



WORKING PAPERS

LAW 2013/09
Department of Law

Law and Politics in Europe's Crisis:
On the History of the Impact of an Unfortunate
Configuration

Christian Joerges

European University Institute
Department of Law

**Law and Politics in Europe's Crisis:
On the History of the Impact of an Unfortunate Configuration**

Christian Joerges

EUI Working Paper **LAW** 2013/09

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

ISSN 1725-6739

© Christian Joerges, 2013

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

European Integration was constructed as a primarily economic project. In its formative phase ordoliberal scholars started to promote the understanding of the ensemble of European economic freedoms together with a system of undistorted competition as the legal framework and normative core of the EEC, *i.e.* as Europe's 'economic' constitution. Economic and Monetary Union as institutionalized by the Maastricht Treaty were expected to complete this project. However, the whole edifice started to erode immediately after its establishment. Following the financial and the sovereign debt crises, EMU with its commitments to price stability and its focus on monetary politics is by now widely perceived as a failed construction precisely because of its reliance on inflexible rules. The European crisis management seeks to compensate these failures by regime which disregards the European order of competences, des-empowers national institutions and burdens in particular Southern Europe with austerity measures. This new mode of economic governance establishes pan-European commitments to budgetary discipline and macroeconomic balancing. The ideal of an ordering of the European economy 'through law' is thereby abolished while the economic and social prospects of these efforts seem gloomy and the Union's political legitimacy is eroding.

Keywords

European Economic Constitution – Monetary Union – Financial Crisis – Economic Governance – Constitutional Adjudication – Carl Schmitt – Jürgen Habermas – Unity in Diversity

TABLE OF CONTENTS

Integration through Law	1
Processes of Erosion: A Digression into Karl Polanyi's Economic Sociology.....	2
De-Juridification of Monetary Union	3
Constitution without a Guardian.....	4
Carl Schmitt's Shadow	7
The Crisis as Opportunity according to Jürgen Habermas	10
<i>'Unitas in Pluralitate'</i>: A Plea for a More Modest Union.....	11

LAW AND POLITICS IN EUROPE'S CRISIS: ON THE HISTORY OF THE IMPACT OF AN UNFORTUNATE CONFIGURATION

*Christian Joerges**

*'Ich möchte Deutschland und den Deutschen für Ihren großen Einsatz für unser Europa von Herzen danken.'*¹ Along the European integration history, Germany has been the biggest contributor in financial terms towards our project. That is why I never miss an opportunity to say thank you. Yet, let's be completely frank, there is a paradox. The perception of the outside world is not always in tune with this... In politics, the issue is sometimes not what we do but how we do it. It is about explaining and communicating what we truly believe to be in the best interest of our citizens.' Jose Barroso closed his remarks on 'The State of Europe' with these words in front of a very large invitation-only audience on 9 November 2011 at the *Haus der Berliner Festspiele*.² Indeed: there is no sign of enthusiasm in Germany. But this is not what vexes the European public. On the contrary, the perception is, and with quite a bit of resentment, that Berlin decides what is to be done in the crisis countries. The paradox of which Barroso speaks does not exist. Instead, this is a clearly delineated constellation of conflict: the enforcement of European prerogatives driven by allegedly irresistible economic constraints versus the rights to political autonomy on the part of states and of their citizens' trust in constitutional commitments to the rule of law (*Rechtsstaatlichkeit*) and democracy. Nobody can desire and design such a disastrous situation. But it cannot be controlled easily, either.

Integration through Law

Europe is substantially a 'Community of law'. This characterisation is widely ascribed to the first President of the Commission of the EEC.³ And indeed, from the outset, much was entrusted to law. The law was considered capable of governing a broad range of issues. It was to overcome the natural state of the European world of states, replace its bellicose past with a peacetime order, and rein in economic egoism used by Member States. 'Integration through law' was the motto of European policy in its formative phase, which was dominated by jurists. The so-called constitutionalisation of the treaties, which created an autonomous order distinctly separate both from the law of the nation-states and from international law, emerged through the European Court of Justice and consisted of legal principles: Community law binds the Member States; core components not requiring implementation apply directly as the 'law of the land'; therefore, their effect must take precedence over national law; they must bring about unity and be applied uniformly; that is why a central authority is necessary to define this unity; the European Court of Justice itself is the only suitable option for this function. Of course, on the path from the Economic Community of 1957 to the 'ever closer union of the peoples of Europe', Europe unceasingly remade what Hans Peter Ipsen has characterised as a *Wandelverfassung*⁴

* Translated from the German by Sandra H. Lustig, Hamburg. The German version was published in (2012) 66 *Merkur. Zeitschrift für europäisches Denken*, Heft 762, 1013-1024.

¹ [I would like to thank Germany and the Germans sincerely for your great dedication for our Europe]. In German in the official version at http://europa.eu/rapid/press-release_SPEECH-11-738_en.htm.

² 'The State of Europe – Die Europa Rede Berlin, 9 November 2011'; note 1.

³ The pertinent publication was in French: Walter Hallstein, 'La Communauté Européenne, nouvel ordre juridique. (1964) *Les Documents Communauté Européenne*, no 27; see Matev Abelj, 'The Legal Viability of European Integration in the Absence of Constitutional Hierarchy', in Daniel Augenstein (ed), *'Integration through Law' Revisited: The Making of the European Polity*, Surrey: Ashgate, 2012, 29.46.

⁴ See his 'Europäische Verfassung – Nationale Verfassung', (1987) *Europarecht*, 195-213, at 201.

and it engaged continuously in constitutional reconfigurations. Yet those dogmatic core concepts on which Europe was founded in legal terms remained in force. Their stability and impact seem simply phenomenal. But this appearance is also deceptive. The shadow of orthodoxy in terms of European legal policy concealed both their inherent partiality and their political powerlessness.

Processes of Erosion: A Digression into Karl Polanyi's Economic Sociology

In his remarks on 'The State of Europe', Barroso focussed on the crisis of Economic and Monetary Union and thus on an institutional accomplishment, which was originally perceived as the the consummation of very high ambitions – entirely line with the original project of 'integration through law'. The monetary union agreed in the Treaty of Maastricht in 1992 was a political project, but one that was constituted again as a legal project: The new common currency was hence not to be entrusted to a political union, but to be bound to legal rules. Only an economic policy 'that could be bound by constitutional law aligned with actionable criteria' was to be practiced in Europe – that was the creed of Ordoliberalism.⁵ The legal constitution of monetary policy fulfilled this demand and took on a form that was to immunise Europe against Keynesian impulses and macroeconomic policies, a form that was to determine priorities in each given situation, and that therefore could not be legally programmed according to actionable criteria which the judiciary would supervise. As is well known today, this strategy was not successful. Yet the inherent defects and design flaws of the monetary union and the 1997 Stability Pact rounding it out were already widely known at the time. It was not long before they became generally visible. The fact that it was precisely Germany and France that did not follow the rules laid down in the Stability Pact and that the deficit procedures initiated by the Commission then came to nothing led to the German apologists of the € incriminating themselves and calling for its legal framework to be perfected. These complaints take the wrong approach. 'The 3% cap is at best ridiculous and at worst perverse', wrote Barry Eichengreen, one of the most renowned observers of European monetary policy, in the 20 November 2003 issue of DIE ZEIT. He knew that at the time, Germany could not afford the Stability Pact and would therefore not comply with it. The project of 'integration through law', expanded to include the monetary constitution, had gained a Pyrrhic victory in the Maastricht Treaty and a decade later met defeat at Cannae.

"'More Europe' is by definition better." – 'In the final analysis, crises always promoted integration.' These theorems, which have been repeated so often, are no longer on firm ground. Taking a look at the economic sociology of Austro-Hungarian *émigré* Karl Polanyi, which has experienced a renaissance in recent years, is helpful. His arguments seem to call many certitudes of European Studies in question.⁶ Three 'fictitious goods' play a prominent role in Polanyi's reconstruction of how industrial capitalism prevailed and its susceptibility to crises: money, labour, and land. According to Polanyi, they are fictitious if and because they are treated like goods even though they were not produced for the market. Success does not come easily to such imposed commodification; instead, such political moves will spark crises and provoke countermovements. These theorems are astonishingly current. We have already started to discuss 'money' and will focus on that commodity. But it is worth noting that Polanyi's warning deserves to be taken seriously more comprehensively. With regard to 'labour', this is obvious and particularly urgent. Headed by its highest court, Europe is waving the flag of economic

⁵ See for a seminal restatement of this tradition Ernst-Joachim Mestmäcker, 'Macht – Recht – Wirtschaftsverfassung', (1972) 137 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 97-118; Mestmäcker's most recent worried interventions mirror his commitments to this tradition; see 'Der Schamfleck ist die Geldverachtung' (the ashaming flaw is the disdainfulness of money), *Frankfurter Allgemeine Zeitung*, 18.11.2011, p. 33 and 'Ordnungspolitische Grundlagen einer politischen Union' (foundational principles for the ordering of a political union), *Frankfurter Allgemeine Zeitung*, 12.11.2012, p. 12.

⁶ Karl Polanyi, *The Great Transformation*. New York: Farrar & Rinehart (1944); references here are to the to the 2001 edition published by Beacon Press in Boston. On its topicality in place of many other works: Fred Block, 'Karl Polanyi and the writing of *The Great Transformation*', (2003) 33 *Theory and Society*, 275-306 and Jens Beckert, 'Die soziale Ordnung von Märkten', MPIfG Cologne, Discussion Paper 07/6. Cologne 2007.

freedoms of Europe's market citizens and retreats from collective labour law – once the institutionalized countermovement to the commodification of labour.⁷ It is quite remarkable that this move occurred in an unheard of vigour in December 2007, that is together with the beginning of the financial crisis.⁸ After its turn towards a community of austerity, Europe is now riding roughshod over considerations of labour and social law. Environmental policy is about 'land' in the sense of our natural resources – actually a flagship in the process of integration. Admittedly, one very sensitive environmental issue, namely the conflict about nuclear energy, does not fit this pattern – and again, the law plays an unfortunate role. Although the Euratom Treaty of 1957 praised atomic energy as the technology of the future par excellence, the decision about using it was left to the Member States. The Treaty of Lisbon did not change this in any way – with the consequence that a phase-out of atomic energy in Europe effective for everybody involved can take place only if all Member States were to implement it. Germany has yet to feel the effects of the de facto irreversibility of this legal situation. For the time being, however, Europe is preoccupied with its currency and the financial crisis.

De-Juridification of Monetary Union

One would like to know, but one cannot know what 'in actual fact' is the case here. The German Council of Economic Experts, which still exists even after the de facto repeal of the Keynesian 1967 Stability Act, diagnoses 'multiple crises' in its special report of 5 July 2012.⁹ According to the report, the 'banking, debt and macroeconomic crises' are interrelated in a 'mutually reinforcing' 'vicious circle'. The European economic and monetary union can quite obviously not cope with all this. Since the spring of 2010, Europe has been taking action rapidly, and by now at breakneck speed, introducing audacious regulatory mechanisms: the 'Europe 2020 Strategy' (March 2010), the 'European Semester' (May 2010), the 'EFSF Framework Agreement' (June 2010), the 'Euro Plus Pact' (March 2011), and the 'Six Pack' (December 2011). And much more is ready to complement these steps or in the pipeline: the 'Two Pack' (November 2011), the 'European Stability Mechanism' (February 2012), the 'Treaty on Stability, Coordination and Governance' (TSCG, March 2012), and the banking union (September 2012). Since all this is difficult to reconcile with the Treaties, in particular with the bailout ban of Article 125 TFEU, an audacious revision procedure in accordance with Article 48 Paragraph 6 TEU foresees amending Article 136 TFEU with a new Paragraph 3 legalising financial assistance as of 1 January 2013.

From a legal point of view, there is quite a lot here which can and needs to be discussed, and not surprisingly, the debates on the extent to which the legal scope can be widened, preferably without Treaty amendments, are highly intense. The deeper threat, however, does not stem from this or that acrobatic feat of interpretation, but from the fact that legally structured action is replaced by bundles of measures that are characterised by a given situation and take effect in particular concerning 'multilateral surveillance'. A transnational functional bureaucracy is being established here whose forms of action are oriented towards the models of independent agencies in which there are no genuinely European competencies. To be sure, all constitutional democracies are familiar with the delegation of decision-making powers to institutions that possess particular expert knowledge, develop long-term orientations, and are to be protected from the rhythms and vicissitudes of politics. But such delegations are usually limited to well-defined fields and are monitored through control mechanisms of their own. Giandomenico Majone, the staunchest proponent of European governance through independent agencies, has always argued for reserving all distributive policies for the nation-states

⁷ See the recent Commission report on labour market developments at http://ec.europa.eu/economy_finance/publications/european_economy/2012/pdf/ee-2012-5_en.pdf.

⁸ Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779; Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, [2007] ECR I-11767; Case C-346/06, *Rechtsanwalt Dr. Dirk Ruffert v. Land Niedersachsen*, [2008] ECR I-01989.

⁹ <http://www.sachverstaendigenrat-wirtschaft.de>.

because only they can be democratically legitimated to a sufficient degree. This is not possible, he claims, with the type of macroeconomic management now practiced in European crisis management, and which is to be perpetuated institutionally. This would establish a European distribution machinery that could only change the European democratic deficit into ‘democratic default’.¹⁰

Constitution without a Guardian

The current crisis policy avoids regular treaty revision procedures that appear risky in substance, but that are also unsuitable because they take too much time and moreover could require referenda. Their supervision by the judiciary seems all the more important. Yet one must also consider the following: It is according to Article 263 TFEU the European Court of Justice who has the mandate to assess the legality of European legislative acts, the actions of the Council, the Commission, and the European Central Bank. How likely is it, however, that institutions with the right to initiate proceedings – the Member States, the European Parliament, the Council, the Commission – will take action against measures in which they are so deeply involved, and regarding which they risk to receive a decision rejecting their claims? Even more important in systematic terms: How far and how deeply would a ruling by the ECJ penetrate the structure of European, nation-state, and international-law policy? Small wonder, that so far¹¹ national constitutional courts, above all the German Federal Constitutional Court (FCC), were the most important fora for debating crisis policy.

With its new rulings on the relationship between the Basic Law and European law, the German Federal Constitutional Court has become nothing less than a target of European constitutionalism, even if for entirely different reasons. Just 20 years ago, the decision of the FCC on the Maastricht Treaty had drawn a great deal of attention. With this judgment, the Court made a considerable, albeit highly problematic, contribution to the development of the economic and monetary union. The FCC has stated that a de-politicised legal architecture of the monetary union was a *sine qua non* for Germany to participate.¹² The Court must have recognised how fragile the institutional configuration of the monetary union was to which it had given its consent. This, of all things, was not deemed worthy of mention in the public-law division of European law scholarship in Germany or elsewhere.¹³

The judgment on the Treaty of Lisbon then emphasised new points without explicitly calling the Maastricht precedent into question. On the one hand, it stipulated that there is a ‘responsibility for integration’ founded in constitutional law, on the other, it also underlined its mandate to protect Germany’s democratic statehood. We can read, for example: ‘The state is neither a myth nor an end in itself, but a historically developed, globally recognised organisational form of a political community

¹⁰ Cf., Giandomenico Majone, ‘Rethinking European Integration after the Debt Crisis’, UCL Working Paper 3/2012. London 2012.

¹¹ By now, however, the CJEU has followed suit in Case C-370/12 *Pringle v Ireland*, Judgment of 27 November 2012 – and the similarities in the reasoning of both courts are remarkable; see Michelle Everson /Christian Joerges, ‘Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?’, forthcoming in Sandra Kröger (ed.), *Political Representation in the European Union: Still democratic in times of crisis?*, London: Routledge; available at <http://ssrn.com/abstract=2287111>.

¹² Judgment of 12 October 1993, *BVerfGE* 89, 155 [Brunner v. European Union Treaty, (1994) 57 *Common Market Law Reports*, 1].

¹³ Instead, the Court was confronted with its talk of an ‘association of states’, its announcement that it would refuse to follow ‘diverging legal acts’, but above all the statement that it was a dictate of democracy that a ‘relatively homogeneous people’ must have the opportunity ‘to give legal expression to what unifies them – intellectually, socially, and politically’; cf., famously, J.H.H. Weiler, ‘Does Europe Need a Constitution? Reflections on Demos. Telos and the German Maastricht Decision’, (1996) 1 *European Law Journal*, 219-258; but see also Christian Joerges in all his works on Europe since ‘The Market without a State? [1992] States without Markets? [1996] Two Essays on the Law of the European Economy’, EUI Working Paper Law 1/96, San Domenico di Fiesole 1996, <http://eiop.or.at/eiop/texte/1997-019-and-020.htm>.

able to take action.’ Responsibility for integration and responsibility for democracy are two different things. One should not pursue one objective at the expense of the other, but rather respond to this tension with conflict rules that shape the process of integration in a democracy-friendly way. Surely the judgement failed to explore that insight in more depth and contained less comforting passages. But the outrage it provoked is hardly justified.¹⁴

And then, the less spectacular decision of 19 June 2012, in which the Court defended the right of the *Bundestag* to be informed, nurtured new hopes.¹⁵ The strengthening of the *Bundestag* was not presented as a conflict rule mitigating between democratic commitments and integration objectives. But the judgment documents very precisely how crisis management is taking place, namely in the post-democratic regulatory mode that Damian Chalmers and Giandomenico Majone were talking about.¹⁶ In a comment in the *Frankfurter Allgemeine Zeitung* Christian Geyer described the judgment as the ‘anatomy of a deception’.¹⁷

Indeed, after this enlightening discussion of the decision-making processes, the Court’s silence concerning the issue itself comes across as deafening. Can we expect greater decisiveness? How difficult it is to fulfil such expectations can be taken from the decision of 7 September 2011 on aid for Greece.¹⁸

Here, the Court reacted to the conflict between integration and democracy by reiterating legal principles the observance of which it then failed to guarantee: Budgetary powers, it said, are a core responsibility of the parliament; however, when assessing budgetary risks, there is a prerogative for which political responsibility is to be borne. It is true that ‘breakout’ legal instruments which disregard the treaties (*‘ausbrechende’ Rechtsakte*) do not apply in Germany; but that risk was contained by the fact that the economic and monetary union had, after all, been formulated to be consistent with the Basic Law. Last but not least: While in principle it is true that the government cannot elude its legal obligations with the help of international institutions, it remained unclear, whether or not legal protection has to be granted when European law is circumvented or transformed where the integration programme of the Union is ‘complemented’ by an intergovernmental treaty.¹⁹

The Court was confronted with complaints by a group of 5 professors against the aid granted to Greece, and of Member of the Bundestag, Dr. Gauweiler, against the Euro Rescue Package. The procedural specifics of Federal Constitutional Court Act need not concern us here. However, the three substantive principles which the Court has established are certainly instructive – but so are the reasons which the Court has added to explain why it can and should refrain from intervening.

¹⁴ Two special editions of legal journals deserve mention: the (2011) *German Law Journal*, No. 10 with nine contributions and the (2009) 48 *Der Staat*, No. 4, 2009 with six contributions and former constitutional judge Dieter Grimm as the only author to show (some) understanding for the Court.

¹⁵ Decision of 19 June 2012, 2 BvE 4/11, available at http://www.bundesverfassungsgericht.de/entscheidungen/es20120619_2bve000411.html press release in English at <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-042en.html>.

¹⁶ See note 7, Majone, note 10 above, Damian Chalmers, ‘The European Redistributive State and the Need for a European Law of Struggle’, (2012) 18 *European Law Journal*, 67-693 and Christian Joerges/Maria Weimer, ‘A Crisis of Executive Managerialism in the EU: No Alternative?’, forthcoming in Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (eds), *Liber Amicorum for David M Trubek*, Oxford: Hart Publishing, available at <http://ssrn.com/abstract=2190362>.

¹⁷ Christian Geyer, ‘Anatomie einer Hintergehung’, *Frankfurter Allgemeine Zeitung* 21.06.2012, p. 29

¹⁸ Decision of 7 September 2011, 2 BvR 987/10 – 2 BvR 1485/10 – 2 BvR 1099/10, available at http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710en.html.

¹⁹ In the recent judgment of 12 September 2012 on the ESM and Fiscal Compact, (an – incomplete – translation is available at http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html), the issue was addressed again. The court now cited the notion of “*völkerrechtliches Ersatzunionsrecht*” (international law substituting European Union law)’ and observed that ‘no monitoring by the European Parliament is possible’ (para. 252).

The core argument concerns the budgetary power and responsibility of the Bundestag, clearly a constitutional essential because ‘the decision on public revenue and public expenditure is a fundamental part of the ability ... to democratically shape itself’²⁰ (47, para. 122). The Bundestag must ‘retain control of fundamental budgetary decisions even in a system of intergovernmental administration.’ However, the so the court continues, ‘the FCT must restrict itself to manifest violations’ and must with regard to the risks incurred ‘respect a latitude of assessment of the legislature.’²¹

Recalling the Maastricht Judgment and its warning that Germany will not comply with European legislative acts where the order of competences has not been respected (‘*ausbrechende Rechtsakte*’), the Court states bravely that ‘particular mention should be made of the prohibition of direct purchase of debt instruments of public institutions by the ECB, the prohibition of accepting liability (bail-out clause) and the stability criteria for sound budget management.’²² Somewhat surprisingly, the Court then explains that in the present case, a detailed examination necessitated even though it is ‘possible to derive’ from Articles 123-126 and 136 TFEU that these provisions pre-suppose the autonomy of national budgetary powers and that hence an ‘acceptance of liability for decisions of other Member States with financial effect which overstretches the basis of legitimation of the association of sovereign states (*Staatenverbund*) – by direct or indirect communitarisation of state debts - is to be avoided.’²³

Last but not least, the Basic Law protects Germany’s citizens against ‘a loss of substance of their power to rule by far-reaching ... transfers of duties and powers of the Bundestag to supranational institutions’.²⁴ Such protection is not mandated, however, because the acts complained against here were ‘not sovereign acts of German state authority which may be challenged under the Federal Constitutional Court Act.’²⁵

The recent judgment on the ‘European Stability Mechanism’ (ESM Treaty) and the ‘Treaty on Stability, Coordination and Governance on the Economic and Monetary Union’ (Fiscal Compact), which had been anticipated with so much suspense, is profoundly ambivalent.²⁶ As was being reported in many quarters, a step towards democratising crisis policy had been accomplished because the rights of the *Bundestag* had been strengthened again. Indeed para. 274 reads: ‘By virtue of its approval of stability aids, the Bundestag exercises the influence demanded by the Constitution and is a participant in decisions on the amount, conditionality and length of stability aids. It therefore determines the most important conditions for future successful demands for capital disbursements under Article 9, Para. 2 ESM Treaty’.²⁷ But what about the budgetary rights of other parliaments in the Union? The conditionality, which the European Central Bank, too, would like to see guaranteed, is anything but democratic. Its approval is all the more confusing because the Court had previously, in the most positive passage of the decision, taken the requirement of the so-called eternity clause (Art. 79 Para. 3 German Basic Law) to guarantee ‘structures and procedures which keep the democratic process open’. Would other alternatives have been possible and advisable? Should the Court have brought down aid

²⁰ Para. 122.

²¹ Para. 130

²² Para. 129

²³ Para. 129.

²⁴ Para. 98,

²⁵ Para. 116

²⁶ See the reference in the previous note. In view of the importance of para. 274, the German original is added here: ‘Da der Bundestag durch seine Zustimmung zu Stabilitätshilfen den verfassungsrechtlich gebotenen Einfluss ausüben und Höhe, Konditionalität und Dauer der Stabilitätshilfen zugunsten hilfeschender Mitgliedstaaten mitbestimmen kann, legt er selbst die wichtigste Grundlage für später möglicherweise erfolgende Kapitalabrufe nach Art. 9 Abs. 2 ESMV’.

²⁷ This is our translation. Pertinent passages in the extract translation can be found at para.s 125 ff.

for Greece and the European Stability Mechanism? This is not yet the crux of the matter. Just as the European Court of Justice cannot and must not control the entire structure of Europe's constitution, the German Federal Constitutional Court cannot and must not presume such decision-making power. Joseph Weiler reproaching the German Court for acting like a dog that barks, but does not bite, or Perry Anderson's caustic remark that the Court underlines democratic principles with one hand while signing off on their contemptuous treatment with the other sound elegant, but are too simplistic.²⁸ The actual problem is of a fundamental nature: Nobody is the guardian of Europe's present constitutional constellation.

In all this, the following becomes apparent: European crisis policy has acquired a toolbox with which it monitors the Member States with unparalleled intensity; Germany Europeanises its philosophy of austerity by placing conditions on financial transfers; decisions are exacted from the German Federal Constitutional Court that are critical to the survival of the European currency and the destiny of the global economy. All this is not the result of sinister conspiracies, but takes place because the dynamics of the crisis demand too much of the law and because the law with its restrictions has contributed to Europe's policy failure. Not less than three former judges of the FCC expressed their dismay publicly. 'Does necessity abide by no laws?', Ernst-Wolfgang Böckenförde asked as early as 21 June 2010.²⁹ 'Is there no time for the law?', Winfried Hassemer added in the *Frankfurter Allgemeine Zeitung* in its 28 June 2012 issue; Paul Kirchhof detects a 'constitutional emergency' in the *Frankfurter Allgemeine Zeitung* of 12 July 2012. Are we experiencing how Europe and its constitution are being put on trial? More dramatically, and in the form of an alternative: Is this a state of emergency when the time for a commissarial dictatorship has come? Or should we be in a position to understand the crisis as an opportunity for Europe to push forward its democratisation decisively? Carl Schmitt stands for the first alternative, Jürgen Habermas for the second.

Carl Schmitt's Shadow

Carl Schmitt considered himself a situational thinker. For this reason, it would not be legitimate to read a diagnosis of Europe's current situation into his writings. But his opus certainly does include a set of theorems that are astonishingly current. This applies not only to the state of emergency already mentioned above, but also to his notions from the early 1920s about a commissarial dictatorship linked to such a state of emergency and to his analyses from the mid-1930s of the decline of the separation of powers. In addition, it also applies to important elements of his theory of the *Großraum*, which he presented in a talk entitled '*Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte*' at a conference of the *Reichsgruppe Hochschullehrer des Nationalsozialistischen Rechtswahrer-Bundes* [Reich section of professors in the National Socialist Association of Lawyers] in Kiel in the spring of 1939.³⁰ Schmitt argued that the *de facto* spatial order of Europe was no longer in line with the *jus publicum europaeum*, which had made the sovereign state its central concept. Now, a concrete 'space' had to become the conceptual basis for international law and 'the new ordering concept for a new international law' – that of the 'Reich, with its Volk based, *völkisch Großraum* order'. Schmitt identified 'a people that has proved itself capable of this task', namely the German people, to be the 'guarantor and guardian' of the order of the *Großraum*.

²⁸ J.H.H. Weiler, 'The "Lisbon Urteil" and the Fast Food Culture', (2009) 20 *European Journal of International Law*, 505-509, at 505; Anderson, 'After the Event', (2012) 73 *New Left Review*, 49-61, at 53.

²⁹ www.nzz.ch/nachrichten/kultur/literatur_und_kunst/kennt_die_europaeische_not_kein_gebot_1.6182412.html.

³⁰ The lecture was published as early as April 1939 in the Institute's series; its 4th edition of 1941 refers to translations into 5 languages. It was annotated extremely carefully by Günter Maschke (ed), *Carl Schmitt, Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969*, Berlin: Duncker & Humblot 1995, 29-320. The *Großraum* was only recently translated into English by Tymothy Nunan; see his edited Volume *Carl Schmitt, Writings on War*, Cambridge: Polity Press 2011, 75-124.

The theory of the *Großraum* with its ‘German Monroe Doctrine’ suited Nazi policy. The lecture was Schmitt’s way of reasserting himself as a leading legal thinker. Yet Schmitt had based his concept of the *Großraum* not only on *völkisch* claims to leadership, but also on transformations dominated by technical, industrial, and economic developments. Thus, Schmitt outlined, however spuriously, an erosion of the territorial state as the harbinger of the adaptation of international law, the factual restructuring of international relations and the replacement of classical international law by norm systems which today would affirmatively be called ‘governance structures’ or, distanced and critically, ‘authoritarian managerialism’. Schmitt underlined two phenomena in particular, namely, the economic inter-dependencies beyond state frontiers (*Großraumwirtschaft*) and the specific dynamics and the ruling functions of technology-driven developments (‘technicity’ [*Technizität*]).

In light of the financial crisis and when dealing with it, we must take not only Schmitt’s hypotheses on nation-states’ loss of sovereignty and the de-legalisation of their relationships seriously. Just as relevant are his observations—broadly supported by comparative legal research—on the increase in the powers of the executive and the usurping of legislative powers by governments forcing through a ‘ratio gubernativa’ with a ‘laws decreed and enforced by the government’.³¹ Schmitt explicitly linked up with the figure of the ‘open state of emergency’ in which ‘the practice of authorizations to make laws (legislative delegations) [is] of particular theoretical and practical relevance’. Is such a practice ‘dictatorial’? Schmitt believed that this question is posed too simply. Legislative authority, ‘provided it is constitutional’, ‘always’ offered ‘a *legal bridge*, but it can both lead back to the earlier constitutional legality and away from it to an entirely new constitutional basis’.

In a comment on Hans Peter Ipsen’s monumental 1972 work *Gemeinschaftsrecht*, Schmitt revealed his opinion of the ‘earlier constitutional legality’ of European law. He had been ‘beset by a deep sense of sorrow’ when reading the 1000-page tome. This type of law, which *legalises* a technocratic-functional administration of European associations, had no concept of a *legitimate political* project.³² Concerning monetary union, we could add that its legal constitution with the restriction of the European mandate to monetary policy and the concomitant constraints of national powers was one cause of the crisis. Then, it seems we would have to proceed to ‘an entirely new constitutional basis’. How would we get there? Christoph Schönberger, who is intimately familiar with Schmitt and certainly not equating Schmittian notions of the political with more benevolent types of leadership, recently suggested that Germany should accept the role of Europe’s hegemonic power which has accrued to it *de facto*.³³ In so doing, he did not point to Max Weber’s nation-state that was to pursue ‘our nation’s economic and political power interests’; he hoped instead for a ‘German statecraft’ bringing about order pudently. At the time, Max Weber did not believe that Germany’s political class was capable of this. Are the prospects better now? The practice of European crisis policy, which certainly reflects Germany’s influence, is seeking refuge in a technocratic model [*Technizität*] as described by Schmitt. One can find elements of a kind of economic managerialism with an authoritarian flavour; one should note that is no longer bound by constitutional law and that would not conform with actionable criteria, in the economic and social recipes prescribed by this policy. Those who hold Germany’s ordoliberal legacy

³¹ Carl Schmitt, ‘Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)’, (1938) 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 252-267.

³² Carl Schmitt, ‘Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität’, (1978) 17 *Der Staat*, 321-339. In this tribute to French economic theorist François Perroux, who studied apparently related economic dimensions of space, we read: ‘Today, the issue is about the political system for society adequate in relation to scientific-technical-industrial developments. Today, the adage *cujus industria, ejus regio* or *cujus regio, ejus industria* applies’ (328), and on the following page: ‘The industrialised society is bound to rationalisation, including the transformation of law into legality.’

³³ Christoph Schönberger, ‘Hegemon wider Willen. Zur Stellung Deutschlands in der Europäischen Union’. (2012) 66 *Merkur*, 1-8.

accountable for Germany's moves and non-moves should be aware that this '*Ordnungspolitik*' is no longer anchored in law.³⁴

³⁴ See Ernst-Joachim Mestmäcker, note 5 above.

The Crisis as Opportunity according to Jürgen Habermas

Between Facts and Norms, Habermas's *opus magnum* on the 'discourse theory of law and democracy', was published the same year that the Treaty of Maastricht, which limited the EU Member States' political autonomy to such a large extent, was concluded. The threat to his project was by no means lost on Habermas. Included in the volume is a piece analysing the tension at play in the relationship between social democracy as institutionalised in the nation-state on the one hand and the decision-making processes organised at the European level on the other, a configuration which in Habermas view already then threatens the political autonomy of Europe's citizens.³⁵ Habermas responds to this threat by firmly taking sides, even in this first essay on Europe's constitution: Europe's integration, he writes, is a response to the failures of the nation-states, above all Germany. Integration not only derives its dignity from this legacy, but is at the same time a prerequisite for preserving the accomplishments of democratic constitutionalism and must be shaped accordingly. Since then, Habermas has retained this stance and intensely followed and supported the process of integration with growing passion as a political citizen and political theorist. In the process, he has not permitted himself to be distracted from his goal by setbacks such as the French referendum and the downgrading of the ambitions of the European Convention in the Lisbon Treaty, and has time and again linked his interventions to equally firm criticism of the democratic deficits of Europe's constitution and its political elites.

Prior to the current crisis, the citizen as well as the theorist permitted himself to be challenged – taking up this challenge in countless public interventions across Europe, systematically in his 2011 essay *The Crisis of the European Union: A Response*. 'Post-democratic executive federalism' is the term with which he qualifies and dismisses the handling of the crisis, confronting it with the demand for a 'sufficiently democratic mode of juridification'. The constructive core of his alternative is a proposal bringing Europe's people together as citizens of their states and as citizens of the Union. There is no need for them to give up their nation-states with their democratic achievements. In their role as European citizens, they are not dependent on these states' roles as intermediaries, but rather constitute the European polity as members of one of the Union's citizenries. Habermas does not gloss over the circumstance that the orientations of the citizens of their individual states often conflict with those of the citizens of the Union.³⁶ But he places his hopes on the fact that to the extent that the citizens of Europe become aware of their dual status, they will also realise that this process could generate solidarity and an identity spanning the national citizenries. Nor does he overlook that Europe's political elites deal with the particularistic-egoistic orientations of their electors tactically. Yet he assumes that the crisis will force them to 'rally the population behind a common European future'.

³⁵ Jürgen Habermas, *Staatsbürgerschaft und nationale Identität*, Zurich: Erker 1991; the English translation was published as Annex II to *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA.: MIT Press 1999, 491-516.

³⁶ In his recent essay 'The Crisis of the European Union in the Light of a Constitutionalization of International Law', (2012) 23 *European Journal of International Law*, 335-348. at 343, he has rephrased his early insight: 'What counts as a public interest orientation within a particular nation state changes at the European level into a particularistic generalization of interests confined to one's own people, and that may well come into conflict with the generalization of interests'.

'Unitas in Pluralitate': A Plea for a More Modest Union

Normatively speaking, deciding between authoritarian 'post-democratic executive federalism' and a Union furnished with new competencies and democratically legitimated is unproblematic. The question is only whether such a decision is on the agenda.

The discussion about the European democratic deficit has been conducted with greater and greater intensity since the Maastricht Treaty twenty years ago precisely because of closer integration that was decided upon then. A dispute between Dieter Grimm and Jürgen Habermas in 1995 was one of its early moments of glory.³⁷ Dieter Grimm had put forward the following and warned: The body of European treaties was neither an expression of self-determination on the part of a European society nor should or could it organise a pan-European constitution. Too many of the cultural, social and political prerequisites on which democratic polities depended were lacking. This diagnosis, Habermas countered, was correct, but it failed to respond to the erosion of the nation-states' capacity to act and underestimated the democratic potential of the process of Europeanisation. What mattered was to 'initiate in terms of constitutional law' the communicative relationships that Grimm found lacking and that indeed had been realised only rudimentarily.

The continuity of both adversaries' lines of argument is remarkable – and just as remarkable is a common lacuna: in both contributions, the economy driving Europe in its state of crisis is non-existent. Yet at the time, the legal constitution of monetary union was considered the core of the Maastricht Treaty, a jewel in the crown of the single market, which would lead to political union. The unfounded audacity of these notions can easily be reconstructed within the framework of Polanyi's economic sociology discussed at the outset.

It is true that the process of integration by no means simply 'deregulated' Europe's economy. But it destroyed the interdependence between (nation-state) labour relations and the European economic constitution without reconstituting the European welfare-state traditions at European level. It undermined the manifold ways in which the economy is socially embedded in the Member States and institutionalised monetary union in a set of rules that had to operate in a social vacuum. Social disintegration, Polanyi claimed, would lead to crises and then trigger countermovements. The executive-governmental federalism with which Europe responds to its crises has nothing in common with the countermovements Polanyi imagined. They are rather to be found in the protests against the policies for dealing with the crisis. Jürgen Habermas, who indeed let Polanyi have his say in his 1996 (English translation: 2001) collection of essays *The Postnational Constellation*, will hardly disagree. In his construction of a decision situation, such insights seem to get lost – ironically, constitutional lawyer Grimm's position is closer to Polanyi's here, even if he does not deal explicitly with the economy.

The management of the crisis by means of regulatory policy and the call for a democratic deepening of Europe have something in common that is apparently considered to be without alternative: the way out of the crisis is said to require 'more Europe'. To what extent is such a way out in fact without alternative? Anyone who takes the trouble to study the crisis management procedures and the numerous recommendations made and rubber-stamped in the context of the European Semester will wonder:³⁸ Is this the way to do justice to the fact that the socioeconomic differences in the expanded Union are precisely not smoothing out, at least not uniformly, but are deepening? Is this the way to correct the disintegrative effects of the neoliberal interventions in the Union's capitalisms? If it is not possible to construct a uniform welfare-state model, is it then advisable to dismantle Europe's welfare-

³⁷ Dieter Grimm, 'Does Europe need a Constitution?', (1995) 1 *European Law Journal*, 282-302; Jürgen Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"', (1995) 1 *European Law Journal*, 303-307.

³⁸ Cf., www.consilium.europa.eu/press/press-releases/economic-and-financial-affairs?lang=en&BID=93.

state traditions altogether? If our goal is not to suppress Europeans' painful memories, not to iron out the differences between their historical experiences, not to waste the wealth of their cultures, must not then tolerance determine the status of European citizens?

These questions are rhetorical. They are directed towards the currently practiced centralist style of European governance, which must claim to have knowledge that does not exist. To take up once more what was said at the outset, they are directed against the notion that one could suspend or write off democracy entirely by enthusiastically disbursing money and imposing strict cutbacks. They find normative support in the felicitous 'motto' of the ill-fated 2003 Constitutional Treaty about Europe being 'united in diversity'. They do not project a return to the nation-state, least of all to that of Max Weber, but aim for legally structured relationships of cooperation in a Europe that has to learn to deal in a civil way with the conflicts resulting from its diversity, but which may refrain from attempting to attain the status of a major power.³⁹

³⁹ Cf., Christian Joerges, 'Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form', in: Rainer Nickel and Andrea Greppi (eds), *The Changing Role of Law in the Age of Supra- and Transnational Governance*, Baden-Baden: Nomos 2014, available at <http://ssrn.com/abstract=1723249>..

