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Political Science Series

An Exercise in Legal Honesty: Re-writing the Court of Justice and the Bundesverfassungsgericht

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INSTITUT FÜR HÖHERE STUDIEN
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Founded in 1963 by two prominent Austrians living in exile – the sociologist Paul F. Lazarsfeld and the economist Oskar Morgenstern – with the financial support from the Ford Foundation, the Austrian Federal Ministry of Education, and the City of Vienna, the Institute for Advanced Studies (IHS) is the first institution for postgraduate education and research in economics and the social sciences in Austria. The **Political Science Series** presents research done at the Department of Political Science and aims to share “work in progress” before formal publication. It includes papers by the Department’s teaching and research staff, visiting professors, graduate students, visiting fellows, and invited participants in seminars, workshops, and conferences. As usual, authors bear full responsibility for the content of their contributions.

Das Institut für Höhere Studien (IHS) wurde im Jahr 1963 von zwei prominenten Exilösterreichern – dem Soziologen Paul F. Lazarsfeld und dem Ökonomen Oskar Morgenstern – mit Hilfe der Ford-Stiftung, des Österreichischen Bundesministeriums für Unterricht und der Stadt Wien gegründet und ist somit die erste nachuniversitäre Lehr- und Forschungsstätte für die Sozial- und Wirtschaftswissenschaften in Österreich. Die **Reihe Politikwissenschaft** bietet Einblick in die Forschungsarbeit der Abteilung für Politikwissenschaft und verfolgt das Ziel, abteilungsinterne Diskussionsbeiträge einer breiteren fachinternen Öffentlichkeit zugänglich zu machen. Die inhaltliche Verantwortung für die veröffentlichten Beiträge liegt bei den Autoren und Autorinnen. Gastbeiträge werden als solche gekennzeichnet.

Abstract

At a time of crisis – a true state of emergency – both the Court of Justice of the European Union and the German Federal Constitutional Court have failed the rule of law in Europe. Worse still, in their evaluation of the ersatz crisis law, which has been developed in response to financial and sovereign debt crises, both courts have undermined constitutionality throughout Europe. Each jurisdiction has been implicated within the techocratisation of democratic process. Each Court has contributed to an incremental process of the undermining of the political subjectivity of European Citizens. The results are depressing for lawyers who are still attached to notions of constitutionality. Yet, we must also ask whether the Courts could have acted otherwise. Given the original flaws in the construction of Economic and Monetary Union, as well as the politically pre-emptive constraints imposed by global financial markets, each Court might thus be argued to have been forced to suspend immediate legality in a longer term effort to secure the character of the legal jurisdiction as a whole. Crisis can and does defeat the law. Nevertheless, what continues to disturb is the failure of law in Europe to open up any perspective for a return to normal constitutionality post crisis, as well as its apparent inability to give proper and honest consideration to the hardship now being experienced by millions of Europeans within crisis. This contribution accordingly seeks to reimagine each Judgment in a language of legal honesty. Above all, this contribution seeks to suggest a new form of post-national constitutional language; a language which takes as its primary function, proper protection of democratic process against the ever encroaching powers of a post-national executive power.

This contribution forms a part of an on-going effort to identify a new basis for the legitimacy of European Law, conducted jointly and severally with Christian Joerges, University of Bremen and Hertie School of Government, Berlin. Differences do remain in our theoretical positions; hence this individual essay. Nevertheless, the congruence between pluralist and conflict of law approaches to the topic are also readily apparent. See, for example, Everson & Joerges (2013).

Keywords

Constitutionality, rule of law, Bundesverfassungsgericht, European Stability Mechanism, Court of Justice of the European Union, Maastricht Judgement, Economic and Monetary Union, European Charter for Fundamental Rights, Treaty for European Union, European Central Bank

General note on content

The opinions expressed in this paper are those of the author and not necessarily those of the IHS.

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I. The Rule of Law Undone?

It might not be a laudation with no consideration at all for judicial flaws. Nevertheless, Paul Craig's editorial analysis of the judgement of the Court of Justice of the European Union (CJEU) in the case of *Pringle*,¹ is distinctly elegiac in nature (Craig 2013). So, per Craig, the 'denouement of the judgement', in which the CJEU 'saves the European Stability Mechanism (ESM) from the most potent challenge to its legality', or the damning claim that it undermines the constitutional commitment of the EU to monetary stability, 'reveals much that is of interest about the nature of legal argument, in particular the blend of text, background purpose and teleology that constitutes the very essence of legal reasoning' (2013:11). Certainly, the story of *Pringle*, set against a background of global financial instability, only augmented by potent concern that the EU lacked the will or structures necessary to secure the euro, is one of a chronicle foretold. It is hard to conceive of any Court setting aside the ESM with a judgement of its illegality, thus playing the potentially decisive part in the collapse of Economic and Monetary Union, the most significant of all of European achievements. Yet, for Craig at least, the action of the CJEU was far more than a matter of simple extra-legal *Realpolitik*. Instead, formulated within 'the very essence of legal reasoning', the judgement not only saved the euro, but also protected the European constitutional jurisdiction against this very particular challenge to its rule of law.

Others do not agree, and with very good reason. Gunnar Beck, stating that he does not 'quite understand the meaning' of Paul Craig's formulations, immediately reveals the emptiness in an 'essence' of a form of 'legal reasoning' that does not take the law seriously (Beck 2013). Taking a broader approach, Beck notes that all constitution-like jurisdictions, both at national and at global level, furnish themselves with a necessary margin of decisional discretion, relying on more than one 'interpretative criterion'; and adopting a literal, schematic, teleological or, increasingly so, purposive approach to discerning a cumulative meaning for their 'constitutions'. Equally, such a margin of discretion is just as surely a vital element within *responsive* constitutionality; a key to the abiding legitimacy of constitutional jurisdictions, as constitutional justices struggle to adapt the meaning of dusty tomes, captured in the contexts and prejudices of their textual instantiation, to societies and populations, which are not only in constant moral and political flux, but which are also subject to the functional challenges of historical contingency. The New Deal, after all, could not have come into being without judicial flexibility: the curious mix of formalist deference to legislative process, assertion of modern scientific evidence to challenge the liberal shibboleths of formal equality, and purposive appeal to the desires and, more importantly, immediate needs of 'We the People', which allowed US Justices to move beyond the economically, neo-classical individualism of the *Lochner*-era Supreme Court, in order to facilitate this one-time interventionist response to global financial meltdown (Ackermann 1998).

¹ Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, Judgment of 27 November 2012, not yet reported.

Yet, as Beck also notes, ‘Law is law, not least because anything does not go’ (Beck 2013). And herein we find the greatest challenge facing the constitutional jurisdiction. Law must adapt, but must also be constrained by legal reasoning, *exactly* in order to distinguish it from mere political decision-making. Especially as regards the response to historical contingency, the line between (constitutional) jurisprudence and grand political design is inevitably fine. The CJEU, like many a Court before it, has long found itself inexorably enmeshed in the great Weberian paradox of constant oscillation between maintenance of self-referential formal method and material (substantive) legal response to the justice demands of a world outside law (Everson & Eisner 2007). But, for Beck, it is exactly at this point of oscillation, of careless fluctuation, that the Court in *Pringle* fails the rule of law; it is at this point, that Craig’s blend of text, background and purposive reasoning is a blunt and legally meaningless melange, masking a programme that dispenses with all legal restraint in order to enable immediate political goals. The European treaties explicitly constrain the permissible political options in relation to EMU, seemingly recognising the need to restrain short-term actions for long term benefits. Where, with regard to the interpretation of these constraints, law becomes open-ended and indeterminate, thus permitting all conceivable political strategies, it is no longer distinguishable from the politics which it is supposed to restrain. The judgement’s joint and several responses to each of the heads of complaint made both against the ESM Treaty (TESM) and Council Decision 2011/199, amending Article 136 TFEU in order to facilitate conclusion of that Treaty, are no more than an unrestrained and absurd cacophony of political noise.

The Judgment in three curtailed points:

(1) For Paul Craig, the dismissal of the first head of claim made in *Pringle* – one that Council Decision 2011/199, taken under the simplified Treaty revision procedure laid down by Article 48(6) Treaty for European Union (TEU), illegitimately modified Article 136 TFEU, thus expressly allowing for transfer payments between member states and enabling signature of the ESM – is an instance of legal formalism. For Beck, by contrast, the Court’s supposed formalism is a *reductio ad absurdum*, both in fact and in law. Simplified treaty modification under Article 48(6) is possible only where such modification entails no increase in competences for the Union. Equally, modifications may only be made to Part III of the TFEU, thereby also protecting the Union’s exclusive competences laid down in the proceeding sections of the Treaty. The assertion that the ESM would substantially enhance the Union’s competences in matters of monetary policy was rebutted by the Court with the argument that the modified Article 136, expressly allowing for the member states to establish a stability mechanism ‘created no legal basis’ for any Union action that was not possible prior to treaty amendment. Similarly, the assertion that the creation of the ESM would infringe upon the exclusive competences of the Union with regard to monetary policy (Article 125 TFEU), was defeated by virtue of the Court’s conviction that the ESM was concerned solely with economic policy, only ‘indirectly’ impacting upon monetary policy through its mission to secure the stability of the euro area in its entirety. Many lawyers are familiar and even

comfortable with the natural ‘transcendental nonsense’ of formalist legal discourse (Cohen 1935), or with the tendency of judicial language to conjure a non-existent reality from a non-sequitur of self-referential legal reasoning. Yet, few could fail to be surprised, or even disturbed, by the simple and counterfactual assertion of the Court that the ESM, with the full participation of EU institutions, such as the Court, Commission and European Central Bank (ECB), would not have as its primary role or impact, an increase in liquidity within Europe, and at the same time would increase the *de facto* competences of the Union.

(2) To Paul Craig, the ‘denouement’ of *Pringle* captures the essence of legal reasoning as the Court combines a literal reading of Article 125 TFEU with a highly unusual teleological recourse to the preparatory work of the member states for conclusion of the Maastricht Treaty, as well as throws in a weighty measure of purposive reasoning, in order to declare: a) that the ESM does not constitute transfers between member states – forbidden by Article 125 TFEU – but merely establishes an enduring relationship between creditor states and the ESM, regardless of the potential for member state default; b) that the ESM satisfies the ‘strict conditionality’ sought by the member states when concluding the Growth and Stability Pact; and c) that conditionality within the ESM also secures the prime purpose of price stability within the EMU, ensuring that debtor member states will be subject to market discipline in maintaining sound budgetary policy. For Beck, such compound reasoning – in particular, the re-casting of a notion of conditionality ‘unearthed’ in member state negotiations as a ‘higher principle’ of market discipline within the EU – is simply a reflection of a tortuous judicial effort to avoid application of Occam’s razor; to ignore the obvious conclusion that Article 125 TFEU should surely be held by the Court to mean what it clearly appears to mean in plain language – that the Treaty prohibits any form of debt financing between member states. Sophistry, in Beck’s opinion, is also further heaped upon sophistry, as the Court similarly reverses the normal course of legal reasoning, holding that the detailing by the Treaty of specific circumstances of permitted cross-subsidisation between member states (122(2) TFEU) indicates potential for, rather than impliedly precludes a general as well as specific competence for fiscal transfers between states.

(3) For Beck, two further features of the CJEU judgement disturb. Firstly, the Court’s decision that the provisions of the new European Charter for Fundamental Rights, and in particular the right to due judicial process, would not apply to the workings of the ESM. This is perhaps justifiable on a purely formal reading;² but it is also, on the one hand, a hammer blow to a rule of law founded in legal protection for the individual, and, on the other, highly incongruous given the ESM’s self-declaration that it would respect all of the provisions of European law. Secondly, however, the view taken by the Court that participation of the ECB within the workings of the ESM – in particular its purchase of ESM bonds on secondary markets – was not a contravention of Article 123 TFEU, or the Bank’s primary duty to maintain price stability, would also appear, in Beck’s analysis, to amount to a legal reification of a counterfactual; a

² The member states would not be applying Union law *strictu sensu*.

nod of formal approbation for the Bank's pragmatic circumvention of Article 123 TFEU ever since the beginning of crisis through secondary market purchasing and bail out of Europe's private banks, or an illogical legal denial of an inevitable increase in potential for increased liquidity in European markets.

II. Giving Law in the State of Exception

II 1. A Return to 'Normal Constitutionality'

From the viewpoint of legal and constitutional theory, such dissection and critique, both of the *Pringle* judgment and of Paul Craig's elegy for the judges of the CJEU, is wholly justified. The muteness or empty core of Craig's laudation mirrors an incurable silence within *Pringle* itself. As noted, the constitutional jurisdiction is no stranger to oscillations between formal and material jurisprudence; is rarely lacking – at least as regards instances of fundamental decision-making – in deft judicial juggling of literal, schematic, teleological or purposive methodology; but all in the search for socially-responsive and legally self-enforcing interpretative leeway. By the same latter token, the constitutional jurisdiction has a particular mission. With its dual audience made up, on the one hand, of social legatees – the 'We the People' who are both inheritors and progenitors of the constitutional tradition – but also, on the other, of the legal practitioners and commentators who are guardians of the uniqueness of the law, it must, if it wishes to retain the sobriquet of constitutionality, eschew simple legal trickery to mask political design. The constitutional tradition must perforce unfold itself within coherent narratives, which are immediately accessible, or capable of generating social conviction, but which are simultaneously, intricately elusive and referencing of a closed legal-constitutional tradition of self-bounded legitimacy. Here, both *Pringle* and Craig fail on all counts. In a Europe of uproar and revolt against austerity regimes, as well as of counterpart fiscal trepidation, or popular unwillingness to commit to a European community of solidaristic fate, the *fait accompli* judgement, expounded without reference to social context, and unfolded only within the technical minutiae of a sadly diminished European legal discourse forecloses potential for proper evolution of a socially-responsive European constitutional tradition. At the same time, in all of its manic vacillation between formalism, literalism, teleological referencing and purposive re-statement of that referencing,³ the judgment similarly fails to connect with any form of constitutional-legal tradition, leaving itself open to the accusation of legal trickery in the politicised service of a brute functionalist rescue of the euro. In failing to level that accusation, Paul Craig becomes apologist for the rule of law undone.

Nevertheless, Gunnar Beck's ready conclusion that the CJEU should have given a finding of illegality, both in the case of Decision 2011/199 and with regard to the compatibility of the ESM Treaty with Articles 125 and 123 TFEU, also raises its own concerns. The story of the creation and near fall of Economic and Monetary Union was not penned by Hans Christian Andersen. At the time of the conclusion of the Maastricht Treaty plenty of small boys, including former heads of the US Federal Trade Commission, were on hand to state clearly that the Emperor was naked. The countries of the European Union did not form an optimal

³ Albeit, and significantly so in the latter case, without any explicit, implicit or rhetorical reference to the material purposes of constitutional justice (see below (III))

currency area. Labour mobility throughout Europe could not and would not compensate for divergences in national economic development. The structural commitment to an integrated monetary policy dedicated – ‘constitutionally’ – to price stability and without an accompanying economic policy, was one that exacerbated divergence and was doomed to falter. Unhappily, however, in this case, nobody listened (Majone 2012). The ‘boundless optimism’ of a community method, which even now continues to present contested political goals as technical exercises, equally failing to draw up contingency plans for their probable failure (Majone 2014), has left the EU with a legacy of an unworkable currency Union, one which precludes escape from asymmetric shocks through regional devaluation or solidaristic transfer. In its design, EMU was a structure which would in any case succumb to any economic disturbance, and which did so decisively in the wake of the global financial crisis dating from the 2008 collapse of Lehmann Brothers. Under pressure from markets and their own political constituencies, as well as inhibited by the cumbersome nature of decision-making within the EU – including the constraints imposed by the originally flawed structures of EMU – the member states first responded to crisis with national measures such as bank guarantees, but then under further stress from the knock-on effects upon interconnected European financial markets, began to construct a common response to crisis; but all at the very edges of European law.

The ESM Treaty is only one of a series of ‘crisis law’ measures, sometimes concluded as ‘*ersatz* law’ outside the European treaties (Everson & Joerges 2013): for example, the ‘Europe 2020 strategy’⁴ and the ‘European Semester’⁵ from 2010; followed in June 2010 by the EFSF Framework Agreement⁶ and in March 2011 by the European Council’s ‘Euro Plus Pact.’⁷ As noted, On 25 March 2011, on the basis of the simplified revision procedures laid down in Article 48(6) TEU, the European Council also decided to add a new Paragraph 3 to Article 136 TFEU permitting the establishment of a stability mechanism and the granting of financial assistance, effective as of 1st January 2013.⁸ This was followed in November 2011 by a bundle of legislative measures aimed at reinforcing budgetary discipline on the part of Member States. The package is supposed to go down in history under the catchy title ‘Six Pack’ and entered into force on 13th December 2011.⁹ The high point and cornerstone of the whole new edifice, however, is the Treaty on Stability, Coordination and Governance (TSCG), drafted in December 2011, approved at an informal meeting of the European

⁴ Communication from the Commission of 3 March 2010, COM(2010) 2020 final.

⁵ Communication from the Commission of 12 May 2010, COM(2010) 250 final.

⁶ Confirmed in the conclusions of the European Council, Brussels, 17 June 2010, EUCO 13/10, CO EUR 9, CONCL 2. The Framework Agreement was concluded by the ECOFIN Council and confirmed by the European Council, Brussels on 17 June 2010.

⁷ Conclusions of the European Council, Brussels, 24/25 March 2011, EUCO 10/11, CO EUR 6, CONCL 3 (Annex I).

⁸ Dec 2011/199/EU amending Art 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, OJ 2011, L 91/2011, 1.

⁹ The five regulations 1173-1177/2011/EU and directive 2011/85/EU of 8 November 2011, OJ L 91/2011, 1.

Council on 30th January 2012,¹⁰ and signed on 2nd March 2012 by 25 out of 27 Member States. A debt brake, designed according to the German model, will be introduced and will be subject to judicial review by the CJEU in the form of institutional borrowing from the TFEU (Article 267 TFEU), with one Member State bringing an action against another in case of non-compliance. Support from the European Stability Mechanism (ESM), a permanent crisis fund, will be available only to countries in the euro area that have signed the pact. In March 2013 the 'Two Pack' submitted back in 2011 was adopted with parliamentary blessing.¹¹

Adding in the activities of the ECB, and, in particular, its purchase of bonds on secondary markets, the extent and highly unusual nature of crisis law reveals the depth of the malaise into which the EU has sunk. Although historical analogy is inevitably strained, the Union might be suggested to have experienced its own 'state of exception' *sensu* Carl Schmitt; with the result that the tarnished legality of crisis law must also be re-assessed. From the 'dangerous mind' of Schmitt (Müller 2003), jurists draw the uncomfortable lesson that dogmatic pursuit of legality needs may be disavowed where legality itself bears potential to destroy the fundamentals of the constitution. Certainly, simplified revisions to the Treaty, and establishment of the ESM would appear to lie without the realm of legality. Yet, a finding to that effect would have been greeted with market uproar, factional strife amongst member states and, potentially, the comprehensive unravelling of Monetary Union with all consequences of an immediate and painful hardship to be experienced by populations not only throughout Europe, but also beyond. Where the measure of constitutionality is the preparedness of the constitutional jurisdiction to set its rules aside in an act of judicial self-restraint, immediate illegality might be the appropriate price to be paid for long-term constitutional survival; a laudable and brave exercise on the part of constitutional judges.

Nevertheless, and all Schmittian reconsideration apart, this is decisively *not* the case in *Pringle*: for all that, to modern minds, Schmitt's evocation of 'constitutional guardianship' within the state of exception is irredeemably tainted by association with the notion of *Führer* as embodiment of *Volk*, his approbation of the emergency transfer of power away from the Constitution to the Political still gives us a degree of contemporary guidance. Schmitt's disapplication of law is, and vitally so, not unbounded, still demanding constitutionalist generation of social conviction; albeit, in Schmitt's analysis, in the final perversion of charismatic Weberian leadership. Equally importantly, however, Schmitt's giving of law within the state of exception, the self-suspension of legality within the constitutional jurisdiction, also encompasses continuing reference to elusively closed and self-referential constitutional

¹⁰ Cf., the Communication of the euro area Member States as well as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union in the version of 20 January 2012, http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf.

¹¹ The 'Two-Pack' provides for 'enhanced monitoring and assessment of draft budgetary plans of euro area member states, with closer monitoring for those in an excessive deficit procedure, and furthermore enhanced surveillance of euro area member states that are experiencing or threatened with serious financial difficulties, or that request financial assistance'; for details see http://www.europarl.europa.eu/pdfs/news/expert/infopress/20130312IPR06439/20130312IPR06439_en.pdf

traditions, and does so to the exact degree that ensuing illegality, or *non-legal constitutionality* must, even in Schmitt's analysis, create perspectives for a return 'to normal constitutionality.'¹²

II 2. Constitutional Guarantees for the 'Openness of Democratic Process'

Although, in our final analysis (see below (III)), a disappointing judgement, the distinctive tenor of laudatory legal commentary heaped upon the decision of the *Bundesverfassungsgericht* (FCC)¹³ on the compatibility of the TSCG and the ESM with the German Constitution, and, in particular, its 'eternity clause' (Articles 20(1), 20(2) and 79(3) GG) guaranteeing German sovereignty, acts to italicise the constitutionalist void lying at the empty core of the CJEU's legal trickery in *Pringle*.

First, however, the very existence of Decision 2 BvR 1390/12 confirms the peculiarities of the European constitutional jurisdiction. A striking absence within all of CJEU jurisprudence remains any form of explicit recognition for the simple fact that its self-declared doctrine of 'supremacy', dating from the revolutionary *Costa* and *Van Gend* jurisprudence of the European Court of Justice of the 1960s (ECJ),¹⁴ has always been subject to the material tolerance of national constitutional jurisdictions; the preparedness of member state jurists to cede to the intrusion of the norms of European treaties into their interpretative realms, as well as the legal-constitutional conditions which they have laid down for that secession. Within an EU normative structure still governed, at least at the level of grandiloquent legal and political self-justification, by constant reiteration of the principle of the conferral of powers – a principle now surely strained to breaking point, both in fact and in law, by the CJEU's approbation of Council (mis)use of Article 48(6) TEU to modify Article 136 TFEU – member state constitutions continue to reign 'sovereign', disposing of a national competence-competence, or right of constitutive initiative, which is absent at European level, but nevertheless integral to the paced evolution, or very survival, of the EU; at least in instances of crisis-driven shock to the system.

Perhaps also now nascent within more general bodies of international law, especially as nation states have exhibited increased willingness to harness their sovereignty to the functionalist aims and norms, for significant example, of global economic integration within bodies such as the World Trade Organisation, the globally enabling but always potentially conflictual – functional supremacy versus originating sovereignty – paradigm of plural and heterarchical constitutional interconnection is still far more advanced within the EU, but continues to defy satisfying theoretical resolution. Nevertheless, early warnings from

¹² Everson & Joerges (2013), citing Schmitt (1931 & 1938).

¹³ Federal Constitutional Court.

¹⁴ Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 1269 & *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1

distinguished legal theorists, such as Neil McCormick, that constitutional assertion of ‘sovereignty now’ would only ossify the outdated nationalisms of a bygone and discredited age, thereby also smothering emerging regional and post-national identities (McCormick 1998), have largely been assuaged within the pragmatically-inspirational deliberations of member state constitutional jurisdictions, who have sought to reconcile the irreconcilable; to marry the unbridled constitutive initiative of their own (We the) *Volk* with the counter-posing aspirations and needs of an emerging European polity. The FCC, beginning with its infamous *Maastricht* Judgment,¹⁵ subjecting processes of European integration to its own review of whether European norms can be made compatible with the eternity clause of the German Constitution, has been at the forefront of such endeavours; all the while earning itself a notable sobriquet of the ‘dog that barks, but never bites’ (Weiler 2009), in particular, as regards its cumulative efforts to describe the constitutive core of democratic process to be defended within the Federal Republic against the incremental advances of supreme EU law.

Whether its reference has been to Hermann Heller and to the ‘spiritual bonds’ of nationhood (*Maastricht* Judgment), or to its own tortuous judicial (mis)interpretation of political science literature on the core components of constitutive and representative democracy (*Lisbon* Judgment),¹⁶ the Court’s discursive emphasis has primarily been one of rhetorically evolutionary Bathos. One which pairs, on the one hand, the re-statement of the fundamentals of constitutive Germanhood (the emotionalism of *Maastricht*) and of German ‘Republicanism’ (the quasi-academic considerations of *Lisbon*), with, on the other, a universalist German commitment to European integration (approval of evolutionary European Citizenship (*Maastricht*)) now culminating in imposition of an ‘*Integrationsverantwortung*’, or accountability for integration, upon the German Parliament (*Lisbon & Aid to Greece*¹⁷); squaring this eternal and eternally impossible circle by simultaneously finding the eternal core of the German Constitution to remain (repeatedly) untouched by integration advances, all the while assuring the German people that it, the FCC, would continue to subject cumulative Europeanisation to core constitutional review. Unlike the CJEU, the FCC has always been generous – and perhaps overly so in its flights of judicial introspection – in the degree of prosaic consideration which it has dedicated, at the very limits of legality, to dual constitutionalist demands both to generate social conviction and to adequately reference closed constitutional tradition. At the same time, it has never ‘bitten’; or asserted Germanhood above the paced processes of European integration.

¹⁵ Judgment of 12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92, 89 BVerfGE 155 (1993) [Brunner v European Union Treaty, CMLR 57 (1994) 1]

¹⁶ See, for misinterpretation, (Lord & Pollak 2013)

¹⁷ FCC, Lisbon Judgment of 30 June 2009, available at: www.bundesverfassungsgericht.de; English translation at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html & FCC, Judgment of 7 September 2011, 2 BvR 987/10 - 2 BvR 1485/10 - 2 BvR 1099/10 – *aid measures for Greece and against the euro rescue package*; available at http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710en.html.

Yet, the rhetorically expansive and enabling FCC has not been without its critics, both within and without the Republic, and the general approval with which Decision 2 BvR 1390/12¹⁸ has been greeted within the legal academy not only reflects juridical wonderment at the Court's *List der Vernunft*, its cunning and deft disposal of methodologies of legal proceduralism to ease immediate transfer of constitutive initiative from the German Constitution to an approximation of the (German) Political. Instead, where particular praise is heaped on 'the modern language of the judgement' (Wendel 2013), it perhaps also hints at a (misplaced) rationalist relief that the FCC appears, on this showing, to have curtailed its own quest for interpretative leeway in the application of the rhetorical canons of classical law that are so suspect to modern legal minds.

Confirmation that the judgement was made within the context of something at least approaching a 'state of emergency', *sensu* Schmitt, was furnished immediately, in a notable break with constitutional tradition. For the first time, the Court undertook a summary review within injunction proceedings brought to prevent the ratification of the ESM Treaty and the Fiscal Compact (TSCG). It held that the proceedings would be unsuccessful 'for the most part,' and that the Republic could ratify the Treaty and Compact 'under international law' if:

- (1) Guarantees could be given to ensure that limitations of German financial liability (and authorised stock capital of 190,024,800,000 euros) laid down in the ESM Treaty (Article 8(5) ESM) could not be interpreted in a manner establishing a higher payment obligations for the Federal Republic of Germany without the agreement of the German representative,
- (2) Further guarantees could be given ensuring that ESM Articles establishing the privacy of ESM documents and information would not detract from the rights of the *Bundestag* and *Bundesrat* to information.

Its demands readily acceded to in subsequent and speedily appended protocols to the ESM, the FCC's summary review addressed only the core question of whether the new architecture of financial stability erected by *ersatz* crisis law would violate the eternity clause of the German Constitution, explicitly reserving for a later full judgement the thorny question of whether ECB participation in ESM financing would violate Article 123 TFEU, thereby also giving itself ample room for a return to its more discursive form of jurisprudence.¹⁹ Nevertheless, and subject to this proviso, the Justices of the Court, also leaned more closely to procedural – or process-based – rather than substantive paradigms of law giving in the state of emergency. Firstly, in their efforts to structure an 'openness' for evolution of the future structures of EMU, as well as for the unfolding of German democratic process. And secondly, in their own 'judicial self-restraint', in particular with regard to the political rather

¹⁸ An incomplete English translation is available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html

¹⁹ Oral hearings were held in May 2013.

than legal nature of future decisions to assume increased solidaristic European liabilities (Wendel 2013).

The Judgment in three curtailed points:

(1) With regard to the newly configured Article 136(3) TFEU, the FCC is too attached to logical probity to repeat the CJEU's absurd legal sophistry: in any analysis, the existence of Article 122(2) TFEU precludes rather than impliedly confirms the existence of a general competence to stabilise the euro through fiscal transfers between member states. Thus, for the FCC, the insertion of Article 136(3) into the TFEU is not a counterfactual continuation of the *status quo*, but represents instead a 'fundamental reconfiguration' of current EMU design, departing from the principle of the independence of the national budgets' (paragraphs 233–234). Matthias Wendel commenting on the judgment, is similarly correct to state that this move was itself facilitated by deftly obfuscating judicial interpretation, as the Court also sought to preserve the competence-competence of the German state, noting that 'the introduction of Article 136(3) TFEU does not result in a loss of national budgetary autonomy because it does not itself establish a stabilization mechanism, "but merely opens up to the Member States the possibility of installing such a mechanism on the basis of an international agreement," thus confirming the Member States' sovereignty in this respect.'²⁰ Nevertheless, the interpretative opportunism of the FCC – reproduced throughout the judgment – in highlighting the fact that the ESM is an instrument of international rather than EU law, also offers up a curious potential for the Union to experiment in its movement beyond the original sin of the Maastricht Treaty, or the false treaty reification of a clear distinction between monetary and economic policy, through the procedural recourse to instruments of international law, such as the TESM and, perhaps also to a future 'ESM plus'. That is, to international instruments from which member states, if so driven by desire or circumstance, might exit with far fewer costs than would be the case in an exit from EU law. To be sure, Wendel is also correct to highlight the fact that the FCC, still ensconced in ordoliberal traditions, would seem to be less than enamoured of establishment of any form of linkage between monetary and economic policy. Hence, its contemporaneous statement that the 'stability-oriented character' of EMU is still preserved, given the 'independence of the ECB, the commitment of the Member States to observe budget discipline and autonomous responsibility for national budgets' (paragraphs 233–4). This disdain for a retreat from ordoliberalism is similarly evinced elsewhere in the judgement in the Court's approval of the TSCG upon the grounds that it applies the same debt-brake pursued at German level (Everson & Joerges 2013). We shall return to this problem below (III).

(2) The *Integrationsverantwortung* or accountability of the *Bundestag* and *Bundesrat* for the oversight of integration processes – in this case, crystallising around the question of maintenance of the accountability of the German Parliament for sovereign budgetary policy

²⁰ Citing paragraph 236 of the judgment.

(Article 38 GG) – is a by now well established principle of German constitutional law. It re-emerges in Decision 2 BvR 1390/12 in its guise as the pivotal interpretational fulcrum, allowing for otherwise impossible ‘constitutional morphogenesis’ (Everson & Eisner 2007), as enhanced Europeanisation is reconciled with the eternity clause of the German Constitution – popular sovereignty and representative democracy (Articles 20(1), 20(2) and 79(3) GG) – through the maxim that the German Parliament must exercise sufficient oversight over European decision-making. Shorn here of the FCC’s emotional/quasi-scientific discourses on the essence of popular sovereignty and democratic process, the principle accordingly resurfaces in a purer procedural form, and arguably one that is – in its direct nature – as constitutive of a performatively integrative outlook, as it is defensive of the core of German constitutionality: the ESM must succeed! In particular, however, and with a specific regard for as yet unforeseen economic contingencies, the budgetary accountability of the German Parliament with regard to the ESM is not limited by the FCC either in temporal or total monetary terms. Certainly, the FCC made ratification of the ESM conditional upon the enhanced clarity of Article 8(5) ESM, but only to the degree that any potential increase in German liability within the ESM in accordance with the procedures laid down by Article 25(2) ESM, could only follow with due ‘participation of the legislature’ (paragraph 76). Any potential that the German representative – and thus the German Parliament – might be excluded from decisions on the re-financing of the ESM on the basis of its own bad liabilities is similarly dismissed, with a notable degree of complacency, as inconceivable, due to sound German financial management.

(3) Identified as an act of judicial self-restraint, the deference of the FCC to political decision-making in times of crisis finds its most concrete form in the Court’s general preparedness to allow the legislature a wide measure of discretion in assessing the full measure of liabilities which the Federal Republic might assume, now and in the future; at the same time, restricting its right to review political decision-making to instances of ‘manifest violation’ (Wendel 2013:33). However, German commentators also note that this legal secession to processes of political decision-making likewise entails substantive alteration in the more abstract matter of the Republic’s constitutionality. The duty to inform Parliament, to bind it in to enhanced Europeanisation processes, is no longer a secondary principle (Article 23(2) GG), derived from more abstract constitutional commitments to popular sovereignty and representative democracy. Instead, it has now become a part of the eternity clause (paragraph 259) and, to the degree that the Court dispenses in this judgment with consideration of the core, substantive elements of German sovereignty and representative democracy, also its interpretational *sine qua non*, at least as regards the prying open of the German Constitution by European integration processes (Wendel 2013:37). Hence, the Court’s insistence on the absolute interpretative clarity of Article 8(5) ESM Treaty. Hence, also, its detailed considerations on the matter of whether oversight of the financing and re-financing of the ESM may ever be delegated to special parliamentary commissions on

grounds of necessary confidentiality.²¹ Above all, however, paragraph 222 of the judgement takes on its own momentarily morphogenic constitutional character:

'Article 79(3) of the Basic Law does not guarantee the unchanged existence of the law in force, but those structures and procedures *which keep the democratic process open* and, in this context, safeguard parliament's overall budgetary responsibility [...] If the monetary union cannot be achieved in its original structure through the valid integration programme, new political decisions are needed as to how to proceed further. It is for the legislature to decide how possible weaknesses of the monetary union are to be counteracted by amending European Union law.' (emphasis added).

²¹ Detailed rules have been left to the full hearing.

III. Which Political?

Crucially, in its cited comments on Article 79(3), the FCC moves from the general to the specific, suggesting a comprehensive proceduralisation of its standards of review with regard to the incremental enhancement of European integration. This move is potentially radical in constitutionalist terms. Where the FCC is thus also directing itself to efforts to keep the democratic process open, arguably even beyond the immediate matter of budgetary accountability at issue, the Court is seemingly similarly recasting the *pouvoir constituant* of the German Constitution, rejecting its irreversible instantiation in the inalienability of substantive value (e.g. a German rather than an international concept of human rights), or in the absolutism of retained competences (e.g. defence). By the same token, to the degree that the Court references the *pouvoir constituant* in its continuing pre-occupation with the eternity clause within its own Constitution, it also opens up potential for its transfiguration, its release from the spatial and temporal imprisonment of constitutional statehood. This tentative step on a path, which might conceivably also lead to the purist form of *res publica*, wherein all politics is radicalised with the aim of liberating rather than constraining the future demos, is similarly accompanied by its own constitutionality, still dedicated to the judicial control of politics; a control, however, that is not exercised through imposition of instantiated legal value, but rather through the review and rejection of any politics that forecloses future democratic outcomes within and beyond the state.

Set against this one reading of the potentialities of FCC jurisprudence, the trickery indulged in by the CJEU in *Pringle* is revealed in all of its legal poverty. The CJEU's mix of literal, teleological and purposive reasoning can only but strain the credulity of any jurist not wholly unsighted by the blind optimism that pollutes European integration studies. The FCC, by contrast, not only maintains a measure of constitutionality within a state of exception, but also opens up a vital pathway to the denationalisation of constituent power. Or does it? The contra-punctual measure of doubt is vital: for all of its achievements, the FCC is similarly unable to take the final step of sublimation of German constitutionality within the post-statal jurisdiction; it is unwilling, above all, to pay respect to and trust in the democratic processes of other member states making up the Eurozone.

The core problem, however, is not one of the theoretical concerns that would in any case accompany the revolutionary *res publica*: identification of the means of addressing the dangers posed by a polity in permanent revolution, unconstrained by the substantive values that also play their part in maintaining horizontal bonds of belonging and solidarity within national democratic process. Instead, the judgement remains incomplete, constitutionally closed in its implicit reification of the ordo-liberal ideology to which Germany cleaves, notwithstanding the negative externalities that a disembedded ordo-liberalism, shorn of a mediating community of solidaristic redistribution, has provoked within the peripheral

economies of the EU. The interplay between two paragraphs of the judgement deserves particular attention:

The current programme of European integration designs the monetary union as a stability community. As has been repeatedly emphasised by the Federal Constitutional Court, this is the essential basis of the Federal Republic of Germany's participation in the monetary union. Not only with regard to currency stability, the treaties are parallel to the requirements of Article 88 sentence 2 of the basic law ... which makes compliance with the independence of the European Central Bank and the primary objective of price stability permanent constitutional requirements of a German participation in the monetary union; further central provisions on the design of the monetary union also safeguard the constitutional requirements in European law. This applies in particular to the prohibition of monetary financing by the European Central Bank, the prohibition of accepting liability (bailout clause) and the stability criteria for sound budget management (paragraph 219).

Further:

[e]very single stability support measure taken in accordance with Article 13(2) TESM, as well as the signing of the respective Memorandum of Understanding in accordance with Article 13(4) TESM require a decision by mutual agreement of the Board of Governors and can be, and actually are made contingent on the approval by the German *Bundestag*. As the *Bundestag* can exercise the constitutionally required influence through its approval of stability support and can participate in the decision on the amount, terms and conditions and on the duration of stability support in favour of Members seeking help, the *Bundestag* itself lays the most important foundation of possible capital calls made in accordance with Article 2(9) TESM (paragraph 274).

Leaving aside the intractable issue of ECB' activities on secondary markets, the FCC is not engaging in legal sophistry when it seeks to reconcile 'the fundamental reconfiguration of EMU' through the modification of Article 136 TFEU and the conclusion of the TESM. Certainly, the *Bundestag* has been afforded a wide measure of discretion with regard to German liability within the ESM. Yet, it must exercise that discretion within the constitutional conditionality of German participation within EMU. The Court may likewise have restricted its review of the substance of German action within EMU to matters of manifest error; yet, the message to Parliament and Government is clear. EMU is still a stability community and will and must remain so under German influence.

The re-emergence of nationalised German constitutionality within assured conditionality raises two particular points of concern. Firstly, the disingenuous argumentation of the Court is indication, not so much of a lack of solidarity on the part of the FCC – after all, it did secure German participation within the ESM against the wishes of significant sections of public

opinion, including its own Justices (Kirchhoff 2012) – but far more, of a continuing refusal of one of the most influential European constitutional jurisdictions directly to address the core problems of European integration within a legal language capable of generating social conviction. Simply stated, the *ESM/TSCG* decision concerned, not merely the establishment of German solidarity with other European member states, but more importantly, also the limits to that solidarity: the extent of German preparedness to marry its destiny with other European states; or, more significantly, the issue of the degree to which Germany is prepared to believe and to trust in the diverse political cultures whose actions will, in turn, determine the destiny of the Federal Republic within a monetary union. The topic is an uncomfortable one, but also a legitimate and even indispensable focus for the constitutional jurisdiction: a popular mismatch of political and cultural expectations cannot but feed secessionary forces within the EU. By the same and reverse token, however, judicial resort to a comfort blanket of constitutionalised price stability continues to muffle public reception of the consequences of the original sin of Economic and Monetary Union, its denial of the politically-integrative nature of the project. At the same time, it represents judicial abdication of any responsibility for the generation of the degree of social conviction within Europe necessary to atone for that sin.

Secondly, however, economics matters: the original legal-academic uproar that greeted the FCC's *Maastricht* judgement was largely misdirected (e.g., Weiler 1995). One commentator, however, was not distracted by the Court's rhetorical fancies; its unfortunate referencing of emotional bonds of Germanhood, noting instead that the *Maastricht* Court's conditional approbation of the Treaty of European Union would inexorably pre-empt the politically-democratic evolution of the European polity (Joerges 1996). It would suspend it instead within a stifling and destructive one-size-fits-all design of economic constraint, neither adapted to the steering demands of, variously, the core and the periphery of the Eurozone, nor amenable to democratic self-determination in response to socially-destructive economic circumstance. Recent events have shown Christian Joerges to have been correct in his emphasising of the economic character of FCC jurisprudence. Yet, and vitally so, uproar on the streets of Athens, Lisbon and Madrid, the currently futile expression of the dispossessed, is not the fault of disembedded German *ordo-liberalism* alone. Instead, the debt-brakes and the strict conditionality imposed throughout the European crisis regime and patrolled by an unholy troika of Commission, ECB and IMF is likewise rooted within a far broader, global subsumation of democracy and law within an ideology of market discipline, of shrinking redistributive state function and of dissolution of politics within technocratic control (Koskenniemi 2009; Everson 2013).

To this exact degree the FCC's decision on the *TESM* and *TSCG* displays similar constitutional-economic slippage. As both Wolfgang Streeck and Fritz Scharpf have noted (Streeck 2012; Scharpf 2011), a conditionality of market discipline with regard to state budgets is not a part of a long-standing German constitutional tradition rooted in fears of hyper-inflation. Instead, debt brakes and progressive roll-back of Germany's counter-posing

tradition of (corporatist) social constitutionalism are relatively new developments, reflecting recent German adoption of a prevailing ‘permissive consensus’ of an economic theory (or neo-liberal ideology), which posits the provision of universal welfare within market disciplines which are also applied to the state (Crouch 2011). Where the FCC imposes a conditionality upon the fundamental reconfiguration of EMU, not only in line with the Republic’s general commitment to price stability, but also with regard to the specific integration accountability of the *Bundestag* for the ‘amount, terms and conditions and ... the duration of stability support’, it is joining with the CJEU in the final alienation of the constitutional jurisdiction and the subordination of law to economic theory.

Returning then to *Pringle*, in all of the CJEU’s legal incoherence, an extra-legal economic theory ideology of conditionality provides the European Court with a unifying strand of argumentation. Conditionality ensures respect for the exclusive European competence in monetary policy and thereby the legality of the simplified amendment procedure

[T]he reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU, the article affected by the revision of the FEU Treaty, is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States’ economic policies (paragraph 68).

Conditionality is the glue that keeps transnational actors together:

[When granting assistance] the ESM ‘Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (“MoU”) detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors (paragraph 18).

Last, but not least, Article 125 TFEU retains its function thanks to conditionality,

[T]he purpose of the strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union in particular in the area of the coordination of Member States’ economic policies, those measures being designed, inter alia, to ensure that the Member States pursue a sound budgetary policy.

Within the CJEU, the legal-constitutional jurisdiction is set aside in favour of the governing strictures of the abstract principles of an economic science, or an economic theory, which facilitates the further evolution of a form of European governance rooted in technocratic control. Similarly, for all of the FCC's carefully crafted appeal to constitutional tradition, and its transmission of facilitative powers to an approximation of a German Political, within the wider context of European Union governance, the FCC only aids and abets in a final sublimation of political process to technocratic control. The Eurozone has survived, but thanks only to the alienation of national budgetary sovereignty, and democratic control over that sovereignty, in the best scenario, to the detailed technical calculations of the European Commission (TSCG); and, in the worst indebted case, to the demands and dictates of an unholy alliance of member state representatives and the functional imperatives of European and global technocratic actors (TESM).

Far from opening up perspectives for a return 'to normal constitutionality', the combined juridical effects of national and supranational law-giving in the state of emergency would appear to amount to destructive stasis; to a fundamental unravelling of all constitutionality, as illegality unfolds within the simple functionalism of a technocratic substitution for political process. Early warnings given by Kant that, without due attention to the continuing imperatives of control of executive power, the international legal jurisdiction would similarly facilitate princely corruption of national constitutionalities (Koskenniemi 2009), just as surely re-appear within the Union's ersatz crisis law; at the same time coalescing with more modern concerns – most forcefully expressed by Michèl Foucault (2008) – that a law of the market, or a law founded in economic functionality, would likewise usurp all politics and political subjectivity (Everson 2013).

IV. Popular protest and honest illegality

Thus, perhaps the most disturbing feature within the jurisprudence of each of the Courts concerned is the legal ossification of a disputed economic theory at a time of necessarily radicalised protest against austerity and conditionality at national level. Street protest, startling in its intensity in Greece, Portugal and Spain, may or may not represent the only viable option for expression of dissent within the national political processes of debtor nations, where the differences between the mainstream political traditions of left, centre and right have necessarily dissolved within imposed conditionalities. What is certain, however, is the legal foreclosure of any perspective for return to normally contested, or unconstrained, political process as the imperative of euro survival is pursued in a judicial discourse that gives enduring status and power to an executive regime of international and supranational law, whose pursuit of its solely functionalist aim of EMU preservation re-channels such normatively empty functionalism back to the level of the nation state through imposed legal constraint of national political choice. Far from heralding transition to Kant's Constitution of constitutions, the move to European Economic and Monetary Union has finally witnessed the crowning of executive power throughout Europe, and similar establishment of totalising technocracy in place of politics, as dissenting voices no longer find a channel for institutionalised expression. To dissent is also to have no voice, no political personhood.

Given this nightmarish vision of functionalist dissonance; this reality, not simply of a breach in the rule of law, but also of an undermining of the very foundations of European constitutionalism, the question of whether alternative paths were or are available to the constitutional jurisdiction must surely be an imperative one. Yet, it is also, a complex and intractable one. Where it is accepted that illegality may also be an acceptable price for the survival of European constitutionalism, the search for a European Political, the personification of potential for a return to normal constitutionality, must necessarily be complicated – perhaps beyond resolution – not only by the constraints set by the culture of the individualistic and pluralistic 21st Century, but also with an eye to the politically pre-emptive constituency of globalised capital, as well as within the uncomfortable parameters of fragmented European sovereignty and constitutional interconnection. Thus, any legal prompt urging a return to Weberian notions of charismatic leadership in times of crisis, would surely falter within a justifiable cynicism towards and fear of iconoclastic leadership. The emergence of a post-crisis Jacques Delors, able to marshal a groundswell of popular support for a reborn (solidaristic) union of European peoples is surely only the foolish dream of the disconnected European elite.²² Similarly, however, the constraints posed by capital markets are real, not imagined, and must also apply to judicial interventions. Constitutional

²² Though, needless to say, such dreams have been voiced, in particular as regards up-coming 2014 European elections and the desire that the European people will find renewed democratic voice through the knowing election of party blocks, left or right, who might then, in turn, take on the role of Commission President. See, only, the views of Johanna Croon and Miguel Poiaras Maduro, available at: http://globalgovernanceprogramme.eui.eu/wp-content/uploads/2012/05/PB_Euro_web.pdf

jurisprudence can have negative social impacts where financial markets react destructively. Finally, no constitutional jurisdiction, regardless of whether it disposes of functional supremacy or of originating sovereignty, may be complacent with regard to its interconnected place within a global web of law.

The constitutional challenge is undoubtedly unprecedented. Nevertheless, the Federal Constitutional Court, for all of the flaws within its jurisprudence, has perhaps, in its curious mixture of ancient rhetorical appeal and (post-modern) procedural radicalism, at least begun to sketch out a form of constitutional language within which a modern and fragmented constitutional jurisdiction might yet respond to the state of emergency within a paradigm of constitutionalised illegality. Equally, at a distance from modern canons of rhetorical, literal or purposive forms of constitutional reasoning, Courts throughout the globe have likewise developed innovative forms of constitutional reasoning to respond, for example, to intractable secessionary demands, in the form of an appeal for governmental (rather than legal) action,²³ or in a procedural (rather than substantive) application of yardsticks of technical-expert appreciation to aid in the evaluation of conflicting economic and social interests.²⁴ Is it then possible to conceive of an alternative jurisprudence for both the CJEU and FCC in their responses to the TЕСM and the TSCG? Rather than tackle this question in the abstract, the following seeks in similar three point brevity to re-imagine the two Judgments given. Drawing upon a common law tradition – albeit largely foreign to the jurisdictions concerned – this re-imagination is phrased in the form of individual dissenting judgments, which nevertheless uphold the ‘legality’ of Decision 2011/199 and the TЕСM and TЕСSG Treaties; although subject to significant limitations.

IV1. Pringle with respect for protest: ‘Judge Mario Bounaventura’ (dissenting)

I am minded to conclude that Decision 2011/199 and the ESM Treaty are or may be made compatible with the European Treaties. However, I cannot concur with the reasoning of my colleagues.

(1) This case has been decided upon an economic theory which a large part of the populace of the European Union clearly does not entertain.²⁵ Financial crisis and sovereign debt crisis have visited real hardship upon substantial sections of the European population, and it remains to be seen whether policies of austerity and conditionality have merely aggravated

²³ See, the response of the Constitutional Court of Canada to a constitutional demand for separation from the province of Quebec, and its demand that Federal Government monitor the strength of secessionary sentiment. See, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

²⁴ The traditional mode of reasoning of the historic ECJ; see, for details Joerges (2004).

²⁵ This first paragraph, is largely, if not wholly transcribed from the historic opinion, given by Mr Justice Holmes (dissenting) *Lochner v New York* (198 U.S. 45, 25 S.Ct. 539).

that hardship, or will secure the economic future of the European Union in such a manner that secures the 'well-being' of its peoples (Article 3(1) TEU), as well as maintains the 'solidarity' between member states (Article 3(3)) TEU) that is mandated by the Treaties. In any case, popular protests on the streets of Athens, Madrid, Lisbon and, to a lesser extent, Dublin, indicate that electors in Europe retain a large measure of doubt about the nature of the measures taken. If this case revolved around the question of whether I agreed with the theory so readily adopted by my colleagues, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty because I strongly believe that my agreement or disagreement, together with the agreement or disagreement of the constitutional jurisdiction as a whole, has nothing to do with the duty of our political leaders to respond to crisis, with due regard for both the real experiences and views of the peoples of Europe, as well for real evidence on the effectiveness or otherwise of policies pursued. In turn, my duty becomes one of ensuring that democratic process within the institutions of the European Union and within the member states (Article 5 TEU) remains open to evidential scrutiny, and is sufficiently representative of the views of the peoples of Europe.

(2) The structures of Economic and Monetary Union established by the Treaty of European Union and now concretised in Title VIII of the TFEU have not stood the test of time. Above all, under the pressures of global constraints on liquidity, individual members of the Eurozone now face increasing difficulty in servicing their debts. Decision 2011/199 amending Article 136 TFEU represents a major alteration in the structures of European Economic and Monetary Union, raising at least a possibility of large scale transfers between member states, albeit in the form of the indirect financing of a stability mechanism, established by the ESM Treaty, wherein disbursement is made of the shareholder capital guaranteed by individual member states. At the same time, the combined impacts of Decision 2011/199 and the ratification by 25 member states of the ESM, represent a fundamental change in the nature of European law. For the first time, European goals are being pursued within an instrument of international law, which similarly makes use of the institutional capacities of the European Union. The primary question for the European jurisdiction accordingly becomes one of whether Decision 2011/199 and the international law which it has engendered are compatible with European law and the obligations of the member states to respect European law. My colleagues have asserted that Decision 2011/199 and the ESM create no potential for breach of European law, in particular, with regard to the Commitment of the Union to the maintenance of price stability (Article 3(3)) TFEU). They ground this assertion with reference to the strict conditionality imposed by the ESM regime. With all due respect to my colleagues, however, I cannot concur with this evaluation. Notions of price stability are not set in constitutional stone. I cannot, as a Justice of the European Court assess the technical conditions of financing within Europe, and for the reasons which I have elaborated, do not believe that it is my role to do so. Furthermore, I do not believe that the question of whether price stability has been maintained – or, indeed the parallel question of whether, perhaps in the case of large scale member state default within the ESM, the general prohibition on

transfer funding established by the Treaty (Article 125 TFEU) has been contravened – is one that could be answered, even by an economic expert, in the abstract. Instead, these are complex decisions to be taken over time and in the light of instantiated circumstance. Above all, however, such matter cannot simply be reserved to experts. Instead, these are also political decisions which must likewise pay due attention to the constitutional structures of European Union, which demand a representative democratic element within any expression of European solidarity.

(3) In conclusion: as abstract vehicles, Decision 2011/199, the newly inserted Article 136(3) TFEU and the structures established by the ESM Treaty cannot and should not be judged by a Court in the light of a vaguely argued potential for the unravelling of price stability in Europe or for the creation of large scale transfers between member states. That is a judgment to be made in the future. In their institutional form, however, they are correctly constituted instruments of European and international law. However, in directing the Supreme Court of Ireland to this effect, I must also remind the institutions of the European Union, as well as the member states, of their duties under European law to respect principles of proportionality, as well as to maintain truly representative democratic process within the institutions of the European Union and at member state level. These duties form the cornerstone of the supranational European polity and are particularly onerous: above all, although the member states have chosen to pursue a technical policy of conditionality within an international instrument, pursuit of this policy must remain subordinate to the higher European principle that policy-making must be suited to its aims; a principle further mediated by the core commitment of the European Union to representative democratic process, balanced social and economic growth and European solidarity. In their operation of the ESM, the member states are also therefore enjoined to maintain political oversight and meaningful democratic process, including the continuing consultation of national parliaments in a manner which is informed both by evidence on the true social impacts of the ESM and by the opinions of European peoples who are both creditors and debtors under the mechanism. Given their core place within the legal constitution of the European Union, such duties cannot and should not be curtailed by any institutional constraints, and may require the member states of the European Union to consider future full-scale Treaty reform, especially as regards the limitations placed on the European Central Bank in the conduct of its duties (123 TFEU). Given the inviolate nature of these higher principles of shared European life, I must conclude that individual European citizens should be allowed to request review of the operations of the ESM, at least as regards any gross violation of their rights under the European Charter of Fundamental Rights. I am similarly minded to request my colleagues to consider the deployment of international law in order to effect the goals of the European Union as a new act of delegation from the European Treaties and therefore to apply, by analogy, the primary principles which regulate such delegations, as detailed by the Treaty on the Functioning of European Union in Article 290. Left to my own devices, I would accordingly impose a time limitation on the operation of the ESM Treaty – in particular as regards its compatibility with European law – of five years. I would request that the member

states of the Union use this time wisely, in order to consult with the peoples of Europe for whose benefit European Economic and Monetary Union was established.

IV2. The FCC addresses the underlying issues: ‘Justice Edit Heumacher’ (dissenting)

I am grateful to my colleagues for their thoughtful treatment of the claims brought to the Court. Although I concur with the broad conclusions of the Judgment as given, I nevertheless feel obliged to alter the terms in which these are stated.

(1) In view of the bitter experiences of European disunion, the participation of the Federal Republic of Germany within the European Union is beyond doubt. This Court has re-iterated this position on a number of occasions (*Maastricht & Lisbon*). Today, the Court’s imposition of a ‘responsibility for integration’ upon the *Bundestag* should not be read simply as an injunction placed upon our democratic representative to reconcile the process of the integration of the European Union with the core constitutive values of the Federal Republic of Germany. Instead it must also be understood to impose a parallel duty – one mandated by the Constitution – upon our representatives in Parliament, and, in turn, Government, to facilitate European integration. This dual task is an onerous one; and one in the execution of which our representatives will be required to take decisions which might have a profound and lasting impact upon the lives and circumstances of individual citizens of the Federal Republic. In the case before us, for example, we are, in essence, concerned with the degree to which, as well as the conditions upon which, the citizens of the Federal Republic can and will assume the financial risks inherent to an expression of solidarity with our partner member states within the Eurozone. My colleagues have chosen to emphasise the conditionality within which our solidarity must be expressed and which, seemingly, our Constitution imposes upon our participation within European Economic and Monetary Union (*Maastricht*). I am nevertheless drawn to question whether our Constitution must now also be understood to impose an even higher standard or duty upon our representatives; in particular, under the parallel conditions of our participation within a Union of European peoples, which has its own set of substantive constitutional values including precepts of democratic representation and solidarity throughout its territorial boundaries (Article 3 TFEU).

(2) My colleagues have correctly emphasised the core duty of the FCC to maintain democratic standards within the Federal Republic. Noting that ‘Article 79(3) of the Basic Law does not guarantee the unchanged existence of the law in force, but those structures and procedures *which keep the democratic process open*,’ the Court has thus emphasised the pivotal place of the democratic imperative within the functioning and constitutive being of the Federal Republic. In short, the *sine quo non* of the Federal Republic is the establishment and maintenance of the structures of democratic representation which allow the community of citizens represented within German statehood to express its unfettered constitutive will, now

and in the future. The principle is inviolate within the Federal Republic; but equally of such *universal* import that we must also question the degree to which the exercise of the representative will of German statehood can ever be allowed to negate the representative wills of our partner member states in European Union. As we have held (*Maastricht*), and fully in accordance with the principles of the Constitution of the Federal Republic of Germany, the European Union must be understood to comprise an 'Association of States' within which the member states retain their status as 'Masters of the Treaties'. Whereas, the TSCG and TESM are instruments of international rather than European law, they have nonetheless been concluded in order to facilitate the effective functioning of European Economic and Monetary Union. Their intermediate status as '*ersatz* law', as a form of quasi-European law, has been confirmed by colleagues, as has their fundamental import for the law of the European Union by a facilitative amendment of Article 136(3) TFEU, which represents a 'fundamental reconfiguration' of current EMU design. It would be highly incongruous were such instruments of international law – in their effect and impact, additional facilitative instruments of European law – to be subject to any lesser standards of review as regards their the formal and *substantive* respect for the sovereign statehood, and core democratic values of *all* of their signatories. In my opinion, were this to be the case, the status of the member states as 'Masters of the Treaties' would be irrevocably undermined and with it, the basis for the participation of the Federal Republic of Germany within the European Union. Just as Federal Government within Germany respects the democratic integrity of the individual states which make up the federal state, the Federal Republic of German cannot, in its relations, with the European Union contract with 'slaves'. It cannot enter into partnership with anything other than fully sovereign states.

(3) Accordingly, the duty of accountability for integration imposed upon the representatives of German statehood must be expanded to include an extra-territorial responsibility, precisely in order to ensure the constitutional integrity of German participation within the European Union. The representatives of the Federal Republic of Germany must also exercise their functions within the TSCG and TESM with due regard for the democratic imperatives of partner nations. In particular, the suspension of the voting rights of member states in default under the institutional mechanisms of the TESM presents particular constitutional difficulties within the Federal Republic; but not simply because the representatives of German citizens might loose their voice in case of German default, but more generally because the representatives of *any* defaulting member state of the European Union would thereby be disenfranchised. The citizens of the Federal Republic retain their competence to place conditions upon German participation within the TSGC and TESM: in effect, they retain their competence to delineate the exact degree of solidarity which German citizens are prepared to afford their neighbours. However, imposition of particular conditions which offend the democratic will of our partner citizens, but to which individual member states may be forced to accede by virtue of the global circumstances of poor liquidity, would also be an affront to the Constitution of the Federal Republic; and would be so to the exact degree that that Constitution is founded upon a universal rather than particular principle of democratic

sovereignty. It is not the role of this Court to ascertain the exact degree of solidarity which the citizens of the Federal Republic are prepared to afford their neighbours. Neither is it the duty of this Court to determine the technical conditions of financial support offered by the TESM; conditions which might conceivably also require our partner European member states to re-assess their own internal structures of democratic organisation. Nonetheless this Court must make the participation of the Federal Republic of Germany within the TSCG and TESM subject to the general rather than specific degree of openness of their structures to the democratic participation of the entirety of the peoples of the European Union. If European Union and, in particular, European Economic and Monetary Union is to succeed, it must be in a position to win the support of all of the peoples of the Union. In particular, in cases of default under the TESM, member state voting rights should only be suspended following the complete and transparent consideration of representations brought by the state concerned.

V. A Political Caveat

Some might be disappointed that the alternative Judgments presented do not open up the immediate possibility for direct solidaristic transfers between the member states of the Eurozone. However, as much as this might be advisable under certain circumstances, the imposition of substantive measures of justice by the European jurisdiction would represent a sudden and potentially highly unpopular development within a nascent European constitutional jurisdiction. Instead, the core focus of alternative jurisprudence remains the combatting of the primary constitutional danger posed by *ersatz* crisis law; that of the foreclosure of political process throughout European Union through the development of a technocracy of European austerity. Similarly, however, although the judgments presented do make use of ‘purposive appeal’ – above all, by means of the referencing of the aims of European integration – such an appeal in *Bathos*, remaining rhetorical in its classical sense, only appeals constitutively to the values of the social legatees of European Union, or the citizens of Europe, in a broader procedural effort to open up potential for a return to normal constitutionality after crisis. Equally, although delivered in language that differs both in content and in tone from the Judgments given, each act of judicial dissent similarly takes care – again at the limits of legality – to reference eclectically closed constitutional traditions, either by means of reiteration of European principles of proportionality, or by re-statement of German traditions of federal democratic expression.

The core of each opinion, however, is formed by an appeal to political process, by an imposition of a political duty upon on the representatives of European citizens to continue to foster democratic process within the European Union in general, and the Eurozone in particular. Such a radically proceduralist approach does represent an apparently novel, if not unique trend within the global constitutional jurisdiction.²⁶ Nevertheless, in magnifying the observation of the FCC that its duty is to keep the democratic process open; in elevating this duty to the fulcrum of a post-national and pluralistic constitutional jurisdiction of realist jurisprudence which also pays due regard to the economic realities of global financial markets, dissenting opinion continues to reference an original, constitutional function – the original constitutional function – that of ‘defence’. In modern terms, however, defence is no longer a matter of protecting individuals from the domestic state. Instead, in a world of normatively voided functionalism, defence takes on a more general character, as democratic process itself must be protected against a process which has seen the executive powers of the Prince unfold within international law and, in parallel, undermine the domestic constitution through alienation of the democratic function. From the legal standpoint, the *ersatz* law of the European Union, established in response to financial and sovereign debt crises, in its technocratic character and potential challenge to the very political subjectivity of citizens of the European Union, has underlined a readily apparent suppositions that the

²⁶ See, above, note 24.

primary concern of the Constitution of constitutions must be the combatting of the 'empty functionalism' of post-national regimes of law (Koskenniemi 2009).

A final political caveat must nevertheless be added. There is only so much that the constitutional jurisdiction can achieve. In its rhetorical appeals to the citizens of Europe and their representatives to develop a genuinely democratic process of integration, also as regards an immediate response to crisis, it is not merely beholden to financial markets and their preparedness to tolerate the increased degree of institutional contingency that such reinvigorated democratic process might engender. Instead, European constitutionalism is also dependent on the willingness of Europeans, and their representatives, to respond to its appeal.

VII. References

- Ackerman, B. (1998): *We the People – Transformations* (Bloomsbury: London)
- Beck, G. (2013): 'The Legal Reasoning of the Court of Justice and the euro crisis – the flexibility of the cumulative approach and the Pringle case' (Manuscript)
- Cohen, F. (1935): 'Transcendental Nonsense and the Functional Approach', 35:809 *Columbia Law Review* 814-817
- Craig, P. (2013): 'Pringle: Legal Reasoning, Text, Purpose and Teleology', 20 *Maastricht Journal of Law* 1
- Crouch, C. (2011): *The Strange Non-Death of Neo-Liberalism* (Polity Press: London)
- Everson M. & Ch.Joerges (2013): Everson, M. & Joerges, Ch. (2013): 'Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?', LEQS working Paper No. 63 (www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper63.pdf)
- Everson, M. & J.Eisner (2007): *The Making of the EU Constitution: Judges and Lawyers Beyond Constitutive Power* (Routledge-Cavendish: London)
- Everson, M. (2013): 'The fault of (European) law in (political and social) economic crisis', 24:59 *Law & Critique* 22
- Foucault, M. (2008): *Birth of Biopolitics: Lectures at the College de France, 1978-79* (Palgrave MacMillan: London)
- Joerges Ch. (2004): 'What is Left of the European Economic Constitution?', EUI Working Paper LAW No. 2004/13
- Joerges, Ch. (1996): 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration 2:2 *European Law Journal* 105–135
- Kirchoff, P. (2012): 'Verfassungsnot!' FAZ, 12.07.2012
- Koskenniemi, M. (2009): 'Miserable Comforters: International Relations as New Natural Law', 15 *European Journal of International Relations* 395
- Lord Ch. & J. Pollak (2013): 'Unequal but Democratic? Equality according to Karlsruhe,'20(2) *Journal of European Public Policy* 190-205
- MacCormick, N. (1998): 'Risking Constitutional Collision in Europe?', *Oxford Journal of Legal Studies* 18(3): 517-532
- Majone, G. (2012): 'Rethinking European Integration after the debt crisis', UCL, European Institute, Working Paper No 3/2012.
- Majone, G. (2014): *The EU in Comparative Context: Regional Integration and Political Transaction Costs* (Cambridge, Cambridge University Press, forthcoming)
- Müller, J.-W (2003): *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (Yale University Press: New Haven)

- Scharpf, F. (2011): 'Monetary Union, Fiscal Crisis and the Pre-emption of Democracy', 9:2 *Zeitschrift für Staats- und Europawissenschaften* 163-198
- Schmitt, C. (1931): *Der Hüter der Verfassung*, Tübingen: Mohr/Siebeck
- Schmitt, C. (1938): 'Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)', 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 252-267
- Streeck, W. (2012): 'Markets and Peoples: Democratic Capitalism and European Integration', 73 *New Left Review*, January-February 2012
- Weiler, J.H.H. (1995): 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', 1 *European Law Journal*, 219-258.
- Weiler, J.H.H. (2009): 'The "Lisbon Urteil" and the Fast Food Culture', 20 *European Journal of International Law*, 505-9, 505
- Wendel (2013): 'Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012', 14 *German Law Journal* 21-52,
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