 669-704; G. Chamayou, *La société ingouvernable. Une généalogie du libéralisme autoritaire*, Paris, La Fabrique éditions, 2018, esp. pp. 81-94.

64 See: O. Kirchheimer, « Reichsgericht und Enteignung. Reichsverfassungswidrigkeit des Preußischen Fluchtliniengesetzes? », *Die Justiz*, 1930, n° 9, pp. 553-565 (reprinted in: H. Buchstein (ed.), *Otto Kirchheimer – Gesammelte Schriften. Vol. I: Recht und Politik in der Weimarer Republik*, Baden-Baden, Nomos, 2017, pp. 251-263).

65 D. Jungbluth, *Die Entwicklung des deutschen Wirtschaftsverfassungsrechts: Von Weimar bis zum Investitionshilfeurteil*, *op. cit.*, p. 45.

Despite this legislative reluctance and judicial resistance, the socialist legal doctrine did not lay down its arms. While acknowledging that “the tasks are enormous, and the struggles intense”, Sinzheimer continued to assert the existence of an (at least material) ‘economic constitution’ that would supersede the “dominant economic right of the employer”, in line with the long-term trend towards the democratization and collectivization of the economy that he perceived (or thought he perceived) throughout history.<sup>66</sup> He was supported in his fight by other social-democratic legal scholars,<sup>67</sup> such as Fritz Naphtali, who developed the concept of ‘economic democracy’,<sup>68</sup> or Franz Neumann, who proposed a reading of the Weimar Constitution inspired by Hermann Heller,<sup>69</sup> from which he inferred a ‘syndicalist-corporatist economic constitution’ for the German Republic.<sup>70</sup> Yet the Social Democrats hardly succeeded in getting their innovative and progressive ideas into law, even though it was precisely these theories that imbued the constitutional Section on ‘economic life’. This failure is, of course, due first and foremost to the specific political situation that compromised the Weimar Republic. However the fierce opposition of a powerful and influential conservative legal doctrine (which sought to undermine, through its alternative theories, the socialist potential of the Weimar Constitution) may also have played a

66 H. Sinzheimer, « Arbeitsrecht und Arbeitsbewegung (1927) », in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden*, vol. I, *op. cit.*, pp. 100-107, esp. pp. 105-107. However, one year later he acknowledged that “the economic constitution provided for in Art. 165 WRV remained incomplete, since, besides the workers councils, the Provisional Economic Council of the Reich was set up, but not the district economic councils, nor the district workers’ councils or the workers’ council of the Reich, so that a fruitful connection could not develop between the workers councils on the one hand and the Provisional Economic Council of the Reich, as a parliamentary body providing expert advice, on the other” (H. Sinzheimer, « Die Demokratisierung des Arbeitsverhältnisse », in F. Naphtali (ed.), *Wirtschaftsdemokratie: Ihr Wesen, Weg und Ziel*, *op. cit.*, pp. 127-153, esp. p. 152).

67 See in particular the special issue of the legal journal *Jus Politicum* on “Three Left-wing Legal Scholars under Weimar: Heller, Neumann, Kirchheimer” (vol. 23, 2019, « Trois juristes de gauche sous Weimar : Heller, Neumann, Kirchheimer », available at: <http://juspoliticum.com/numero/Trois-juristes-de-gauche-sous-Weimar-Heller-Neumann-Kirchheimer-76.html>; last consulted on 12 February 2022). See also *infra* in this volume, P. C. Caldwell, « The Concept and Politics of the Economic Constitution ».

68 F. Naphtali (ed.), *Wirtschaftsdemokratie: Ihr Wesen, Weg und Ziel*, *op. cit.*

69 F. Neumann, « Über die Voraussetzungen und den Rechtsbegriff einer Wirtschaftsverfassung », *Die Arbeit: Zeitschrift für Gewerkschaftspolitik und Wirtschaftskunde*, 1931, vol. 8, pp. 588-606.

70 C. Zacher, *Die Entstehung des Wirtschaftsrechts in Deutschland*, *op. cit.*, p. 219.

significant role – and one might wonder to what extent the two are not (at least partially) intertwined.

### 3 The Denial of a *Wirtschaftsverfassung* for Weimar and the Fight against the ‘Total State’: Schmitt, Huber and the Conservative Legal Doctrine

In the early years of the Weimar Republic, and especially in the first half of the 1920s, the conservative professor of public law at the University of Rostock, Edgar Tatarin-Tarnheyden,<sup>71</sup> was one of the few (non-socialist) legal scholars who developed a theory of the ‘economic constitution’, which he linked to his corporatist conceptions of the organization of state and society. In his habilitation thesis on *Professional Bodies, their Status in Public Law and the German Economic Constitution*,<sup>72</sup> Tatarin-Tarnheyden used Article 165 WRV and the newly provisionally-established Economic Council of the Reich as the basis for his proper corporatist reinterpretation of the German economic constitution, with the explicit aim of establishing a Chamber of Labour alongside the Reichstag.<sup>73</sup> Still on the basis of the *Räteartikel*, he further developed his arguments in 1930 in a book dedicated to *Occupational Estates and Economic Democracy*,<sup>74</sup> in which he argued for the transfer of a normative power to the *Reichswirtschaftsrat*, as well as for the establishment of a “kind of bottom-up

71 Known before 1933 for his corporatist theories, Tatarin-Tarnheyden then gradually rallied to the Nazi regime. Before officially joining the National Socialist Party in 1937, he took part in the infamous congress organized by Carl Schmitt at the University of Berlin on 3–4 October 1936, devoted to ‘Judaism and Legal Science’ (*Das Judentum und die Rechtswissenschaft*), where he offered his ‘reflections’ on “The Influence of Judaism in Public Law and State Theory” (*Einfluß des Judentums in Staatsrecht und Staatslehre*).

72 E. Tatarin-Tarnheyden, *Die Berufsstände, ihre Stellung im Staatsrecht und die Deutsche Wirtschaftsverfassung*, Berlin, Carl Heymanns Verlag, 1922. On Tatarin-Tarnheyden’s corporatist theory of the state, see: T. Meyer, « Die Ständestaatstheorie Tatarin-Tarnheydens », in T. Meyer (ed.), *Stand und Klasse: Kontinuitätsgeschichte korporativer Staatskonzeptionen im deutschen Konservativismus*, Wiesbaden, Westdeutscher Verlag, 1997, pp. 225–240.

73 E. Tatarin-Tarnheyden, *Die Berufsstände, ihre Stellung im Staatsrecht und die Deutsche Wirtschaftsverfassung*, *op. cit.*, p. 243.

74 E. Tatarin-Tarnheyden, *Berufsverbände und Wirtschaftsdemokratie. Ein Kommentar zu Artikel 165 der Reichsverfassung*, Berlin, Reimar Hobbing, 1930.

corporatism”,<sup>75</sup> through the creation of the district economic councils provided for in the constitution but never implemented.

This corporatist theory of the state and of an ‘economic constitution’ allegedly enshrined in Art. 165 WRV nevertheless raised some objections within the conservative doctrine itself. Carl Schmitt,<sup>76</sup> in particular, criticized in his *Verfassungslehre* the idea of a corporatist structure for the Weimar state, with an explicit reference to Tatarin-Tarnheyden.<sup>77</sup> This corporatist project would have proceeded from a misinterpretation of the constitutional order and legislative framework in force. Above all, it would entail a conceptual contradiction: as soon as a conflict arose, and since “the decision always lies in the political sphere”, “the parliament that proves itself the decisive part will necessarily become the *political* parliament, because it assumes leadership and, with this, responsibility, regardless of whether it was previously organized as a political or an economic parliament”.<sup>78</sup> Schmitt considered more fundamentally that while the *Reichsverfassung* certainly involved “dilatory formal compromises” (*dilatorische Formelkompromisse*) and implied a “mixed

75 P. Collin, « The Legitimation of Self-Regulation and Co-Regulation in Corporatist Concepts of Legal Scholars in the Weimar Republic », *Politics and Governance*, 2017, vol. 5, n° 1, pp. 15-25, esp. pp. 18–19.

76 I leave aside for this contribution the controversy over the qualification of Carl Schmitt as ‘fascist’, including for the period 1922–1933, i.e. before Hitler’s accession to the chancellery and Schmitt’s subsequent official membership of the NSDAP. On this issue, see *inter alia*: H. Rabault, « Carl Schmitt et l’influence fasciste. Relire la Théorie de la constitution », *Revue française de droit constitutionnel*, 2011, vol. 88, n° 4, pp. 709–732. I share Hugues Rabault’s position on the influence of (or even fascination for) Italian fascism in Schmitt’s thought (even before 1933), but I do not think that his thought, analysis and theories could be reduced to this fascist ideology. In particular, as will be exposed, Schmitt specifically rejects the idea of a total politicization of society: since, according to him, the state *is* politics, a total politicization would lead to confusion between state and society, and thus to a negation of the state. If all spheres of society (religious, economic, cultural, etc.) are *potentially* political, they can never be political at the same time. Besides, as shall also be seen, Schmitt also seems to reject, before 1933, the form of the single-party state. I will therefore maintain in the following pages the term ‘conservative’ to qualify Schmitt, even if the term ‘(proto-)fascist’ might perhaps have been appropriate too.

77 C. Schmitt, *Constitutional Theory, op. cit.*, pp. 322–323.

78 *Ibid.*, p. 322 (Schmitt’s emphasis). Schmitt concludes with a reference to the *Reichswirtschaftsrat* provided by Article 165 WRV: according to him, although it could be that this council represents the beginning of a new and specific institution that cannot be understood using traditional ideas of state organization, “it must be said that up ‘til now this Economic Council of the Reich of the Weimar Constitution is neither a second chamber nor an economic parliament” (*ibid.*, p. 323).



character”,<sup>79</sup> its “substance” and the hierarchy of constitutional provisions clearly revealed that the Weimar Republic formed a “liberal” and “bourgeois *Rechtsstaat*”, rejecting any “republic of councils with dictatorship of the proletariat”<sup>80</sup>. Hence, the Weimar Constitution would renounce any absolute political and state domination over the economy.

This issue concerning the relationship between state and economy – and concerning a possible ‘economic constitution’ for the Weimar Republic – was only superficially and cursorily discussed in this *Verfassungslehre*, but Schmitt further developed it in 1931, in the context of the controversy over the ‘guardian of the constitution’.<sup>81/82</sup> According to the future *Kronjurist* of the Third Reich, the concepts of ‘political’ and ‘economic’ constitutions were actually mutually exclusive: a state can *either* be structured around a strict and proper political domain, with a conscious and deliberate decision to leave the (considered to be) ‘neutral’ and non-political other domains (religion, economy, culture, *etc.*) to society;<sup>83</sup> *or* the state (and therefore the politics) can be organized around the economy, making the producers (and no longer the *bourgeois* citizens) and the economic bodies (companies, unions, workers’ councils, *etc.*) respectively the basic unit and fundamental decision-making

79 *Ibid.*, p. 83. Schmitt quotes here the words of the Social Democratic Deputy in the National Constituent Assembly Simon Katzenstein, according to whom the provisions of this Title II are “to a certain degree a middle stage between bourgeois and socialist perspectives ([...] Katzenstein, *Bericht und Protokolle des Achten Ausschusses der verfassungsgebenden Deutschen National Versammlung*, Berlin, 1920, p. 186)” (*ibid.*). See *supra*, Section 1. *The Economic Structure of the Weimar Constitution: Economic Freedoms, Social Rights and Democratization of the Economic Order*.

80 C. Schmitt, *Constitutional Theory*, *op. cit.*, pp. 82–88, esp. p. 88.

81 C. Schmitt, *Der Hüter der Verfassung*, Berlin, Duncker & Humblot, 1931, pp. 71–100, esp. pp. 96–100.

82 On this controversy, see: L. Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge, Cambridge University Press, 2015 (with English translation of Kelsen and Schmitt’s most important texts on constitutional guardianship and the legitimacy of constitutional review). See also: O. Beaud and P. Pasquino (eds.), *La controverse sur ‘le gardien de la Constitution’ et la justice constitutionnelle. Kelsen contre Schmitt / Der Weimarer Streit um den Hüter der Verfassung und die Verfassungsgerichtsbarkeit: Kelsen gegen Schmitt*, Paris, Editions Panthéon-Assas, 2007; R. Baumert, *La découverte du juge constitutionnel, entre science et politique: les controverses doctrinales sur le contrôle de la constitutionnalité des lois dans les républiques française et allemande de l’entre-deux-guerres*, Paris, LGDJ, 2009.

83 C. Schmitt, *Der Hüter der Verfassung*, *op. cit.*, p. 73. More generally, Schmitt’s theories on the notions of ‘political’, ‘non-political’ or ‘neutral(ization)’ are developed in: C. Schmitt, *Der Begriff des Politischen*, Berlin, Duncker & Humblot, 1932 (English translation by G. Schwab: C. Schmitt, *The Concept of the Political. Expanded Edition*, Chicago, University of Chicago Press, 2007).

structures of the state. The latter case corresponds to the ‘economic constitution’ and necessarily implies the negation of the traditional ‘political constitution’ inherited from the 19th century liberal state. Yet, Schmitt contended that “it is one of the fundamental and positive decisions of the current Reich Constitution that it rejects the system of an economic constitution, in particular the ‘political’ system of councils”, for “even the ‘anchoring of the Councils’ system’ in Article 165 WRV was intended, as was strongly emphasized, to have only an economic and not a state-organizational meaning”.<sup>84/85</sup> Besides, he argued that the impossibility of making this Art. 165 the core of an economic constitution governing the German state is evidenced by the lack of implementation of this constitutional provision.<sup>86</sup>

But Schmitt did not stop at this still relatively formal reading. He also proposed in this *Guardian of the Constitution* a much more substantial analysis of

84 C. Schmitt, *Der Hüter der Verfassung*, *op. cit.*, p. 97. In other words, and unlike the Russian Soviet model, Art. 165 WRV is not intended to organize the state on the basis of the sphere of production, but only to potentially (since the article has no direct effect) organize the economy beside the purely political organization of the state on the basis of *bourgeois* democracy: the councils do not ‘represent’ in the abstract and political sense (*repräsentieren*), they only ‘represent’ in the concrete sense of specific interests (*vertreten*). It must be noted that, on this specific point, Schmitt does not oppose Sinzheimer’s positions developed in his speech as rapporteur of the fifth section and in his writings, which tend to reject the establishment of the ‘dictatorship of the Soviets’ as well as the creation of a ‘chamber of labour’ (see *supra*, Subchapter 2. *The Advocacy of the Wirtschaftsverfassung as a Social Democracy: Sinzheimer and the Social-Democratic Legal Doctrine*). However, they draw quite opposite consequences from this finding, because Sinzheimer developed the possibility of combining a ‘state constitution’ and an ‘economic constitution’, whereas Schmitt absolutely rejects this hypothesis: an ‘economic constitution’ is either ‘state constitution’ or nothing.

85 To support his reasoning, Schmitt returned on this occasion to the theses of Tatarin-Tarnheyden, whom he described as “one of the best experts in the field”. In the light of Tatarin-Tarnheyden’s new book (E. Tatarin-Tarnheyden, *Berufsverbände und Wirtschaftsdemokratie. Ein Kommentar zu Artikel 165 der Reichsverfassung*, *op. cit.*). Schmitt drops his initial criticisms expressed in the *Verfassungslehre*. On the contrary, he now emphasizes the convergence of their interpretations: they would “only apparently contradict each other”, for if as Tatarin-Tarnheyden states “the Weimar Constitution has [...] taken a ‘twofold path’ of political will formation, firstly that of head-count democracy (*Kopfzahldemokratie*) and secondly that of the collaboration of economic classes and professional bodies (*Zusammenwirkens der Wirtschaftsklassen und Berufsstände*)”, he also points out that the latter is given subsidiary importance, so that it shall always be subject to the *political* constitution (C. Schmitt, *Der Hüter der Verfassung*, *op. cit.*, p. 97).

86 C. Schmitt, *Der Hüter der Verfassung*, *op. cit.*, pp. 97–98. On this point, he also refers to another well-known conservative legal scholar of that time, Erwin Jacobi (*Grundlehren des Arbeitsrechts*, Leipzig, Deichert, 1927, pp. 392–395).

the development of the modern state.<sup>87</sup> In the aftermath of the Great War, the state is said to have evolved from the 19th century liberal, neutral and non-interventionist state to a ‘total’ state, i.e. a weak state unable to withstand the political pressures of the various social groups and therefore interfering in all spheres of society in a disorderly manner.<sup>88</sup> On the basis of a reformulation of the military concept of ‘total mobilization’ designed to express the requisition of all areas of society (economy, education, science, *etc.*) for the war effort,<sup>89</sup> Schmitt pointed out the “shift towards the total state”.<sup>90</sup> However, far from requisitioning all social sectors for a political goal defined by itself, the state was rather requisitioned by all particular (but no less organized) social interest groups, be it by political parties (pluralism) or by private powers emerging directly from the economic sphere (polycracy).<sup>91</sup> According to Schmitt, this trend was perceivable in all social spheres, but “the most striking turn is in the economic sphere”, since more than half (53%) of German national income appeared to be controlled by the public authorities.<sup>92</sup> The “self-regulating mechanism of the free economy and free market” would thus be *de facto* abolished and gradually replaced through the advent of an ‘economic state’ (*Wirtschaftsstaat*).<sup>93</sup>

The result is a “blatant discrepancy: an economic state, but no economic constitution”.<sup>94</sup> And this discrepancy leads to a twofold deadlock: “de-economizing the state” (*den Staat entökonomisiert*) was no longer possible;<sup>95</sup> but the solution of “resolutely economizing the entire state” (*den Staat entschlossen ganz verwirtschaftlicht*), in order to achieve a true ‘economic constitution’ founding a genuine “corporatist, syndicalist or council state” (*Stände-, Gewerkschafts- oder Rätestaates*), appears undesirable.<sup>96</sup> In the latter case, the will of the state, instead of being strengthened in its unity, would

87 *Ibid.*, pp. 71–131.

88 *Ibid.*, p. 77. See also: C. Schmitt, « Die Wendung zum totalen Staat (1931) », in *Positionen und Begriffe*, *op. cit.*, pp. 146–158; « Weiterentwicklung des totalen Staats in Deutschland (1933) », in *Positionen und Begriffe*, *op. cit.*, pp. 185–190.

89 C. Schmitt, *Der Hüter der Verfassung*, *op. cit.*, p. 79. Schmitt refers here to Ernst Jünger (« Die totale Mobilmachung », in E. Jünger (ed.) *Krieg und Krieger*, Junker und Dünhaupt, Berlin, 1930, pp. 9–30) who in turn borrows the idea from Léon Daudet (*La Guerre totale*, Nouvelle Librairie Nationale, Paris, 1918).

90 C. Schmitt, *Der Hüter der Verfassung*, *op. cit.*, pp. 79–80.

91 *Ibid.*, pp. 73–94.

92 *Ibid.*, pp. 80.

93 *Ibid.*, pp. 80–81.

94 *Ibid.*, p. 98.

95 *Ibid.*

96 *Ibid.*, p. 99.

splinter – even more than in a liberal representative democratic state. At that stage, Schmitt seemed thus to develop only a critical assessment of the situation, without proposing any solutions, either political or legal. But the conclusion of this chapter devoted to the “search for an economic constitution” (*Versuche einer Wirtschaftsverfassung*) prefigured perhaps the beginning of a solution, albeit still somewhat confused:

It is very remarkable that today only two major states have such economic constitutions: communist Russia with its Soviet system and Fascist Italy with its *stato corporativo*. These are two still largely agrarian countries, that are by no means at the forefront of economic development and industrial progress, and whose economic constitution, as everyone knows, is in the shadow of a tightly centralized party organization and the so-called single-party state. The system of economic constitution here is not at all intended to make the economy free and autonomous, but, on the contrary, to place it in the hands of the state and subordinate it to the state; the single-party system derives from the necessity to prevent the domination of the state by several parties, that is, to prevent the pluralistic division of the state.<sup>97</sup>

Schmitt therefore seems to applaud this centralization of power, but he also noted that the respective situations are not economically similar. He also seems to welcome the fact that the economic constitution in both countries is subordinated to the (single-party) state, but one wonders why he then rejected such an economic constitution for the Weimar Republic.<sup>98</sup> The answer, already sketched out in a subsequent section of his *Guardian of the Constitution*,<sup>99</sup> is

97 *Ibid.*, p. 100.

98 This vacillation can already be observed in his review of Erwin von Beckerath's book entitled *Wesen und Werden des faschistischen Staates* (Berlin, Springer, 1927) (C. Schmitt, « Wesen und Werden des faschistischen Staates (1929) », in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles, 1923–1939*, Berlin, Duncker & Humblot, 1940, pp. 108–115), where he already stated that “it is precisely the non-intensively industrialized countries like Russia and Italy that can nowadays provide themselves with an ‘economic constitution’” (*ibid.*, p. 112). Besides, he praises the supremacy of the fascist state – described as a true higher third (*höherer Dritter*), in contrast to the liberal neutral third (*neutraler Dritter*) – over the specific interests of labour and capital, but he asserts, on the other hand, that “the immanent consequence and direction of the fascist apparatus built up today [led] to the state planned economy” (*ibid.*, p. 113).

99 C. Schmitt, *Der Hüter der Verfassung*, *op. cit.*, pp. 115–131 (« Vorgehen der Reichsregierung nach Art. 48 RV. ; Entwicklung vom militärisch-polizeilichen zum wirtschaftlich-finanziellen Ausnahmezustand »).

to be found in the lecture he gave one year later, on 23 November 1932, to the employers' association of Rhineland and Westphalia (*Verein zur Wahrung der gemeinsamen wirtschaftlichen Interessen in Rheinland und Westfalen*) on the subject of "Strong State and Sound Economy" (*Starker Staat und gesunde Wirtschaft*).<sup>100</sup> What he called for is not a total politicization of the economy, nor a single-party state,<sup>101</sup> but a *strong (executive) state, albeit economically self-limited*: strong in order to better assure its self-limitation; economically self-limited in order to better guarantee its power and political unity.

Through this 'qualitatively strong state' (*qualitative starker Staat*), Schmitt actually proposed a kind of *Aufhebung* (sublation) of the contradiction between the liberal and the total state. Against this modern state that would become *quantitatively* total – leading to the confusion between state and society and state and economy<sup>102</sup> – must be imposed a particularly strong state, that would take the *political decision to depoliticize* the non-state spheres of society, and in particular (a part of) the economy. Similar to the *stato totalitario* of the fascist state in terms of "intensity or political energy", but not backed by a single-party, this strong state must rely on the very heart of the executive power, namely the President of the Reich (through the emergency powers of Article 48 WRV).<sup>103</sup> Only he would be able, with the support

100 C. Schmitt, « Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern (Konferenz gehalten am 23.11.1932) », *Volk und Reich*, 1933, pp. 81–94 (first published in the journal of this employers' association: C. Schmitt, « Hauptvortrag von Universitäts-Professor Dr. Carl Schmitt, Berlin », *Mitteilungen des Vereins zur Wahrung der gemeinsamen wirtschaftlichen Interessen in Rheinland und Westfalen*, 1932, vol. 21, n° 1, pp. 13–32; English translation by Renato Cristi available in: C. Schmitt, « Strong State and Sound Economy: An Address to Business Leaders », in R. Cristi, *Carl Schmitt and Authoritarian Liberalism*, Cardiff, University of Wales Press, 1998, pp. 213–232).

101 As Grégoire Chamayou points out in his introduction to the Schmitt-Heller controversy concerning "authoritarian liberalism": "[t]he model promoted by Schmitt in 1932 is not that of a party-state. He wants a strong state, as strong, in some respects, as that of the fascists, but this 'higher third' is not conceived as a total party under which society as a whole should be subsumed" (G. Chamayou, « Présentation, 1932, Naissance du libéralisme autoritaire », in C. Schmitt, H. Heller, *Du libéralisme autoritaire*, Paris, La Découverte (Zones), 2020, pp. 6–82, esp. p. 66). Chamayou concludes from this that, for Schmitt, "[t]he strategy consisted in dictatorializing state power from the inside, without relying on a mass party" (*ibid.*).

102 C. Schmitt, « Strong State and Sound Economy: An Address to Business Leaders », *op. cit.*, p. 218.

103 C. Schmitt, « Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung », in *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (1921), Berlin, Duncker & Humblot, 2015, pp. 240–286.

of the army and the civil service, to carry out and achieve this transfiguration of the quantitative total state into a qualitative strong state.<sup>104</sup>

This point is crucial in Schmitt's reasoning: "only a very strong state would be able to dissolve this dreadful coalescence with all kinds of non-state businesses and interests".<sup>105</sup> And this "depoliticization, the segregation of the state from non-state spheres", which is itself a "specifically political act", requiring nothing less than "a painful surgical intervention".<sup>106</sup> However, the aim of this 'surgical intervention' was not to restore the binary situation of liberalism, in which the (neutral) state and society (and its purely private economic sphere) are opposed to each other. On the contrary, it would be "necessary to

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- 104 Schmitt does not explicitly call in this conference for the president to take the powers of economic exception, but this solution permeates the whole text, albeit in an underlying way. As mentioned above, this is also already apparent from his concept of an 'economic-financial state of exception' which he develops in his *Guardian of the Constitution* (C. Schmitt, *Der Hüter der Verfassung*, *op. cit.*, pp. 115–131). Finally, this call for an authoritarian power takeover by the executive is clearly evidenced in the plans for a *coup d'état* elaborated after the legislative elections of 31 July 1932: Schmitt wrote the drafts of emergency decrees based on Article 48 WRV (G. Chamayou, « Présentation. 1932, Naissance du libéralisme autoritaire », *op. cit.*, pp. 67–69) – but the president's cabinet did not make use of these crisis powers and these decrees were never adopted. Concerning the role of Schmitt in the plans for a *coup d'état* at the end of the Weimar Republic, see: L. Berthold, *Carl Schmitt und der Staatsnotstandplan am Ende der Weimarer Republik*, Berlin, Duncker & Humblot, 1999. It can be noted that the last coup project provided for the liberal Alexander Rüstow as minister of the economy (F. Bilger, *La pensée économique libérale dans l'Allemagne contemporaine*, Paris, LGDJ, 1964, p. 30).
- 105 C. Schmitt, « Strong State and Sound Economy: An Address to Business Leaders », *op. cit.*, p. 221.
- 106 *Ibid.* Hermann Heller comes to the conclusion that Schmitt ultimately defends an 'authoritarian liberalism' (H. Heller, « Autoritärer Liberalismus? », *Die Neue Rundschau*, 1933, vol. 44, pp. 289–298; English translation available in: H. Heller, « Authoritarian Liberalism? », *European Law Journal*, May 2015, vol. 21, n° 3, pp. 295–301). He will be joined in his criticism by Herbert Marcuse: « Der Kampf gegen den Liberalismus in der totalitären Staatsauffassung », *Zeitschrift für Sozialforschung*, 1934, vol. 3, n° 2, pp. 161–195 (translated in English in: H. Marcuse, « The Struggle against Liberalism in the Totalitarian View of the State », in *Negations: Essays in Critical Theory*, London, Free Association Books, 1988, pp. 3–42). For an analysis of this Schmittian 'authoritarian liberalism', see: R. Cristi, *Carl Schmitt and Authoritarian Liberalism. Strong State, Free Economy*, *op. cit.*; G. Chamayou, « Présentation. 1932, Naissance du libéralisme autoritaire », *op. cit.* On the other hand, there are controversies about Schmitt's influence on certain neoliberal currents; see in particular *infra* in this volume, W. Bonefeld, « Economic Constitution and Authoritarian Liberalism – Carl Schmitt and the Idea of a Sound Economy », and the discussions and criticisms by S. Audier (« Le néolibéralisme: Un "libéralisme autoritaire" néo-schmittien ? ») and V. Valentin (« Lidée de constitution économique et l'hypothèse du libéralisme autoritaire »).

insert an intermediate domain between the state and the singular individual” in order to achieve a “tripartition” in the field of the economy:<sup>107</sup> on the one hand, “the *economic sphere of the state*, the sphere of genuine state privilege”, which includes transport, postal services and means of “mass propaganda” (cinema and radio); on the other hand, “the sphere of the free, individual entrepreneur, i.e. the *sphere of pure privacy*”; and, between these two opposite domains, “the intermediate *non-state, but still public sphere*” which would be a “real autonomous administration (*Selbstverwaltung*)”<sup>108</sup> structured around “industrial and commercial chambers, non-voluntary unions of every sort [*Zwangssyndikate*, i.e. compulsory cartels], associations, monopolies, etc”.

Hence, Schmitt certainly denied the existence and relevance of an ‘economic constitution’ for the Weimar Republic: the German state (and thus politics) should not be – and was not – organized around the economy. But he nevertheless defended a qualitatively predominant role of the state vis-à-vis the economy. This kind of interventionism is, so to speak, a ‘feedback’ interventionism: just as the state must be (re)politicized in order to better depoliticize society, it must strategically and authoritatively intervene in the economy in order to better circumscribe its own economic domains as well as the sphere of this corporatist and cartelized self-administration and the residual field of the purely private sphere.<sup>109</sup> And, if need be, it shall do this through the imposition, by the *Hüter der Verfassung* (the President

107 C. Schmitt, « Strong State and Sound Economy: An Address to Business Leaders », *op. cit.*, p. 224–226.

108 In order to avoid any misunderstanding in this business arena, Schmitt adds that “what is advanced here as economic autonomous administration, and as the distinction between state and public spheres, is completely different from the ‘economic democracy’ propagated a few years back by a certain side. That economic democracy explicitly espoused a mixture of economics and politics; it also wanted to acquire economic power within the state by means of political power, and subsequently increase its political power by means of the economic power it had thus acquired” (*ibid.*, p. 225).

109 As Clemens Zacher points out, “Schmitt created an alternative situation in which the economic constitution excluded a state-organizational constitution. In the ‘qualitatively total state’, which Schmitt developed elsewhere as an option of constitutional policy and constitutional theory opposed to the existing ‘quantitatively total state’, he departed completely from the organizational understanding of the positive economic constitution. In his view, the economy – as an autonomous, non-political sub-constitution – should be integrated into the state. Without explicitly stating this, he thus left open the possibility of a corporatist constitution as an anti-Marxist option for integrating the apolitical economy into the state [...]” (C. Zacher, *Die Entstehung des Wirtschaftsrechts in Deutschland*, *op. cit.*, p. 250).

of the Reich), of an “economic-financial state of exception” (*wirtschaftlich-finanziellen Ausnahmezustand*).<sup>110</sup>

This economic state of exception represents the strong legal option of the conservative doctrine. But a perhaps more moderate (but nevertheless congruent) variant was proposed by Ernst Rudolf Huber, disciple of Carl Schmitt,<sup>111</sup> in his opusculé devoted to the *German Reich as an Economic State*<sup>112</sup> published in 1931, in the wake of his master’s *Guardian of the Constitution*.<sup>113</sup> Unsurprisingly, Huber rejected as unfounded the social-democratic interpretations of the fifth Section of Title II of the Weimar Constitution, which were based on prescriptive concepts of “economic democracy” and “social *Rechtsstaat*”<sup>114</sup> and which sought to prove the existence of an “independent economic constitution with its own system of values, its own institutions and special organs”.<sup>115</sup> According to him, these left-wing attempts “do not stand up to lucid scrutiny”.<sup>116</sup>

However, more than this socialist reasoning “which seeks to derive a change in the traditional economic order from the constitution itself”,<sup>117</sup> it is the actual development of the Weimar economy and of the economic policy of the government<sup>118</sup> that “indicates the transformation of the Reich into an

110 C. Schmitt, *Der Hüter der Verfassung*, *op. cit.*, pp. 115–131.

111 Huber was a student of Schmitt at the University of Bonn, where he then taught briefly. In addition to his scholarly writings on economic law, he also published during the interwar period, under a pseudonym, fierce criticism of the Weimar democracy. From the time he joined the NSDAP in 1933, he became one of the most prominent legal scholars under the Nazi regime. Professor in Kiel, Leipzig, Strasbourg and Heidelberg during this period, he was then, after the German defeat, excluded from any academic position for a few years. He taught again from 1953, first in Freiburg, then in Wilhelmshaven-Rüstersiel and Göttingen. After 1956, when he was reintegrated into the Association of German Professors of Constitutional Law, he worked on the publication of an eight volume “German Constitutional History since 1789” (*Deutsche Verfassungsgeschichte seit 1789*, Kohlhammer, Stuttgart), published between 1957 and 1991.

112 E. R. Huber, *Das Deutsche Reich als Wirtschaftsstaat*, Tübingen, Mohr Siebeck, 1931.

113 To whom he refers 16 times in 33 pages, including four references to the *Hüter der Verfassung*.

114 E. R. Huber, *Das Deutsche Reich als Wirtschaftsstaat*, *op. cit.*, pp. 10–15.

115 *Ibid.*, p. 14.

116 *Ibid.*

117 *Ibid.*, p. 15.

118 This actual development of the Weimar Republic is characterized, according to Huber, by a concentration of private powers, an expansion of public economic activity, an increasing state intervention in the regulation of private economic activity (prices, wages, conditions of production and sale, etc.) and an increasing public financial influence on private enterprises (through subsidy, credit, customs and taxation policies) (*ibid.*, pp. 17–23).



economic state”.<sup>119</sup> In other words, Huber endorsed and systematized Schmitt’s critique of the economic state, characterized by political pluralism and economic polycracy. And, together with Schmitt, he highlighted the contradiction between the concrete political-legal context and the normative constitutional order, leading to a situation of “unconstitutionality”.<sup>120</sup>

But, in contrast to Schmitt’s call for an economic state of exception in order to establish the tripartite division of the economy into “state”, “public” (i.e. cartelized but subordinate to the reason of state) and “private” spheres, Huber argued that the Weimar Constitution already implicitly provides for this tripartition. Although it maintains economic freedom as the foundation of the economic order,<sup>121</sup> the *Reichsverfassung* would have substantially transformed the content of this economic freedom: from a freedom originally conceived as a personal sphere prior to and outside of public power, it would have been transformed into a “liberty bound and shaped” by the state,<sup>122</sup> so that, alongside the private economy, there would now be room for a “bound economy” in the Weimar Republic.<sup>123</sup> This solution, however, required the remobilization of state authority, in order to “restore the neutrality of the state vis-à-vis the economy” but “in a new sense”.<sup>124</sup> This implied, on one hand, the renouncing of invasive politics and defence of private economic freedom.<sup>125</sup> But, on the other hand and at the same time, it required this liberty to be politically integrated, that is to subordinate it to the state.<sup>126/127</sup>

119 *Ibid.*, p. 15.

120 *Ibid.*, pp. 23–25.

121 *Ibid.*, pp. 6–8.

122 *Ibid.*, p. 8.

123 *Ibid.*, p. 28.

124 *Ibid.*, pp. 28–29.

125 *Ibid.*, pp. 27–28.

126 *Ibid.*, p. 28.

127 Clemens Zacher also points out that “Huber called for (*forderte*) bound freedom, i.e., subordination to the state, which would thus be relieved of (*enthoben*) the need to fully encompass the economic sphere. Huber systematically rejected the ‘economic state’. Instead, the state should be capable of forming its own will independently of the economy. In a constitutional balance, the organized and the non-organized economy should be subordinated to the will of the state. If one understands the economic constitution sought by Huber as an overall guidance without steering the content (*umfassende Leitung ohne inhaltliche Lenkung*), so that the entire economy subordinates itself to the state’s claim to power (*staatlichen Herrschaftsanspruch*) and does not seek to win it from below (*ihn nicht von unten her zu gewinnen sucht*), then a state sovereignty (*etatischer Herrschaftsanspruch*) prevails, which dominates the certainly existing corporatist elements. In Huber’s view, the claim of the state was always in the foreground, as opposed to the harmonization of economic and social antagonisms – in the sense of integrating the people [into the state]”, i.e. in the sense of economic

Here again arises the rhetoric of the state as ‘higher third’, rising above parties and interest groups to better relativize power struggles and thus ensure its own existence. And this meant intervening in the economy, but only for problems of public interest; private interests, for their part, remained in the domain of a free private sphere subordinate to (but protected by) the state.<sup>128</sup> Yet, this rhetoric of the state as a higher third and independent arbiter would be endorsed by the liberals, albeit with important shifts of meaning – which would lead them to remobilize the concept of ‘economic constitution’.

#### 4 The Liberal *Wirtschaftsverfassung* or the State as the Guardian of a Constitutionalized Market Order: Rüstow, Eucken and Böhm

Embracing the concept of economic constitution, but partially reversing its ‘substance’, German liberals recaptured this notion. This liberal<sup>129</sup> remobilization of the concept did not, however, occur in head-on opposition to the criticisms expressed by the conservative legal doctrine against the existing liberal-democratic constitutional order. Quite the contrary, they took into account – or even endorsed – some of these criticisms, albeit to better inflect and subvert the solutions proposed by the conservative opponents of the liberal *Rechtsstaat*.

The starting point for liberal theories lay in the analysis of the roots of the 1920s-1930s politico-economic crises, also diagnosed by the conservatives. In 1932, economists Alexander Rüstow and Walter Eucken both proposed a convergent interpretation of the underlying causes of the ‘crisis of capitalism’ in Western societies (and especially in Germany). The explanation was primarily to be found in the “structural changes of the state”<sup>130</sup> and, more precisely,

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democracy (C. Zacher, *Die Entstehung des Wirtschaftsrechts in Deutschland*, *op. cit.*, p. 252).

128 E. R. Huber, *Das Deutsche Reich als Wirtschaftsstaat*, *op. cit.*, p. 29.

129 I use the term ‘liberal’ rather than ‘ordoliberal’, since the founding act of the ordoliberal school of thought, or Freiburg school, is usually considered to be 1936 (i.e. after the collapse of the Weimar Republic), with the foreword (which represents a genuine manifesto) of the first book in the collection *Ordnung der Wirtschaft* edited by Walter Eucken, Franz Böhm and Hans Großmann-Doerth: W. Eucken, F. Böhm and H. Großmann-Doerth, « Unsere Aufgabe. Beleitwort der Herausgeber zur Schriftenreihe ‘Ordnung der Wirtschaft’ », in F. Böhm, *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*, Stuttgart, Berlin, Kohlhammer, 1937, pp. VII–XXI. This collection evolved into the journal *ORDO* after the war.

130 W. Eucken, « Staatliche Strukturwandlungen und die Krisis des Kapitalismus », *Weltwirtschaftliches Archiv*, 1932, vol. 36, n° 2, pp. 297–321 (reprint

in the “transformation of the liberal state into an economic state”,<sup>131</sup> which, according to Eucken, was not only revealed by economics but also by public law literature – with the only reference cited being... Carl Schmitt’s book: *Der Hüter der Verfassung*.<sup>132</sup> Rüstow similarly pointed out the relevance of Schmitt’s criticisms of the “total state” and of the “pluralism of the worst kind” in a conference entitled “Free Economy – Strong State” and devoted to the “political and state conditions of economic liberalism”<sup>133</sup> – which was held two months before Schmitt’s conference on “Strong State and Sound Economy”.<sup>134</sup>

Rüstow sought to overcome the dichotomy between the Manchester liberalism of *laissez-faire*, on one side, and, on the other, the counterproductive interventionism that strives to “fight against the natural course of things”.<sup>135</sup> He called for ‘liberal interventionism’ or, in other words, a state that intervenes “in the exact opposite direction to that in which intervention has hitherto been carried out, that is, not against the laws of the market, but in the direction of the laws of the market, not to maintain the old state, but to bring about the new state, not to delay, but to accelerate the natural course of events”.<sup>136</sup> Yet, such liberal interventionism “requires a strong state: a state that stands

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in: W. Eucken, « Staatliche Strukturwandlungen und die Krisis des Kapitalismus », *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 1997, vol. 48, pp. 5–24).

131 *Ibid.*, respectively: *Weltwirtschaftliches Archiv*, pp. 302–308; *ORDO*, pp. 10–14.

132 *Ibid.*, respectively: *Weltwirtschaftliches Archiv*, p. 307; *ORDO*, *op. cit.*, p. 13. Eucken here develops Schmitt’s thesis of the reversal of the ‘total war’ against the state as a result of democratization, leading to an expansion of the state’s economic activity that does not correspond to a “strengthening but, on the contrary, a weakening of the state”, even entailing a “danger of state dissolution”. It should nevertheless be noted that this ‘anti-democratism’ is one of the commonplaces of a substantial part of the Weimar academic elite (R. Fèvre, *L’ordolibéralisme (1932–1950): une économie politique du pouvoir*, PhD thesis, University of Lausanne, 2017, pp. 204–205) – except, of course, the socialist or social-democratic minority.

133 A. Rüstow, « Freie Wirtschaft – starker Staat. Die staatspolitischen Voraussetzungen des wirtschaftspolitischen Liberalismus », in F. Boese (ed.), *Deutschland und die Weltkrise. Verhandlungen des Vereins für sozialpolitik in Dresden 1932*, n° 187, Munich, Duncker & Humblot, 1932, pp. 62–69, esp. pp. 66–67.

134 See *supra*, footnote 100. Rüstow’s intellectual proximity to Carl Schmitt was already observable (and explicitly affirmed) in a first conference in 1929 with a very revealing title: “Dictatorship within the limits of democracy” (A. Rüstow, « Diktatur innerhalb der Grenzen der Demokratie (1929) », *Vierteljahreshefte für Zeitgeschichte*, 1959, vol. 7, n° 1, pp. 87–102). Another article published in 1931 in a French journal also illustrates this anti-democratic stance (A. Rüstow, « La situation économique de l’Allemagne », *La revue des vivants*, 1931, vol. 5, n° 4, pp. 414–420).

135 A. Rüstow, « Freie Wirtschaft – starker Staat. Die staatspolitischen Voraussetzungen des wirtschaftspolitischen Liberalismus », *op. cit.*, p. 64.

136 *Ibid.*

above the groups, above the interested parties, a state that breaks free from its entanglement with economic interests once it has become entangled in them".<sup>137</sup>

While Rüstow in this conference focused on the political aspect of the problem, Eucken introduced a change of perspective in his aforementioned contribution. He discussed the *economic* (rather than state) problem of this 'economic state' (*Wirtschaftsstaat*), namely the fact that it destroys and abolishes the "previous regulating principle of the economy", i.e. the price system, which is directly dependent on the existence of market competition.<sup>138</sup> The rise of monopolistic or oligopolistic private powers was already undermining this regulatory principle, but the economic state tended to eliminate market competition (and this price system) through its policies of cartelization, subsidies, etc. This focus on the system of market prices and its prerequisite (market competition) then revealed, between the lines, an important gap vis-à-vis the conservatives regarding the objectives of this strong state. The aim was not, first and foremost, to restore the state's sovereignty and authority for itself – which required both a (limited) disengagement from the private economy and a partial subordination and cartelization of the economy. Actually, the state was no longer an end in itself, it became a means. The primary and overarching task was to eliminate any (private and public) concentration of economic power in the market; this certainly would require a strong state, but such a state does not find its *raison d'être* in itself (i.e., in the well-named *raison d'état*), but in the *complete* depoliticization and disempowerment (*Entmachtung*) of the economy.<sup>139</sup>

<sup>137</sup> *Ibid.*, p. 68.

<sup>138</sup> W. Eucken, « Staatliche Strukturwandlungen und die Krisis des Kapitalismus », respectively: *Weltwirtschaftliches Archiv*, *op. cit.*, pp. 308-309; *ORDO*, *op. cit.*, p. 14. Eucken observes in this regard that this shift is certainly due in part to the assault of the masses on and within the state, but also to a spurious "interventionist ideology", which carries erroneous economic conceptions (*ibid.*, respectively: *Weltwirtschaftliches Archiv*, pp. 318-321; *ORDO*, pp. 23-24). The worst of them is, according to Eucken, the "assertion that the free capitalist economy is a chaotic, anarchic, haphazard economy in need of state regulation – whereas the truth is that the price system fulfils the task of balancing the immensely numerous economic plans of the individual and creates an order of the utmost rigour".

<sup>139</sup> R. Fèvre, « Le marché sans pouvoir: au cœur du discours ordolibéral », *Revue d'économie politique*, mars 2017, n° 1, pp. 119-151. This obviously echoes Schmitt's critique of liberalism as 'anti-politics', according to which there is "absolutely no liberal politics, only a liberal critique of politics" (C. Schmitt, *The Concept of the Political*, *op. cit.*, pp. 69-79, esp. 70). However the future ordoliberals invalidate this assertion: there is indeed a positive liberal political theory (which becomes explicit in ordoliberalism, perhaps even in reaction to Schmitt's analyses), which is characterized precisely as a

Indeed, if economic entities were able to concentrate and aggregate ever more power in the market, these dominant entities would be able to impose their own will... or even to *create their own law*.<sup>140</sup> The state must therefore become the *guardian of the competitive market order*: a policy for the market<sup>141</sup> should substitute politics against or in spite of the market. And it is precisely this reasoning that was generalized by Franz Böhm, second founding father of the Freiburg School, in his habilitation thesis on *Competition and Struggle for Monopoly*.<sup>142</sup>

Böhm worked in the second half of the 1920s in the Cartel section of the Ministry of Economics.<sup>143</sup> This position convinced him of the harmfulness

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conscious and explicit enterprise of depoliticization, i.e., as ‘politics of depoliticization’ (see: M. Goupy, *L'état d'exception ou l'impuissance autoritaire de l'État à l'époque du libéralisme*, Paris, CNRS éditions, 2016).

140 This is precisely the critique developed by the legal scholar and other founding member of the future ordoliberal school, Hans Großmann-Doerth (See in particular: R. Wakote, « Hans Großmann-Doerth, un cofondateur méconnu de l'École de Fribourg », in H. Rabault (ed.), *Lordolibéralisme, aux origines de l'école de Fribourg-en-Brisgau*, Paris, L'Harmattan, 2016, pp. 127-159) in his inaugural lecture at the University of Freiburg in 1933, devoted to the “self-created law of the economy” (H. Großmann-Doerth, *Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht (Antrittsvorlesung)*, Freiburg, Freiburg Wagner'sche Universität Buchhandlung, 1933). This ‘self-created law of the economy’ criticized by the liberal legal scholar seems to correspond quite well to the ‘economic autonomous administration’ (*wirtschaftliche Selbstverwaltung*) advocated by the conservative legal doctrine. Großmann-Doerth does not directly discuss this particular issue, but he scrutinizes and dissects the “general terms and conditions of sale” and the contractual imbalances between buyers and sellers that this phenomenon reveals. In so doing, he actually highlights the disproportionate balance of power that undermines the market and he points out the role of the state in supervising and controlling the market, in order to prevent abuses of a dominant position and to limit the power of private interest groups (see: C. Mongouachon, « Lordolibéralisme: Contexte historique et contenu dogmatique », *Concurrences*, 2011, pp. 70-78, esp. p. 71).

141 M. Foucault, « Leçon du 7 février 1979 », in *Naissance de la biopolitique: cours au Collège de France (1978-1979)*, Paris, Gallimard, 2004, pp. 105-133, esp. p. 125.

142 F. Böhm, *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung*, Berlin, Carl Heymanns Verlag, 1933 (republished in: F. Böhm, *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung*, Baden-Baden, Nomos, 2010; this last version is taken as a reference in the following pages).

143 On the work and life of Böhm, see: H.O. Lenel, « The life and work of Franz Böhm », *European Journal of Law and Economics*, 1996, vol. 3, n° 4, pp. 301-307; S. Kolev, « Böhm, Franz », in A. Marciano and G.B. Ramello (eds.), *Encyclopedia of Law and Economics*, New York, NY, Springer, 2018, available at: [https://doi.org/10.1007/978-1-4614-7883-6\\_201-3](https://doi.org/10.1007/978-1-4614-7883-6_201-3) (last consulted on 12 February 2022).

of such legal-economic agreements,<sup>144</sup> but, on the other hand, it offered him a first-hand field of practical investigation on which he could sharpen his thoughts and refine the theoretical project of his dissertation and his habilitation thesis. The latter was submitted in April 1933 (three months after the Nazis came to power) and reviewed by Hans Großmann-Doerth and Walter Eucken, thus bringing together for the first time the nucleus of the future ordoliberal school. Through Rüstow (to whom he expressly referred), Böhm shared the Schmittian critique of a democracy that corrupts the state (and its function of higher third and neutral arbiter),<sup>145</sup> but his strategy consisted not so much in discussing other theses as in proposing to “build a [new] theory that would cut the ground from under the cartel’s feet”.<sup>146</sup> And this theory was quite ambitious, to say the least. Böhm explicitly stated in the foreword to the publication of his thesis that:

The present book attempts to elucidate (*veranschaulichen*) the laws (*Gesetzmäßigkeiten*) of a free trade and competitive economy, as determined by economic theory, in a way that has not been achieved before. And it does so by assuming the task of proving and presenting this economic system as a *legal constitution of economic life*, as a legal order in the positive sense [...] of a precise and exact constitutional legal structure. It is, so to speak, *an attempt to translate the doctrinal system* (*Lehrgebäude*) *of classical economic philosophy from the language of economics* (*Nationalökonomie*) *into the language of legal science*.<sup>147</sup>

144 F. Böhm, « Das Problem der privaten Macht », *Die Justiz*, 1927/1928, vol. 3, pp. 324-345. The legal roots of this cartelization of the economy lie in the founding (but, according to Böhm, fatal) decision of the *Reichsgericht* of 4 February 1897 on the Saxon Wood Pulp case (*Reichsgericht, sächsische Holzstoffkartell*, 4 February 1897, RGZ 38, 155), in which the court applied freedom of contract to confirm the binding nature of restrictive competition agreements. Böhm will later provide an analysis specifically devoted to this judgment (F. Böhm, « Das Reichsgericht und die Kartelle. Eine wirtschaftsverfassungsrechtliche Kritik an dem Urteil des RG. vom 4. Februar 1897 », *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 1948, vol. 1, pp. 197-213).

145 F. Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, p. 229.

146 K. W. Nörr, « On the Concept of the ‘Economic Constitution’ and the Importance of Franz Böhm from the Viewpoint of Legal History », *European Journal of Law and Economics*, 1996, vol. 3, n° 4, pp. 345-356, esp. p. 350. See also: J. Walther, « Prométhée enchaîné ou la puissance maîtrisée. Le lien génétique entre droit privé et concurrence dans l’œuvre de Franz Böhm (1895-1977) », in H. Rabault (ed.), *Lordolibéralisme, aux origines de l’école de Fribourg-en-Brisgau*, Paris, L’Harmattan, 2016, pp. 95-126, esp. p. 109.

147 F. Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, p. 17 (emphasis added). Böhm continues with an explicit reference to the physiocratic project of transcribing *natural*

Hence, based on the conceptualizations of (liberal) economic science relating to competition and struggles for monopoly,<sup>148</sup> Böhm developed a real *theory of economic constitution* as the “legal constitution of the free market economy”, essentially structured around private law (the authentic normative basis of the market economy) but that also required to be enshrined in public law through the formal recognition of the freedom of trade and industry as the organizing and regulating principle of economy.<sup>149</sup> Here is Böhm’s first theoretical *coup de force*: where the ‘economic constitution’ was first imbued with a strictly socialist content (because it was forged by social-democratic legal scholars to serve their project of democratization and politicization of the economy) and where the conservatives maintained this socialist understanding of the concept (albeit to better reject this socialist project) – Böhm completely subverts the concept, keeping the signifier but transforming the signified, and thus proposed a truly liberal meaning of this *Wirtschaftsverfassung*.

Besides, this manoeuvre exists not only on an abstract and theoretical level: it is rooted in a detailed analysis of the concrete legal order in force under the Weimar Republic, as well as in a (critical) assessment of the relevant case law and scientific legal doctrine.<sup>150</sup> More than purely descriptive, it also carried with it a performative aim, namely to defend the liberal economic order of the Weimar Republic. It is actually against this quite polemical and political background that Böhm carried out his second theoretical *coup de force*: mobilizing the decisionist definition of the ‘constitution’ given

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(economic) law into positive state law: “With this problem [i.e., the translation of the doctrinal system of classical economic philosophy from the language of economics into the language of legal science], the work takes up the proposition of the Physiocratic School, which one and a half centuries ago claimed that the state should declare ‘the natural law to be the state law’ in the field of economic life. Wherever there exists today a free economic constitution, the right to what is called freedom of trade and industry, the states have at one time or other fulfilled this requirement. But as assiduously as generations of academics have since extended and refined knowledge of the economic natural laws (*wirtschaftlichen Naturgesetzen*), legal science has paid little attention to the question of what a legal constitution that is drawn up by the state declaring ‘a natural law as the state law’ looks like” (*ibid.*). On the physiocratic project, see *supra* in this volume, P. Steiner, « Les Physiocrates, l’économie politique, l’Europe » and *infra* in this volume, H. Rabault, « Le Concept de Constitution économique: émergence et fonctions » and P. C. Caldwell, « The Concept and Politics of the Economic Constitution ». Regarding Franz Böhm’s views on natural (economic) law, see: D. Nientiedt, « Metaphysical justification for an economic constitution? Franz Böhm and the concept of natural law », *Constitutional Political Economy*, 2019, vol. 30, n° 1, pp. 114–129.

148 F. Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, pp. 31–107.

149 *Ibid.*, pp. 206–298.

150 *Ibid.*, pp. 179–191.

by Schmitt, but in order to reshape it and bring, against the opinion of the *Staatslehrer*, an economic core into it:

From a constitutional point of view, the system of freedom of trade and industry is a constitution of economic life in the positive [law] sense; the introduction of this system consequently means a ‘complete decision’ (*Gesamtentcheidung*) over the type and form of the economic-social cooperation process, in the same sense in which Carl Schmitt describes the state constitution as a ‘complete decision over the type and form of political unity’.<sup>151/152</sup>

Böhm’s connection between the Schmittian meaning of (political) ‘constitution’ and the concept of *Wirtschaftsverfassung* may seem surprising at first glance, since Schmitt set the two concepts against each other. But it proves ultimately to be particularly subtle and astute. Schmitt considered (like Huber) that the Weimar constitutional order enshrined a free economy, and thus rejected centralized planning. If they were reluctant to use the concept of ‘economic constitution’, it is only because they remained locked in the anti-liberal conception of the term. Yet, it is precisely this socialist conceptual monopoly on the *Wirtschaftsverfassung* that Böhm broke. And he did so with Schmitt’s conceptual tools, albeit against him. Besides, he turned them against Schmitt not only on the purely theoretical level – that is, on the possibility of giving the concept a properly liberal content – but also in the field of concrete positive law interpretation. While Schmitt denied that the Weimar Republic was a legal order of a planned economy, on the other hand he defended the maintenance of a cartelized public sphere of economy. This is what Böhm strictly rejected: the core of his thesis lay precisely in the refutation of this cartelization of the German economic order. To do so, he opposed this cartelization (and the conservative theories that sometimes underlie it)

151 *Ibid.*, p. 120. Böhm refers here to Schmitt’s *Theory of Constitution*: C. Schmitt, *Verfassungslehre*, München-Leipzig, Duncker & Humblot, 1928. pp. 20 ff. (in the English translation: C. Schmitt, *Constitutional Theory*, *op. cit.*, p. 75).

152 This formulation is the first occurrence of the definition which will be systematically used by the future ordoliberals (W. Eucken, F. Böhm and H. Großmann-Doerth, « Unsere Aufgabe. Beleitwort der Herausgeber zur Schriftenreihe ‘Ordnung der Wirtschaft’ », *op. cit.*, esp. p.XIX.; W. Eucken, *Die Grundlagen der Nationalökonomie*, Iena, Gustav Fischer, 1940, p. 52). For an overview of the advent of the ordoliberal notion of “economic constitution”, see: H. Rabault, « Naissance de la notion ordolibérale de ‘constitution économique’ », in H. Rabault (ed.), *Lordolibéralisme, aux origines de l’école de Fribourg-en-Brisgau*, *op. cit.*, pp. 189-210.



with his own ingenious interpretation of the constitutional (economic) situation of the Weimar Republic.<sup>153</sup>

Böhm hardly denied the revolutionary potential of the Weimar Constitution. He conceded that the latter expressly removed the field of labour (Art. 157 WRV) and agriculture (Art. 155 WRV) from the free-market system and that it empowered the legislature to introduce economic planning through the (state or corporatist) socialization of private economic sectors.<sup>154</sup> He nevertheless strived to rigorously undermine this revolutionary potential, through a two-fold analysis, i.e. both legal and economic. At the first (legal) level, he noted, on one hand, that the state had not (except occasionally)<sup>155</sup> made use of its planning prerogatives. He argued, on the other, that the socialist-oriented provisions of the *Reichsverfassung* represented only *derogations* from the constitutional principles of economic freedom and free competition. Indeed, the latter were, according to him, materially established at the legislative level by the Trade and Industry Code (*Gewerbeordnung*) of 21 June 1869,<sup>156</sup> but also formally enshrined at the constitutional level through Art. 151 (1) and (3) WRV<sup>157</sup> – and were even further extended by the Antitrust Regulation of 2 November 1923.<sup>158</sup>

On the second (economic) level, Böhm deconstructed the idea of a possible partial exit from the market order. Based on the labour market analysis, which is governed by collective bargaining,<sup>159</sup> Böhm pointed out that “economic freedom, which is realized in the field of trade and industry, has

153 F. Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, pp. 299–342.

154 F. Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, pp. 315–317. Böhm even argues that “the *Reichsverfassung* contains a fundamental and significant amendment to the complete constitutional decision taken by the *Gewerbeordnung* [of 1869, enshrining the freedom of trade and industry]” (*ibid.*, p. 315).

155 Böhm cites in particular the “special public service laws for coal, potash, electricity, iron, spirits, and match industries” (F. Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, p. 299). See *supra*, footnote 56.

156 *Gewerbeordnung*, 21 June 1869 RGBl. 1869, 245.

157 These are supplemented by the right to private property (Art. 153 WRV), the freedom of contract (Art. 152 WRV) and the general freedom of association (Art. 124 WRV) (*ibid.*, p. 316).

158 *Verordnung gegen den Mißbrauch wirtschaftlicher Machtstellungen*, 3 November 1923, RGBl. I, p. 1067. Böhm considers that this Antitrust Regulation represents the “way of the compulsory restoration of the free order [...], the *appeal to the natural order*” (*ibid.*, p. 320; emphasis added).

159 This is why the “constitution of working life” (*Verfassung des Arbeitslebens*) is anything but a “Manchesterist” constitution (F. Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, p. 319).

a virtually overpowering effect on the field of wage regulation”,<sup>160</sup> for the (allegedly natural) market laws imply that high wages would lead to the dismissal of workers and to the replacement of the workforce by machines that would become proportionally more competitive. It follows that “the laws of this freedom order [that is, the market economy] require attention and obedience even from those sectors of the economy that are not based on freedom, be it the wage sector or the islands of planned economy within the sphere of trade and commerce”.<sup>161</sup> The logic is implacable: there would only be two ways of governing the economic process: total planning or total competition – and nothing in between. Or more precisely, in between the two it must be concluded that the competitive market order would prevail; all planning is therefore inconsistent in that situation. Since the Weimar Constitution did not provide for this total planning, the German legal order was and must be a market order based on economic freedom.<sup>162</sup>

However, a constitution needs a guardian.<sup>163</sup> An economic constitution, even a liberal one, especially a liberal one, needs a strong guardian to protect the market order. This guardian is the state. This point constituted the keystone that supports the whole theoretical edifice built by Böhm: the market

160 *Ibid.*

161 *Ibid.* Böhm adds: “Should this obedience be denied, the free order will retaliate in so far as the stream of economic life will be dammed up at these obstacles, sooner or later bursting its banks at some point and wreaking havoc in both spheres, for which the proponents of the tied economy then tend to blame economic freedom, while the advocates of economic freedom tend to blame the arbitrariness of the planned economy”. This same economic logic would also apply when enterprises illegally try to circumvent the free market system in order to acquire dominant positions: “[s]ooner or later, the initially dammed and partially diverted stream will sweep the artificially matted structure into its torrent” (F. Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, p. 320: “dann wird der zunächst gestaute und teilweise abgelenkte Strom das künstlich verfilzte Gebilde früher oder später in seinen Strudel reißen”).

162 The method is particularly cunning, for under the guise of recognizing the possibility of an alternative, it makes the latter so radical that it becomes almost utopian. Since the alternative is ultimately not really an alternative, one has to settle for the liberal ‘natural order’. This conceptual radicalization, this antagonization of alternatives is, moreover, quite similar to Schmitt’s theoretical strategies: playing on the binarity and contradiction between concepts, on their irreducible oppositions, in order to better force the choice, and to better impose one of the two alternatives. Planning and competition are not seen here as Weberian ideal types, necessarily tangled and intertwined in reality; they are understood as mutually exclusive – one always having to destroy the other (and *vice versa*). This is also the discursive strategy that F.A. Hayek will develop in his pamphlet *The Road to Serfdom* (London, Routledge, 1944).

163 See *supra*, footnotes 81–82.

order based on economic freedom required the state to set the ‘rules of the game’ of free and fair competition, but also to intervene to enforce them – and *only* to enforce them. Franz Böhm actually demanded a *Wirtschaftsrechtsstaat*, i.e. the extension of the rule of law to the economic sphere of society.<sup>164</sup> He explicitly rejected the idea that economic freedom would find its “dogmatic historical justification” in the individual as “bearer of an absolute value”,<sup>165</sup> i.e. the “bourgeois rule of law” (*bürgerlicher Rechtsstaat*). He rejected, on the other hand, the idea that economic freedom, although prevailing in principle, should nevertheless be tempered and moderated by social considerations, as advocated by the proponents of the “social rule of law” (*sozialer Rechtsstaat*). According to him, the dogmatic justification of economic liberty was to be found in the *competition*, that is in the economic struggle of individuals. Only this struggle would provide an “increase in the social product and an improvement of general prosperity” for the entire community. But it required a state that set (and controlled the respect of) the rules of this competition. Without expressly naming it, he laid the foundations of what would later be called an “*État de droit économique*”.<sup>166</sup>

## 5 The *Wirtschaftsverfassung* or the Question of the (De)Politicization of the Economy through Law

Hence, the ‘economic constitution’ was embedded in a discursive constellation,<sup>167</sup> in which divergent definitions and competing conceptions of fundamental notions – such as democracy, economy, state, rule of law, *etc.* – clash and confront each other. Through the concept of *Wirtschaftsverfassung*, the Social Democrats advocated nothing less than the extension of popular

164 F. Böhm, *Wettbewerb und Monopolkampf*, *op. cit.*, pp. 326–327. See also: F. Böhm, « Privatrechtsgesellschaft und Marktwirtschaft », *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 1966, vol. 17, pp. 75–151. (Translated in: F. Böhm, « Rules of Law in a Market Economy », in Alan T. Peacock and H. Willgerodt (eds.), *Germany's Social Market Economy – Origins and Evolution*, London, Macmillan, 1989, pp. 46–67).

165 Here Böhm openly polemicizes with Schmitt (C. Schmitt, *Verfassungslehre*, *op. cit.*, pp. 158 ff.; in the English translation: C. Schmitt, *Constitutional Theory*, *op. cit.*, p. 198).

166 F. Bilger, *La pensée économique libérale dans l'Allemagne contemporaine*, *op. cit.*, p. 64; M. Foucault, « Leçon du 21 février 1979 », in *Naissance de la biopolitique: cours au Collège de France (1978–1979)*, Paris, Gallimard, 2004, pp. 165–190, esp. p. 176. See also: J. Hien and C. Joerges (eds.), *Ordoliberalism, Law and the Rule of Economics*, Oxford/London, Hart Publishing, 2017.

167 M. Foucault, « La formation des stratégies », in *L'archéologie du savoir*, Paris, Gallimard, 1969, pp. 89–97.

sovereignty to the economy ('economic democracy', sometimes also referred to as 'social *Rechtsstaat*'), in order to politicize the economy and, via the system of (economic and workers') councils, to restore workers' power over their social and economic life.

Conservative legal scholars, on the other hand, rejected this project and what they considered to be an erroneous conception of democracy. The neutral state, under the pressure of the masses, would inevitably turn into a quantitative total state. The *raison d'état* would be overthrown by the onslaught of these vested interests. To counter this threat and to ensure its self-preservation, the state should carry out a vigorous, surgical intervention of (partial) depoliticization of the economy, but precisely in order to better re-politicize the state – if necessary, through the imposition of an *economic state of exception*. They actually radicalized the socialist definition of 'economic constitution', in so far as it would involve the entire organization of politics around the economy and, thus, the impossibility of coexisting with the political state constitution, contrary to what Sinzheimer and other left-wing legal scholars claimed. This radicalization of the socialist understanding of the notion then implied, for these conservative *Staatslehrer*, the rejection of such an 'economic constitution' for the Weimar Republic. If there should be an economic constitution, it could only be a total and absolute one, as in Soviet Russia and Fascist Italy. Otherwise, and especially when applied to the Weimar legal order, it would be, at best, a simple metaphor highlighting the rise in the economic field of an intermediate level between state and society, i.e. the autonomous and cartelized public economy; or, at worst (albeit the most frequent case), this 'economic constitution' would constitute only a polemical, programmatic and tactical concept developed by the social-democratic legal doctrine to subvert the constitutional order by causing a fateful confusion between state and society through economic democratization. This explains the conservatives' call for a strong (or authoritarian) but self-limiting state that would subordinate the economy to its authority while preserving a sphere of private economic freedom.

On a third side, the liberal legal and economic doctrine shared and endorsed this critique of a too extensive understanding of democracy, which would lead to the false belief that it is possible to embrace the entire economy in a global plan, thus undermining the self-regulated market. According to them, the market functioning was disrupted, or even nullified, by this assault of the masses within the state. It was, on the other hand, weakened by the struggle for monopoly of private enterprises seeking to acquire more market power. It was therefore essential to completely depoliticize the economy, i.e., to disempower all (public and private) economic entities. This required,

however, an independent and neutral higher third. This higher third can only be the state, and more precisely a *strong state*. But the latter is quite different from the conservatives' strong state, because here it has to serve the market – and not its own *potestas*. Its *raison d'être* and its *auctoritas* lay in its function of *guardian of the market order*: it would organize the market and enforce the (natural) competition law. This required a proper political decision. In this sense, the state would legally establish the market, it *constitutes* it, even if this market order was considered as a natural order. This natural economic order pre-exists only as a potentiality that has to be realized by the state, just as in physiocratic theories. There is therefore a political choice, a constitutional decision in favour of the liberal market order. Hence, contrary to what the conservative legal scholars claimed, a *liberal economic constitution* can (and does in fact) exist, which is precisely this market order that would have been enshrined in the Weimar Constitution. The state shall therefore respect the rules that it imposes on private agents. It must obey the rules that it has set. As rule maker and arbiter, it cannot intervene in the competition game; it shall only establish the rules and ensure that they are respected. This is nothing less than the principles of the rule of law applied to the economy. The Weimar Republic shall not be a *Wirtschaftsstaat* (economic state), but a *Wirtschaftsrechtsstaat* (economic rule of law).

Facing the new constitution adopted in the aftermath of a traumatic defeat, as well as the major political and economic crises of the inter-war period and the concomitant emergence of Fascist and Soviet alternatives to the liberal model, Weimar intellectuals and scholars sought to grasp, understand and figure out this very specific and contingent historical situation. In other words, they sought to *conceptualize* it. But they did so, however, on the basis of theoretical and ideological assumptions that most of the time were very divergent or even contradictory.<sup>168</sup> The advent of the concept of economic constitution under the Weimar Republic is to be understood against this historical background.

A concept does not carry an absolute and abstract meaning, a sort of primary identity that could be restored to its original purity by retracing its history in a linear way until the discovery of its hypothetical inherent truth. It is formed and shaped against a specific issue, which it seeks to grasp and, in so doing, to overcome. This process of abstraction inevitably involves conflicts over the interpretation of the causes of the problem and of the answers to be

168 C. Gusy, *100 Jahre Weimarer Verfassung. Eine gute Verfassung in schlechter Zeit*, Tübingen, Mohr Siebeck, 2018.

provided. These conflicts are mirrored in the heterogeneous meanings given to the concept.<sup>169</sup> In other words, the concept crystallizes in its polysemy the (political) struggles around the interpretation of the reality it is supposed to apprehend and explain. It is the very *polemical* nature of the concept. But since this conceptualization process involves an ordering (and therefore normative) operation vis-à-vis social phenomena and historical events and structures, it also induces, albeit perhaps implicitly, a conditioning of the field of possibilities. Hence, the interpretation also struggles to shape, by a feedback effect, the historical and political context and the social issues that the concept tries to grasp: by structuring the way of thinking, it conditions the way of acting. The concept thus also involves a *performative* dimension.<sup>170</sup> A dialectical relationship is established between, on one hand, the social and institutional reality and, on the other, the scientific and theoretical discourse: a change in the balance of power within society can influence the way in which social problems are conceptualized; symmetrically, the theoretical debates around concepts affect the power relationships that underlie and structure society.<sup>171</sup>

Against this background, what then is the specific social problem in response to which this concept of 'economic constitution' emerged? What can explain – or at least shed light on – such important doctrinal controversies and ideological struggles? The *Wirtschaftsverfassung* under Weimar actually addressed nothing less than the highly political question of the *social embeddedness or disembeddedness of the economy*.<sup>172</sup> The level of theoretical conflict surrounding the concept responds to the intensity of the social crisis that affected Europe, and particularly Germany, in the first half of the 20th century. What is fundamentally at stake in the debates on the economic constitution was therefore the question of the *(de)politicization of the economy through law*.<sup>173</sup> Faced with the gradual, albeit contingent and

169 M. Foucault, « Nietzsche, la généalogie, l'histoire », in S. Bachelard *et al.* (eds.), *Hommage à Jean Hyppolite*, Paris, Presses Universitaires de France, 1971, pp. 145-172; M. Foucault, « Le souci de la vérité », in *Dits et écrits*, Tome II, Paris, Gallimard, 2001, pp. 1487-1497.

170 R. Koselleck, « Begriffsgeschichte and Social History », in *Futures Past. On the Semantics of Historical Time* (1979), New York, Columbia University Press, 2005, pp. 75-92.

171 F. Taylan, *Concepts et rationalités. Héritages de l'épistémologie historique, de Meyerson à Foucault*, Paris, Éditions matériologiques, 2018. See also *supra* in this volume G. Grégoire & X. Miny, « Introduction – La Constitution économique : Approche contextuelle et perspectives interdisciplinaires ».

172 K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (1944) Boston, Beacon Press, 2001.

173 See also *infra* in this volume, the conclusion of C. Joerges, « Economic Constitutionalism and "The Political" of "The Economic" ».

conflictual, autonomizing of the social relations of exchange, production and property vis-à-vis this very singular (self-)institution that is society,<sup>174</sup> ideological and theoretical positions diverged and confronted each other all the more violently and openly as the economic and political situation appeared to be in a deadlock. The concept of ‘economic constitution’, far from undergoing a straight, linear and uniform evolution within a (legal) science supposedly isolated from the social reality it is supposed to observe and analyse, will thus both crystallize and condition the political struggles that marked the Weimar Republic.

### Conclusion

This very political question of the legal ordering of the economy – what ordoliberalism will later call *Ordnungspolitik* – has, of course, not disappeared with the Weimar Republic. The conceptual architecture in which it takes place has, however, certainly evolved since that time. After the end of the World War II, the ‘economic constitution’, abandoned by the left-wing (political and intellectual) movements, has been mobilized and monopolized by the (neo)liberal schools in order to depoliticize the economy through law.<sup>175/176</sup> Yet, it does not mean that the sense of this key notion would now be fixed and set in stone. Since the 2008 crisis, a number of current socio-political processes, linked to the market economy and sometimes subsumed under the concept of ‘economic constitution’ – such as the extension of the supreme courts’ power

174 C. Castoriadis, *The Imaginary Institution of Society*, Cambridge, Massachusetts, MIT Press, 1998; F. Lordon, *Imperium: structures et affects des corps politiques*, Paris, La Fabrique éditions, 2015.

175 See *infra* in this volume, T. Biebricher, « An Economic Constitution – Neoliberal Lineages ». See also: L. Zevounou, « Le concept de “constitution économique” : Une analyse critique », *Jus Politicum*, 2018, n° 20-21, pp. 445-482; M. Caron, « Réflexions sur la constitutionnalisation des politiques économiques conjoncturelles », *Revue du droit public et de la science politique en France et à l'étranger*, 2016, n° 2, pp. 557-595.

176 There is no contradiction in observing that the ordoliberal *Ordnungspolitik* grasps the very political character of the legal ordering of the economy and, at the same time, that the (neo)liberal schools aim to depoliticize the economy through law. As noted above in regard to the (future) ordoliberals (see *supra*, footnote 139), the (neo)liberal project can be understood as a political enterprise of self-disempowerment of the state and of economic depoliticization (P. Dardot and C. Laval, *The New Way of the World: On Neoliberal Society*, London/New York, Verso, 2014). Beyond their divergences, this project also characterizes the theories of Hayek, the Public Choice school, the New Classical Macroeconomics, etc.

to fundamental economic issues,<sup>177</sup> European integration through law and market (or more precisely through the law of the market)<sup>178</sup> or the globalization of trade and transnationalization of firms<sup>179</sup> – seem to have entered a phase of growing opposition.

Will these political contests, often considered (and sometimes assumed)<sup>180</sup> to stem from (economic) “populism”,<sup>181</sup> lead to the reopening and resurgence of theoretical confrontations around the concept, and to new interpretations and subversions of this economic constitution, notably to rediscover its potential meaning for an economic democracy? Time will tell. In any case, although the question whether “in politics, words and their usage are more important than any other weapon”<sup>182</sup> remains open, it is quite sure that they take their part in these political and ideological conflicts. In this respect, proposing a genealogy of a concept as highly political as that of economic constitution might shed light on our present... and, who knows, open up new horizons for the future.

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