

CHRISTIAN JOERGES

Center of European Law and Politics, University of Bremen
and Hertie School of Governance, Berlin

Between Jürgen Habermas and Carl Schmitt:
Flaws, old and new, in the project of European integration

Abstract

European Integration was constructed as a political project relying for its realizations primarily on economic processes. Economic and Monetary Union as accomplished by the Maastricht Treaty were expected to consummate this endeavour. However, the whole edifice started to erode immediately after its establishment. Following financial and sovereign debt crises, EMU with its commitments to price stability and monetary politics is perceived as a failed construction precisely because of its reliance on inflexible rules. European crisis management seeks to compensate for these failures establishing regulatory machinery which disempowers national institutions and burdens in particular Southern Europe with austerity measures; it establishes pan-European commitments to budgetary discipline and macroeconomic balancing. At present the Union is in state of emergency. The prospects for the return in a constitutional condition are anything but clear.

I. Introduction: The European Dilemma

*"Ich möchte Deutschland und den Deutschen für Ihren großen Einsatz für unser Europa von Herzen danken [I would like to thank Germany and the Germans sincerely for your great dedication for our Europe]. Along [sic] 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."*¹ Commission President 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*. 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 crisis affected countries. The paradox of which Barroso speaks does not exist. Instead, this is a clearly delineated dilemma: 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 as enshrined in Article 2 of the Treaty on European Union. Nobody can desire and design such a disastrous situation. But what has occurred cannot either be redone or controlled easily.

II. Integration through law

Europe is essentially a "Community of law". This characterization which is ascribed to the first President of the Commission, has become an uncontested and unquestionable hallmark of the European project.² From the outset, much was entrusted to law, and 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 the economic egoism of the Member States. "Integration through law" became the motto of European policy in the highly influential conceptualization of 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.³ 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 characterized as a “*Wandelverfassung*” and it engaged continuously in constitutional reconfigurations.⁴ 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.

III. Processes of erosion and their causes: a digression into Karl Polanyi’s economic sociology

In his remarks on “The State of Europe”, Barroso focused solely on the crisis of Economic and Monetary Union and thus on an institutional accomplishment, which was for a good while widely perceived as the consummation of very high ambitions – seemingly fully in line with the original project of “integration through law” as conceptualized famously by J.H.H. Weiler.⁵ There was one crucial difference, however, between Weiler’s understanding of the functions of law in the integration project and the later construction of monetary union. The special feature of the European system, as Weiler had conceptualized it, was the simultaneity and the balance of supranational law and inter-governmental policy.⁶ The law had not replaced political processes entirely; the equilibrium in the Community system remained dependent on continuous balancing efforts. The monetary union agreed upon in the Treaty of Maastricht in 1992 was meant to overcome that dependency. It was a political project, but one that was constituted and sustained by law as a legal project, a more stringent version and vision of “integration through law” as advocated by German Ordoliberalism.⁷ The new common currency was 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 German Ordoliberalism.⁸ The legal constitution of monetary policy fulfilled this demand. It took on a form that was to immunize Europe against Keynesian impulses and macroeconomic policies, which required a continuous assessment of economic and social parameters, an in the last instance political determinations of priorities and which could therefore could not be legally programmed according to actionable criteria which the judiciary would supervise. As is widely recognized today, this strategy was anything but successful. Yet the inherent defects and design flaws of the monetary union and the 1997 Stability Pact rounding it out were already identified at the time by highly respected economists.⁹ 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 continue to assume that the socioeconomically ever more diverse Union would be an optimal currency area and disregard the objections against the “one market, one money” philosophy. “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 under the burden of its unification 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.

The warning voices cited so far all came from mainstream economists. It is not so surprising that they can be complemented by left-leaning political economists from both within and outside the EU.¹⁰ By now, their analyses are much more widely noted.¹¹ In step with these developments, the economic sociology of Austro-Hungarian *émigré* Karl Polanyi has experienced a renaissance in recent years.¹² We refer to his work in our remarks on the failures of the European project for three interrelated reasons: (1) Polanyi has underlined that modern markets were not generated by some evolutionary process but established by political planning¹³ – Europe’s “internal market project” is the best conceivable confirmation of his thesis. (2) One of most important insights of his work concerns the “social embeddedness” of mar-

kets and the economy.¹⁴ These insights are of crucial importance for Europe has on the one hand realized that the functioning of markets requires comprehensive regulatory activities but tends to disregard the economic, political and cultural variety and dependence of markets. (3) Polanyi has also much to teach us with regard to the growing skepticism about so many so long firmly held beliefs about the benefits of ever more European integration. These beliefs contrast strikingly with what Polanyi taught us about the three “fictitious commodities”: money, labor, 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 warnings deserve to be taken seriously more comprehensively. With regard to “labor”, this is obvious and particularly urgent. Headed by its highest court, Europe is waving the flag of economic freedoms of Europe’s market citizens and retreats from collective labor law – once the institutionalized countermovement to the commodification of labor.¹⁵ It is quite remarkable that this move occurred in an unheard of vigor in December 2007, that is together with the beginning of the financial crisis.¹⁶ After its turn towards a community of austerity, Europe is now riding roughshod over considerations of labor 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.

IV. De-juridification of monetary union and Europe’s the new modes of economic governance

The debate on the European crisis oscillates between optimism (“so far every crisis has strengthened the integration project”), pessimism (“Europeans are neither willing nor able to face the challenges”) and catastrophism (“if the euro fails, then Europe fails”). The German Council of Economic Experts, which still exists even after the de facto repeal of the Keynesian 1967 Stability Act, diagnosed “multiple crises” in its special report of 5 July 2012.¹⁷ According to the report, the “banking, debt and macroeconomic crises” are interrelated in a “mutually reinforcing” and “vicious” circle. It is safe to characterize the present situation by a replacement of the notion of risks, which can be evaluated and managed, into one of high uncertainties. What we can nevertheless observe, analyze and evaluate is the establishment of new modes of governance. 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 ex post revision procedure amending Article 136 TFEU so as to legalize financial assistance as of 1 January 2013.¹⁸

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, preferably without Treaty amendments, be widened 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 characterized 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 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 European distribution machinery that could only change the European democratic deficit into “democratic default”.¹⁹

V. What is left of European Constitutionalism after the financial crisis?

We are not going into the new legal discipline of “crisis law” in any detail here, but focus in our discussion on the reactions of the judiciary, first those of Germany’s Federal Constitutional Court (FCC), then that in the recent judgment of the ECJ, now Court of Justice of the European Union (CJEU), in the case of Thomas Pringle.²⁰

Just 20 years ago, in its judgment on the Maastricht Treaty²¹ the FCC has established the right of German citizens to ask for judicial examination of the compatibility of legislative acts promoting European integration with Germany’s Basic Law on the grounds that the right to vote guaranteed by Article 38 of the Constitution is to ensure their “participation in the democratic process.” The question submitted to the Court was whether that right to democratic governance excluded the transfer of the functions and powers of the *Bundesbank* to the European Central Bank. The answer of the FCC: The political rights of German citizens are not affected as long as the EU Treaty ensures a de-politicized essentially legal architecture of the monetary union. This was a statement which made sense only on the basis of Germany’s *ordo-liberal* legacy. It implied that the continuous governance of monetary policy by the rule of law and the commitment to prize stability were a *sine qua non* for Germany’s participation in monetary union. This, of all things, was not deemed worthy of mention in the public-law division of European law scholarship both in Germany and elsewhere.²²

With its judgment on the Maastricht Treaty and its insistence on Germany’s “democratic statehood” on the one hand, its consent to the new treaty on the other, the FCC has built up the reputation of a dog “that barks but does not bite.”²³ The financial crisis generated various opportunities to consolidate that ambiguous reputation. Its judgment of 19 June 2012 dealt with a complaint by “The Greens” who alleged that the political rights of the parliament, enshrined in Article 23 of the Basic law, to be adequately informed by the government about the financial risks of Germany’s commitments in European rescue measures, had not been respected. The FCC defended the position of the *Bundestag*.²⁴ Its judgment documents very precisely how difficult it has become for the parliament to keep track of what is happening in Europe’s crisis management. In a comment in the *Frankfurter Allgemeine Zeitung* Christian Geyer described the judgment as the “anatomy of a deception”.²⁵ Unfortunately, however, the Court did not substantiate the implications of the government’s failure in a way which would ensure an effective parliamentary involvement in European crisis politics.

Two further decisions on involvement of Germany in European rescue measures deserve particular mention... The first is the judgment of 7 September 2011 on aid for Greece.²⁶ The plaintiffs in this litigation were a group of professorial economists and Dr. Gauweiler, a member of the *Bundestag*, as representing the Bavarian branch of the Christian Democratic Party (CSU). They challenged both German and European legal instruments as well as further measures which are related to attempts to solve the current financial and sovereign debt crisis in the area of the European monetary union.²⁷ Again, the messages of the Court are strong in principle, but not so constraining in practice. The principle: budgetary powers are a core responsibility of the parliament and a central element of democratic self-rule; this is why the *Bundestag* must remain “the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments”²⁸. This, however, is the point where the law ends: parliament enjoys wide latitude in the exercise of its re-

sponsibilities – and this is a *political* prerogative which the Court will respect; it will hence not examine the quality or plausibility of parliamentary decision-making.²⁹ The responses to the further two complaints were similarly evasive: The Court confirmed its infamous Maastricht *dictum* that European legal instruments which disregard the competence provisions of the treaties (“*ausbrechende Rechtsakte*”) do not apply in Germany; but that risk, the Court continued, 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 program of the Union is “complemented” by an intergovernmental treaty.³⁰

The by far most spectacular litigation so far concerned the “European Stability Mechanism” (ESM Treaty) and the “Treaty on Stability, Coordination and Governance on the Economic and Monetary Union” (Fiscal Compact).³¹ Not only the well-known professorial plaintiffs and Dr. Gauweiler but also the parliamentary group of *Die Linke* and no less than 37,000 citizens, among them very prominent figures, had filed complaint requested primarily a temporary injunction, which would inhibit the entering into force of the statutes passed by the *Bundestag* and the *Bundesrat* on 29 June 2012 as measures to deal with the sovereign debt until the final decision of the FCC would be handed down. The anxieties of the many publics in the EU and elsewhere awaiting that judgment are easy to explain. Even though hardly anybody had any doubts about the outcome, it matters how the highest judicial authority of the economically most powerful Member State of the Union would evaluate Germany’s crisis activities whose government underlines again and again how seriously it takes every judicial pronouncement. The outcome was as expected. The plaintiffs were disappointed, the government, “Brussels” and “the markets” were relieved. The resonance in academic quarters was unusually positive. On closer inspection, however, the judgment seems highly problematical. Its ambivalence stems, seemingly paradoxically, from the Court’s renewed defence of the budgetary power of the German *Bundestag* as a democratic essential. Indeed para. 274 of the judgment 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(2) ESM Treaty”.³² All this, the Court ensures us, will protect the democratic rights of German citizens. Non-German citizens of the Union, however, should not be amused at all. Why is budgetary autonomy not understood as a *common* European constitutional legacy, respect for which is demanded by Article 4(2) TEU? The one-sidedness of this argument is not the only democratic failure of this judgement. With its disregard of “foreign” constitutional rights the Court gave implicitly its blessing to the “strict conditionality” of financial aids. The conditionality, which the European Central Bank, too, would like to see guaranteed, is anything but democratic. How is the approval of conditionality reconcilable with a previous passage of the judgment in which the Court argues that the so-called eternity clause of the Basic Law (Art. 79 Para. 3) is to guarantee “structures and procedures which keep the democratic process open”? This makes only sense, if the Court feels committed to Germany and no one else.³³ And precisely that self-understanding seems to be the crux of the matter. The FCC cannot and must not presume the authority to act as the guardian of European constitutionalism in its entirety. Weiler’s respectful ridicule about 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 still somewhat simplistic.³⁴ The actual problem is of a fundamental nature: In Europe’s present constellation may have no guardian. The only remaining candidate for that is the CJEU.

The CJEU came into the position to act as the guardian of European constitutionalism thanks to the complaints of Thomas Pringle, Member of the Irish Parliament against the involvement of his government in the establishment of the ESM – and the readiness of the Irish Supreme Court to do what the FCC has so far anxiously avoided, namely to submit a reference for a preliminary ruling to the CJEU. Pringle had commenced this litigation in April 2013; the CJEU (sitting as Full Court, with all 27 judges) handed down its judgment on 27 December 2012.³⁵

Pringle had argued in his complaint that the ESM-Regime constituted an usurpation of competences which were not conferred to the Union. This argument concerned hence the substitution of EMU as established by the Maastricht Treaty. The substantive and methodological core problem which the Court had to resolve stems from the bailout prohibition of Article 125 TFEU,³⁶ and the emergency exception in Article 122 (2) TFEU.³⁷ The Court restates the conceptual background of the former provision succinctly: “The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes, at Union level, to the attainment of a higher objective, namely, maintaining the financial stability of the monetary union.”³⁸ How can that philosophy be reconciled with the collective rescue messages which the ESM-Treaty legalises? The answer of the Court is straight forward: “Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who [sic] are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council.”³⁹

The answer approves the transformation of the European Economic Constitution by a new regime. It goes without saying that this new regime must develop a logic of its own: “[T]he ESM Treaty does not provide that stability support will be granted as soon as a Member State whose currency is the euro is experiencing difficulties in obtaining financing on the market. ... [S]upport may be granted to ESM Members ... only when such support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States and the grant of that support is subject to strict conditionality appropriate to the financial assistance instrument chosen.”⁴⁰

When these interpretations are read together, the full picture of the new constitutional constellation becomes clearly visible: The non-bailout philosophy with its appeal to autonomy and responsibility of Member States is being replaced by a regime of collective governance. Nowhere in the Pringle judgment does one find an explanation as to the conceptual basis or a means-ends rationality of the new modes of European governance. The law delegates such matters to politics without caring about the democratic legitimacy of political decision-making. The CJEU and the FCC are operating in tandem.

In all this, it becomes apparent that the judiciary has given its blessing to a European crisis policy and a monitoring of unparalleled intensity. 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 compliance with the law as it stands would have aggravated the damage. 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 2010.⁴¹ “Is there no time for the law?”, Winfried Hassemer added in the *Frankfurter Allgemeine Zeitung* in its 28 June 2012 issue; Paul Kirchhof discerned a “constitutional emergency” in the *Frankfurter Allgemeine Zeitung* of 12 July 2012. – Are we experiencing how Europe and its (former) constitution are being put on trial? More dramatically, and in the form of an alternative: Is this a state of emergency when the “hour of the executive” eventually even time for a “commissarial dictatorship” has come? Or should we instead 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.

VI. 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 “*Völkerrecht-*

liche Großraumordnung mit Interventionsverbot für raumfremde Mächte” (The *Großraum* Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of *Reich* in International Law) at a conference celebrating the 25 anniversary of the Kiel Institute and hosting at that occasion the *Reichsgruppe Hochschullehrer des Nationalsozialistischen Rechtswahrer-Bundes* [Reich section of professors in the National Socialist Association of Lawyers] in Kiel in the spring of 1939.⁴²

The *jus publicum europaeum*, which had made the sovereign state its central concept, Schmitt explained in his key note, was no longer syntonic to the *de facto* “spatial” order of Europe.⁴³ Now, a concrete “space” had become the conceptual basis for international law and “the new ordering concept – was from now on that of the “*Reich*, with its volk based, *völkisch Großraum* order”. Schmitt went on to identify “a people that has proved itself capable of this task”, the German volk as a matter of course. That volk was to be the “guarantor and guardian” of the order of the *Großraum*.⁴⁴

The theory of the *Großraum* with its “German Monroe Doctrine” which “excludes the possibility of intervention on the part of spatially foreign powers”⁴⁵ while proclaiming German leadership suited Nazi policy. The lecture was Schmitt’s way of reasserting himself as a leading legal thinker of the *Reich*.⁴⁶ 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 apocryphally, 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.”⁴⁷ 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*]).⁴⁸

After Europe’s financial crisis and when discussing its crisis management, we must take not only Schmitt’s diagnosis on nation-states’ loss of sovereignty and the de-legalization 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”.⁴⁹ 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”.⁵⁰ 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”.⁵¹

Is this, then, the European constellation after the financial crisis? Former constitutional judge Böckenförde, a renowned *connaissanceur* of Schmitt’s *oeuvre* was the first to allude to the “state of emergency.”⁵² Others followed suit. “The European Stability Mechanism,” writes Ulrich Hufeld, has “the format of a constitution-breaching measure along the lines of Carl Schmitt’s conceptualization of contrasts,”⁵³ adding a quotation from Schmitt’s 1928 *Constitutional Theory*:

Such breakout entities are, by nature, measures, not norms. [...] Their necessity arises from the particular circumstances of an individual case, an unexpected abnormal situation. If, in the interest of the whole, such renegade entities are formed, the superiority of the existential over mere normativity is apparent. Whoever authorized such acts and is capable of acting, is sovereign.⁵⁴

The “state of emergency” is hardly too speculative a term to characterize the present situation. “Commissarial dictatorship” however seems too far-fetched an analogy. The new modes of economic governance which Europe has established have many masters. The European Council sets the tone but is anything but a unitary actor. And the Council must coordinate its activities with the Commission; sometimes see the blessing of the European Parliament, national parliaments, and constitutional courts. Germany clearly the economically strongest European states is by no means really prepared and in a position exercise hegemonic leadership, as some see it or recommend it.⁵⁵ They must not only come to an arrangement at supranation-

al level, but also between the levels of the multilevel governance system, as well as internationally – the dictator has been replaced by technicity.

How comforting, however are these observations? In a comment on Hans Peter Ipsen's monumental 1972 work *Gemeinschaftsrecht*, which constituted Germany's European law scholarship as a new legal discipline, Schmitt revealed his opinion of the "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 *legalizes* a technocratic-functional administration of European associations, had no concept of a *legitimate political* project.⁵⁶ 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 present crisis and its replacement by a transnational crisis management machinery seems very much in line with Schmitt's perceptions – with one important difference: the kind of political legitimacy which Schmitt found lacking is not identical with the failures which we have identified. The practice of European crisis policy, which is seeking refuge in a technocratic expertise and political bargaining, disregards Europe's commitments to democracy and the rule of law. If the old European constitutionalism has proved to be unsustainable, how could new constitutional look like and how could it be accomplished? These are the questions Jürgen Habermas seeks to answer.

VII. The crisis as opportunity: 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 analyzing the tension at play in the relationship between social democracy as institutionalized in the nation-state on the one hand and the decision-making processes organized at the European level on the other, a configuration which in Habermas view already then threatens the political autonomy of Europe's citizens.⁵⁷ 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.⁵⁸ Since then, Habermas has retained this stance and intensely followed and supported the process of integration with growing passion as both a political citizen and a political philosopher. He has defended and elaborated his passionate commitment for a deepening of the integration project despite setbacks such as the French, the Dutch and later the Irish referenda, and the downgrading of the ambitions of the European Convention in the Lisbon Treaty.

The financial crisis has interventions provoked countless and ever more passionate interventions which were published across Europe in English, French, German and Italian.⁵⁹ They contrast markedly in substance and tone with the prevailing discourses of Europe's political elites and their focus on the evaluation of Europe's economy by "the markets": "Democracy is at stake", he has warned time and time again,⁶⁰ Europe is establishing a post-democratic regime of "executive federalism".⁶¹ These drastic messages are accompanied by signals of hope and also political appeals: he wants us to understand the crisis as a chance, an opportunity to strengthen the European project. The "strength" which he is advocating is not merely Europe's managerial potential; to him, "more Europe" also means a deepening of Europe's democratic credentials.

In step with these interventions as a political citizen, Habermas has renewed his theoretical agenda, most systematically in his 2011 essay *The Crisis of the European Union: A Response*. The constructive core of his constitutional vision is the idea of dual commitment of Europeans as citizens of their states and as citizens of the Union. Fully in line with his discourse theory of law and democracy Habermas defends the nation state as the harbinger of human rights and democracy. There is no need for Europe to transform into a fully-fledged federation. What Europeans have to understand and to live is their dual role: This is a democratic vision because it breaks with Europe's praxis of "integration by stealth" and anchors the democratization of Europe instead in the minds and activities of its citizens. It is a very Habermasian vision in that it downplays their political complacency and also the ever growing socio-

economic diversity of Europe including the conflict constellations which this diversity is bound to generate. To put this slightly differently: Habermas does not gloss over the differences of interests and political preferences of citizens of the individual states; he acknowledges that these will often conflict with those of the citizens of the Union.⁶² But he believes that the citizens of Europe will increasingly become aware of their dual status, and that this transformation of their mindsets could generate solidarity and an identity spanning the national citizenries. Nor does Habermas overlook that Europe's political elites pursue 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".⁶³

The present discussion about the European democratic deficit has its precursors. It has been conducted with ever greater intensity since the Maastricht Treaty twenty years ago precisely because of the promised move towards an "ever closer Union". A legendary dispute between Dieter Grimm and Jürgen Habermas in 1995 was one of its early moments of glory.⁶⁴ 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 organize 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 realized 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.

VIII. *Unitas in pluralitate: An alternative vision for the European 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 that alternative is on the agenda. The challenges which Europe faces and European scholars and politicians must address are twofold. We have to understand the design failure of the European institutional architecture and on that basis reconsider Europe’s future. With the law-politics relationship this essay has focused on one characteristic of the integration project which ensured or contributed to its very remarkably successful beginning in the formative phase. The law provided a civilizing link among former enemies. The constitutionalisation of European law with its empowerment of the judicial branch fostered economic integration and defined by the same token a politically restricted *finalité* below federal ambitions. These limitations turned, ironically and tragically, into failures with the dynamics of the integration process and its deepening. Our analyses of this seemingly progressive but in hindsight destructive moves have focused on monetary union (the “economic constitution”) and on industrial relations (the “social constitution”). In both fields Europe’s once so successful toolbox proved to be deficient. In both fields the law was (ab)used as an *ersatz* of politics. Referring to Polanyi’s economic sociology we have argued that these experiences should not simply be attributed to the neo-liberal tilt of the European institutional architecture but to the sociological and political dimensions of economic processes. That diagnosis is by now hardly controversial in principle. The same is true *cum grano salis* for two of its implications: Europe must acknowledge the failure of its “one-size-fits-all” philosophy which it has pursued in its reliance on law as the “agent and the object of integration.”⁶⁵ It must acknowledge that the financial crisis and the inability to institutionalize a European social model signal political failure which cannot be cured within the present institutional configuration.

But do not Habermas with his plea for a Political Union and Europe’s political elites with their quest for “more Europe” respond to precisely that impasse? The problematic of these responses should have become sufficiently apparent. The praxis of Europe’s crisis management has so far not delivered the promised output and is about to deepen Europe’s democratic deficit and to destruct its legitimacy while Habermas cannot plausibly explain how a democratic turn of these developments might come about.

The alternative to which the Latin notion in the title of this section points was the motto of the ill-fated 2003 Constitutional Treaty about Europe being “united in diversity.”⁶⁶ To recall this formula is by no means to advocate some regressive return to the nation state. It is instead meant to reorient European studies sociologically and normatively. The socio-economic, sociological and political development of the EU is characterized, the common currency of 17 member states notwithstanding, by ever more diversity even among the 17 eurozone countries. This development has surprised the advocates of the “ever closer Union” proclaimed by the Maastricht Treaty. Its acceleration, however, is anything but surprising in particular after the Eastern enlargement of the Union. Due to this increasing diversity the interests and conflict configurations in the Union are ever more diverging. This is neither good nor bad in itself but it necessitates a move from “integration through uniformization” to integration through conflict resolution.” “Conflicts-law as Europe’s constitutional form” is the notion which I have coined for such a constitutional change. The approach was designed as a counter-move to the orthodoxy of European legal doctrines and an alternative to the mainstream of European constitutionalism, on the one hand, and a defense of the integration project against both the gradual destruction of Europe’s welfarist legacy and its clandestine de-legalization, on the other – with the constructive ambition to defend the European commitments to democratic governance and the rule of law. I am not going to summarize here what I have repeated ad nauseam over a decade.⁶⁷ What I will do instead is to sketch out how this kind of approach

may inspire a novel way of dealing with the financial crisis as it has manifested itself in the transformation of the economic constitution (1) and the turn to an austerity union.(2).

(1) We can, sadly, assume that the experts and technocrats in the Directorate General “Economy and Finance” in the European Commission and the European technocratic networks will not deliver what their political masters are promising. Such failures will provoke increasingly the political public, national parliaments and even faction in the EP. Will it become ever more apparent that it is simply impossible for the great majority of signatories of the “Fiscal Compact” that they will not be able to comply with the requirements imposed upon them.

If these conjectures are warranted, the room for political manoeuvre will widen. And yet, so far some substantial transformation of the regime which has been established is out of sight and it is hard to believe that conceptual disorientation and frustration with the implementation of the new European economic governance will somehow generate re-orientation among the epistemic community organising of Europe’s crisis management. But conflicts of interests cannot be camouflaged and the European technocracy cannot be shielded against the European public and politicians who are accountable to their constituencies. Is it conceivable that the new policy coordination within the annually repeating European Semester, the reporting and multilateral surveillance obligations, the macroeconomic imbalance procedures, the responses to country-specific recommendations lead to new assessments of the weight of socio-economic diversity, insights into the social embeddedness of markets, acknowledgement of the different regulatory, social and economic cultures in the Member States, a search for innovative responses to complex conflict constellations – and sooner or later even to the developments of standards and criteria which discipline authoritarian managerialism?

(2) It is true that the process of integration by no means simply deregulated Europe’s economy. But it did destroy the interdependence between (nation-state) labor 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 was socially embedded in the Member States and institutionalized 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. We are witnessing ever more unrest and protest among disempowered citizens who are exposed to austerity measures which are experienced as hopeless, if not unnecessary suffering.

These responses to the European turn to “competitiveness” as a new pan-European value have so far not led to an organised transnational movement with an elaborated agenda. This, however, may well happen in not too far a future. What we can observe day by day, however, are conflicts between the European commitments to the rule of law and democracy and the practices of its crisis management. It should be a matter of time until these conflicts are framed as legal claims and reach the law in Europe. So far, this did hardly happen. A -- modest -- signal has been sent by Portugal’s constitutional court.⁶⁸ That Court has examined the compatibility of the austerity measures of the Portuguese government with the Portuguese constitution. The Court did explicitly recognize “the seriousness of the current economic/financial situation and the need to attain the public-deficit goals included in the specific economic policy conditions laid down in the memoranda of understanding between the Portuguese government, the European Union and the International Monetary Fund.” But it did then object to the implementation of these requests because of their disregard of the principles of equality and proportionality. This is not much, but it is more than nothing.

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:⁶⁹ 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-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.⁷⁰

¹ José Manuel Durão Barroso, “The State of Europe – Die Europa Rede”, Berlin, 9 November 2011, official version at http://europa.eu/rapid/press-release_SPEECH-11-738_en.htm (retrieved on 4/7/2013)

² The pertinent publication was in French: Walter Hallstein, “La Communauté Européenne, nouvel ordre juridique” in *Les Documents Communauté Européenne*, 27 (1964); see Matej Avbelj, “The Legal Viability of European Integration in the Absence of Constitutional Hierarchy”, in *Integration through Law’ Revisited: The Making of the European Polity* edited by Daniel Augenstein (Surrey: Ashgate, 2012), 29-46.

³ See the magisterial reconstruction by Joseph H. H. Weiler, “The Transformation of Europe,” *Yale Law Journal*, 100 (1990-91), 2403–85, at 2410-31.

⁴ Hans Peter Ipsen, “Europäische Verfassung – Nationale Verfassung,” *Europarecht* (1987), 195-213, at 201; for Weiler’s account of such changes see his “Transformation“, *ibid.*, 2437-50..

⁵ See, pathbreaking, his “The Community system: the dual character of supranationalism”, *Yearbook of European Law* 1 (1981), 257-306 – and then the seminal work he orchestrated: Mauro Cappelletti, Monica Secombe and Joseph H. H. Weiler (eds.), *Integration through Law* (Berlin-New York: de Gruyter, 1986 *et seq.*).

⁶ *Ibid.* (note 4) and previously his “The Community system:” (previous note).

⁷ See for a seminal restatement of this tradition Ernst-Joachim Mestmäcker, “Macht – Recht – Wirtschaftsverfassung”, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 137 (1972), 97-118 and for a critical evaluation Christian Joerges, “What is left of the European Economic Constitution? A Melancholic Eulogy,” *European Law Review*, 30 (2005), 461-89.

⁸ And remains alive a such; see Mestmäcker’s most recent worried interventions which mirror his commitments to this tradition; see “Der Schamfleck ist die Geldverachtung” (the shaming flaw is the disdainfulness of money), in *Frankfurter Allgemeine Zeitung*, (18.11.2011), 33; and “Ordnungspolitische Grundlagen einer politischen Union” (foundational principles for the ordering of a political union), in *Frankfurter Allgemeine Zeitung* (12.11.2012), 12; in the public debate, the President of the *Bundesbank* is the most prominent among the no longer so numerous defenders of ordoliberal ideas; see Jens Weidmann, “Crisis management and regulatory policy,” Lecture given at the Walter Eucken Institute, Freiburg, 11 February 2013, available at http://www.bundesbank.de/Redaktion/EN/Reden/2013/2013_02_11_weidmann_eucken.html

⁹ Suffice it here to point to the report of Barry Eichengreen, “European Monetary Integration with Benefit of Hindsight”, *Journal of Common Market Studies* 50 (2012), 123-36, 123-6; cautious but instructive also the reserves of Helmut Schlesinger, then President of the *Bundesbank* against a monetary union without political union in his expert testimony in the proceedings on the Treaty of Maas-

tricht: before the German *Bundesverfassungsgericht*; see the Judgment of 12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92, *Entscheidungen des Bundesverfassungsgerichts* 89, 155; English translation: : “*Brunner v. European Union Treaty*”, in *Common Market Law Reports*, 1 (1994), 57-108, para. 92.

¹⁰ Polanyi has never been forgotten; his notion of embeddedness has been used in analyses of globalisation, see, e.g., Elmar Altvater and Brigitte Mohnhaupt, *Grenzen der Globalisierung Ökonomie, Ökologie und Politik in der Weltgesellschaft*, (Münster: Westfälisches Dampfboot, 4th ed., 1999), 90 *et seq.*, Jürgen Habermas has referred to Polanyi in “The Postnational Constellation and the Future of Democracy”, in idem, *The Postnational Constellation. Political Essays*, (Cambridge MA: Polity Press, 2001), 58-112. Europe has been addressed by Stephen Gill, “European governance and new constitutionalism: Economic and Monetary Union and alternatives to disciplinary Neoliberalism in Europe”, *New Political Economy* 3 (1998). 5-26. By now, there is more available, see note 15 below.

¹¹ Hans-Jürgen Bieling, “Das Projekt der Euro-Rettung und die Widersprüche des europäischen Krisenkonstitutionalismus,” *Zeitschrift für Internationale Beziehungen* 20 (2013), 89-103; Jeremy Leaman, “The Size that Fits No-one: European Monetarism Reconsidered” in Eduardo Chiti, Agustín Menéndez and Pedro Gustavo Teixeira (eds.), *The European Rescue of the European Union*, Oslo (ARENA Report No 3/12); Wolfgang Streeck, “The Crises of Democratic Capitalism,” *New Left Review* 71 (2011), 5-23; Fritz W. Scharpf has already in Europe’s heydays underlined the neoliberal tilt of the integration project; he is by now the most ardent critic of the Euro on the left, see his “Monetary Union, Fiscal Crisis and the Preemption of Democracy”, *MPIfG Discussion Paper* 11/11, Cologne 2011.

¹² Karl Polanyi, *The Great Transformation* (New York: Farrar & Rinehart, 1944); references here are 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’”, *Theory and Society* (2003) 33, 275-306 and Jens Beckert, “Die soziale Ordnung von Märkten”, *MPIfG Discussion Paper* 07/6 (Cologne 2007).

¹³ See Polanyi, *ibid.*, in particular 125 *et seq.*

¹⁴ *Ibid.*, in particular the famous passages on p. 56 and out of an abundant literature Fred Block, “Towards a New Understanding of Economic Modernity”, in Christian Joerges, Bo Stråth and Peter Wagner (eds.), *The Economy as Polity: The Political Constitution of Contemporary Capitalism* (London: UCL Press, 2005), 3-16. -- The Polanyi renaissance has reached European studies, albeit not always in fortunate ways; see James A. Caporaso and Sidney Tarrow, “Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets,” *International Organization* 63 (2009), 593-620 (arguing that the jurisprudence of the ECJ has accomplished a reembedding of markets and disregarding the imposition of market discipline in particular on labor relations); for a conclusive critique see Martin Höpner and Armin Schäfer, “Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting,” *International Organization* 66 (2012), 429-55.

¹⁵ 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 (Retrieved on 8/4/2013).

¹⁶ 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] JECR I-01989.

¹⁷ Sachverständigenrat, “Nach dem EU-Gipfel: Zeit für langfristige Lösungen nutzen. Sondergutachten gemäß § 6 Absatz 2 Satz 1 des Gesetzes über die Bildung eines Sachverständigenrates zur Begutachtung der gesamtwirtschaftlichen Entwicklung” (Wiesbaden: Statistisches Bundesamt, 2012). <http://www.consilium.europa.eu/special-reports/european-semester?lang=en> (Retrieved on 4/9/2013).

¹⁸ For comprehensive documentation see Matthias Ruffert, “The European Debt Crisis and European Union Law,” *Common Market Law Review* 49 (2011), 1777-1806; Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, 2nd. Paperback edition (Chapter 12 on “Financial Crisis, Response, and Europe’s Future”, (Oxford: Oxford University Press, forthcoming 2013)..

¹⁹ See Giandomenico Majone, “Rethinking European Integration after the Debt Crisis,” *UCL Working Paper* 3/2012 (London, 2012).

²⁰ Case C-370/12 *Pringle v. Ireland*, Judgment of 27 November 2012, available at <http://curia.europa.eu/juris/recherche.jsf?language=en>.

²¹ Judgment of 12 October 1993, cited in note 9 above.

²² 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;” see, famously, Joseph H. H. Weiler, “Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision,” *European Law Journal* 1 (1996), 219-258; but see also Christian Joerges, “The Market without a State? States without a Market?: Two Essays on the Law of the European Economy,” *EUI Working Paper Law* 1/96 (San Domenico di Fiesole, 1996).

²³ Joseph H. H. Weiler, “The ‘Lisbon Urteil’ and the Fast Food Culture,” *European Journal of International Law*, 20 (2009), 505-509, at 505, commenting on the FCC judgment of 30.6.2009, English translation available at:

http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

²⁴ 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>. (Retrieved at 7.4.2013)

²⁵ Christian Geyer, “Anatomie einer Hintergehung,” in *Frankfurter Allgemeine Zeitung* (21.06.2012), 29.

²⁶ 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. (Retrieved on 4/7/2013).

²⁷ Namely, the *Währungsunion-Finanzstabilisierungsgesetz* (Monetary Union Financial Stabilisation Act), which grants the authorisation to provide aid to Greece, and the *Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus* (Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism).

²⁸ Para. 124.

²⁹ Para.s 130-32.

³⁰ Para.s 114-16.

³¹ Judgment of 12 September 2012 on the ESM and Fiscal Compact, 2 BvR 1390/12; an – incomplete – translation is available at http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html,

³² This is our translation. Pertinent passages in the extract translation can be found at para.s 125 ff.

³³ Jürgen Habermas has realized this very clearly; see his “Drei Gründe für ‘Mehr Europa’” (three reasons for “more Europe”), Forum Europa, Juristentag, Munich, 21 September 2012, reprinted in: *idem, Im Sog der Technokratie*, (Berlin: Suhrkamp, 2013), 132-137.

³⁴ Joseph H. H. Weiler, “The ‘Lisbon Urteil’ and the Fast Food Culture”, in *European Journal of International Law* 20 (2009), 505-509, at 505; Perry Anderson, “After the Event,” *New Left Review* 73 (2012), 49-61, at 53.

³⁵ See note 19.

³⁶ Article 125(1) stipulates: “The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.”

³⁷ Article 122(2) reads: “Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.”

³⁸ CJEU (note 19), para 135.

³⁹ *Ibid.*, para. 116.

⁴⁰ *Ibid.*, para. 142

⁴¹ Ernst-Wolfgang Böckenförde, “Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung”, NZZ6/21/2010, www.nzz.ch/nachrichten/kultur/literatur_und_kunst/kennt_die_europaeische_not_kein_gebot_1.6182412.html (retrieved on 4/7/2013).

⁴² 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 editor Günter Maschke: *Carl Schmitt, Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969* (Berlin: Duncker & Humblot, 1995), 29-320. The translation of the title of Schmitt's essay as bracketed in the text is from *Carl Schmitt: Writings on War*, edited and translated by Timothy Nunan, (Cambridge: Polity Press, 2011), 75-124.

⁴³ In more detail on the following Christian Joerges, "Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project," in: Christian Joerges and Navraj S. Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, (Oxford: Hart Publishing, 2003), 167-191.

⁴⁴ Schmitt, note 46, at 306.

⁴⁵ See Schmitt and Nunan, *ibid*, 110.

⁴⁶ See Lothar Gruchmann, *Nationalsozialistische Großraumordnung. Die Konstruktion einer "deutschen Monroe-Doktrin"*, (Stuttgart: DVA, 1992), 11 *et seq*; William E. Scheuerman, *Carl Schmitt: The End of Law*, (Lanham MD-Boulder CO-New York-Oxford: Rowman and Littlefield, 1965), 161 *et seq.*, and 169 *et seq.*

⁴⁷ Martti Koskeniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization," *Theoretical Inquiries in Law* 8 (2007), 9-36, at 16; *idem*, "Miserable Comforters: International Relations as New Natural Law", *European Journal of International Relations* 15 (2009), 395-422, at 411.

⁴⁸ See Schmitt and Nunan, note 46, at 111; on the notion of technicity see John P. McCormick, *Carl Schmitt's Critique of Liberalism. Against Politics as technology*, (Cambridge: Cambridge University Press, 1997), 42-46, 92-105.

⁴⁹ Carl Schmitt, "Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 6 (1938), 252-267; among the few who have taken notice of this remarkable essay is, of course under the impression of the American understanding of the executive, Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State*, (Oxford-New York: Oxford University Press, 2010), 62 *et seq.*

⁵⁰ See Carl Schmitt, *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* [1921], 5th reprint., (Berlin: Duncker & Humblot, 1989). I am following in my reading the seminal work of Hasso Hofmann, *Legitimität gegen Legalität. Der Weg der politischen Philosophie Carl Schmitts*, 2nd ed. (Berlin: Duncker & Humblot, 1992), 62 *et seq.* (state of emergency), and 70 *et seq.* (dictatorship).

⁵¹ Schmitt, previous note, at 253.

⁵² Note 45 above.

⁵³ Ulrich Hufeld, "Zwischen Notrettung und Rütlichwur: der Umbau der Wirtschafts- und Währungsunion in der Krise," *Integration* 34 (2011), 117-131, at 122.

⁵⁴ Carl Schmitt, *Verfassungslehre* [1928], 10th ed., (Berlin: Duncker & Humblot, 2010), 107 (own translation).

⁵⁵ See William E. Paterson, "The Reluctant Hegemon? Germany Moves Centre Stage in the European Union," *Journal of Common Market Studies* 49 (2011), 57-75; Christoph Schönberger, "Hegemon wider Willen. Zur Stellung Deutschlands in der Europäischen Union," *Merkur* 66 (2012), 1-8 and the critique by Giandomenico Majone, *Has European Integration Gone Too Far—Or Not Far Enough?*, (Cambridge: Cambridge University Press, forthcoming 2014), chapter 8 (on file with author).

⁵⁶ Carl Schmitt, "Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität", in *Der Staat* 17 (1978), 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: "The industrialised society is bound to rationalisation, including the transformation of law into legality" (329).

⁵⁷ 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.

⁵⁸ Habermas' work on Europe is indeed unique in its integration of his philosophical foundations with legal and constitutional theory, historical reflections and the effort to define European perspectives after globalisation; see in more detail Christian Joerges. "Reflections on Habermas' Postnational Constellation", in: Camil Ungureanu, Klaus Günther and Christian Joerges (eds.), *Jürgen Habermas*,

Vol. 2, (Aldershot-Burlington VT: Ashgate Publishing, 2011), XI-XXI.

⁵⁹ Most of them can be found at <http://www.habermasforum.dk>, the most recent (by 14 August 2013) being “Merkel’s European Failure: Germany Dozes on a Volcano”, first published in *Der Spiegel*, 5 July 2013.

⁶⁰ Succinctly, for example, in the *Frankfurter Allgemeine Zeitung* of 4 November 2011; “Rettet die Würde der Demokratie” (Rescue the dignity of democracy).

⁶¹ See his “A Pact for or against Europe?,” in: Ulrike Guérot and Jacqueline Hénard (eds.), *What does Germany Think about Europe?*, European Council on Foreign Relations, Berlin, 83-89, available at: <http://habermas-rawls.blogspot.it/2011/07/habermas-pact-for-or-against-europe-in.html>.

⁶² In his recent essay, Jürgen Habermas, “The Crisis of the European Union in the Light of a Constitutionalization of International Law”, in *European Journal of International Law* 23 (2012), 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.”

⁶³ Very similarly in that respect recently Claus Offe, “Europe Entrapped. Does the EU have the political capacity to overcome its current crisis?,” *European Law Journal* 19 (2013), 595–611.

⁶⁴ Dieter Grimm, “Does Europe need a Constitution?,” in *European Law Journal* 1 (1995), 282-302; Jürgen Habermas, “Remarks on Dieter Grimm’s ‘Does Europe Need a Constitution?’”, in *European Law Journal* 1 (1995), 303-307.

⁶⁵ See for this famous formula Renaud Dehousse and Joseph H. H. Weiler, “The Legal Dimension”, in William Wallace (ed), *The Dynamics of European Integration*, (London: Pinter, 1990), 242-60, 243.

⁶⁶ Article 1-8 of the Draft Constitutional Treaty, available at <http://european-convention.eu.int/docs/Treaty/cv00820.en03.pdf>.

⁶⁷ For a recent restatement see Christian Joerges, “Conflicts-Law-Constitutionalism, Ambitions and Problems”, in Peter Hilpold, Nikos Lavranos, Stefan Schneider and Andreas Ziegler (eds.), *Liber Amicorum Ernst-Ulrich Petersmann* (Leiden, Brill, 2013, forthcoming), available at <http://ssrn.com/abstract=2182092>.

⁶⁸ ACÓRDÃO N.º 187/2013, Processo n.º 2/2013, 5/2013, 8/2013 e 11/2013, Plenário, English translation available at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html>,

⁶⁹ <http://www.consilium.europa.eu/special-reports/european-semester?lang=en> (Retrieved on 4/7/2013).

⁷⁰ Christian Joerges, “Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form”, *LEQS Paper* No. 28/2010 (London, 2010; revised version: April 2013).