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Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?

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Abstract

This discussion of the ECJ in the context of a project on political representation in the EU responds to the Court's changing functions in the integration process and also to the critique which the exercise of this function has provoked in recent years after the Court objected to constitutional provisions and legislation of constitutional status in particular in the sphere of labour law and social protection. The ECJ has been accused of partisanship with a neoliberal-monetarist agenda. These debates are bound to extend to the new functions which were assigned to the CJEU in the supervision of the budgetary discipline of Member States in the Euro zone. The problems that might arise in such a case have been foreshadowed by the recent jurisprudence on the legality of the European practices of crisis management. The judgments of the German Bundesverfassungsgericht of 12 September 2012 on the ESM Treaty and the Fiscal Compact and the CJEU Judgment of 27 November 2012 in the Pringle case are of exemplary importance. They document the difficulties both courts have with the defense of the autonomy of law against apparent functional necessities and concurring attitudes in the readiness to accept the primacy of the political.

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A first draft of this essay was presented at the conference on ‘Representation in the EU’ on 24-25 May 2012 at the University of Exeter, organised by Dario Castiglione and Sandra Kröger. On this background see S. Kröger (ed.), ‘Interdisciplinary views on political representation in the EU’, UCL Working Paper No. 4/2012, London 2012 and the recently established platform <http://www.exeter.ac.uk/departments/newtrends/>. -- The revised version of our contribution will be forthcoming in Sandra Kröger (ed.), *Political Representation in the European Union: Still democratic in times of crisis?*, London: Routledge).

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I. Ceding the Constitution to the Political Guardian?

The issue and problem of ‘constitutional guardianship’ is one with a long history. It was answered starkly and infamously by Carl Schmitt during and with regard to the final, crisis-ridden, years of the Weimar Republic: The guardian of the Constitution is not the *Reichsgericht*, the judicial branch, but the *Reichspräsident*, a political actor exercising the quasi dictatorial powers defined in Article 48 of the Weimar constitution on behalf of a politically homogeneous *Volk*.¹ This particular understanding of constitutional guardianship has now re-achieved a disquieting degree of topicality within a crisis ridden European Union. This dimension of our topic will be discussed in more details in the second part of our contribution. We begin, however, with a series of reflections on the issue of constitutional guardianship within the Union in less fraught times. Even prior to crisis, the problem was highly troublesome, albeit that very few commentators, and even fewer institutional actors, recognised the true nature of the challenge. Nevertheless, this challenge is now becoming ever more apparent in step with a growing and critical awareness of deeply entrenched – even growing – diversity within Europe and the obviously paradoxical nature of a voluntaristic response to diversity, which is ever more insistent in its pursuit of a future unity, but which cannot explain how this project might be realized through democratic processes.

¹ Carl Schmitt, *Der Hüter der Verfassung*, Tübingen: Mohr/Siebeck, 1931.

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When set against this background, the relevance of our topic to a context of debate upon democratic representation should be obvious. To be sure, courts, generally-speaking, are the non-majoritarian vanguard institutions par excellence of constitutional democracies. Non-partisanship defines their very ethos. Nevertheless, Constitutional courts, in particular, do not find their prestige and authority exclusively within the legal provisions of the Constitutions that establish them. Typically, these provisions do not endow them with powers of enforcement. Instead, constitutional courts rely and build upon a Weberian legitimacy, which they acquire to a significant degree through the modes in which they articulate and thereby 'represent' both the *normed* character, as well as, the normative *dignity* of the order in which they are situated and operate. In other words, constitutional legitimacy is founded within a tense duality of rule-bounded, but socially responsive adjudication.

This twofold – formal and social – embeddedness of constitutional courts presents its own very particular problems within a European constellation, and impacts – as we shall demonstrate – cumulatively upon the issue of the constitutional guardianship of the EU. The European Union is, as the Preamble of the Treaty of Lisbon and numerous of its Articles assure us,² committed to human rights, freedom, equality, democracy and the rule of law. Adherence to these commitments is a condition for membership within the Union; at least in theory. Constitutional adjudication came later to Europe than to America, but is nonetheless one which has gained the status of a common European heritage. How, however, might this legacy be understood in the context of the *sui generis* Union with its multi-level system of governance? Which institution is in a position to exercise the function of constitutional guardianship within such a constellation? Certainly, the ECJ/CJEU springs immediately to mind. But that conclusion would be

² Most emphatically in Article 21(1) TEU.

premature and far too superficial. The European Court has never been formally established as a 'constitutional' body. To be sure, its foundational jurisprudence on direct effect and supremacy, the *Cassis*-jurisprudence and its aftermath, its characterisation of the Treaties as a 'constitutional charter',³ presupposes and assumes important supervisory function for law 'at all levels of governance,' which are widely recognised by the courts and authorities of many jurisdictions and with great emphasis and near unanimity in European law scholarship. However, this power cannot be considered to be comprehensive, even in theory, as long as 'Union competences are governed by the principle of conferral.'⁴ Equally, its validity will be doubted for as long national constitutional courts – most notably Germany's *Bundesverfassungsgericht* – refuse to make use of the preliminary reference procedure and continue to question the authority of the by determining unilaterally whether European prerogatives are being lawfully asserted. In other words, constitutional guardianship within the Union cannot yet be regarded as having been entrusted to one single body. It has both national and European masters: masters who may be in disagreement with one another.

This insight is neither new, nor particularly disquieting *per se*. It was discussed particularly thoroughly by Neil MacCormick⁵ a good while ago. There is pluralism in Europe, he acknowledged – adding that wise solutions could and should be found where legal solutions are not conceivable.⁶ MacCormick's suggestions seem to anticipate what various Courts, including the notoriously inconvenient *Bundesverfassungsgericht* have learned to do, namely to establish interactive modes of adjudication. These adjudicative modes have by now been doctrinally refined by a host of academic

³ Opinion 1/91, *European Economic Area*, [1991] ECR I-6079

⁴ Article 5(1) TEU.

⁵ 'Risking Constitutional Collision in Europe?', *Oxford J Legal Studies* (1998) 18(3): 517-532

⁶ At 531.

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commentators.⁷ We will not explore the theoretical premises and practical accomplishments of these responses in any further depth,⁸ however, returning instead to the earlier conceptualisation of the multiple-guardian problem constellation as a contest for mastery over the *Kompetenz-Kompetenz* (II). We suggest that the conceptualisation of constitutional guardianship under this heading has, if inadvertently, disclosed a constellation of diversity in the Union which should not and cannot be dealt with through a form of hierarchical ordering, but instead requires horizontal cooperation.

The continuity which we reconstruct is a promising signal as it indicates that a potential exists to cope constructively with Europe's diversity. In Section III, where we consider the various European transformations following financial crisis, we will document responses to Europe's troubles of a different kind. The pragmatically legalised *comitas* among European courts, which proponents for interactive conflict resolution advocate, has now given way to a new primacy of the 'Political' in the Union *sensu* Schmitt. In Section IV we will investigate the efforts of the judiciary to manage these transformations. We analyse the judicial actions of the usual suspects in relation to two Judgments of exemplary importance. Both the German Federal Constitutional Court (FCC) and the CJEU retain their specific style. But these differences now contrast markedly with their agreement *in re*. Both courts appear to be prepared to accede to the primacy of the Political; they concur in their de-legalisation of constitutional adjudication.

⁷ See, *e.g.*, L. Viellechner, 'Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law', (2012) 4 *Goettingen Journal of International Law*, 599-623; M.-S. Kuo, 'Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?', Warwick School of Law Research Paper No. 2013/06.

⁸ Although some authors take a more sociological approach to commentary on the historic ECJ. See, M. Everson and J. Eisner, *The Making of the European Constitution: Judges and Lawyers in the Constitutive Moment*, Routledge-Cavendish: London (2007).

II. Kompetenz-Kompetenz in a Non-unitary Union?

Our argument in the following section departs from prevailing modes of European legal scholarship in a twofold manner: failing to trumpet the historical merits of the ECJ, it likewise appears to question them. Belief in the centrality of law and its judicial enforcement was constitutive for legal scholarship during the formative era of the integration project. Law was prominently presented as both ‘the object and the agent’ of European integration.⁹ In that vision, the ECJ necessarily figured as the incarnation of Europe’s integrationist vocation. There is, also, more than a kernel of truth in the assertion that the Court’s jurisprudence was to prove, at least to the degree that it has withstood political irritations and disagreements. Similarly, the historic Court is noteworthy in that it deepened the normative quality of European law, in particular in relation to its human rights jurisprudence, and mitigated – often successfully – between competing claims and policies, all the while managing to build up an unquestioned authority. Today, however, the court is no longer portrayed so enthusiastically, even by the most faithful of its supporters.¹⁰ How could any judicial institution cope with the ever increasing complexity and growth of its workload and continue to convince national legal systems throughout an ever more diverse Union with its one-size-fits-all philosophy? How might it hope ever to convince with its highly formalistic style of reasoning in cases of fundamental conflict which are characterised by conflicting economic interests and political disagreement? The Court’s labour law judgements in *Viking*, *Laval* and *Rüffert*,¹¹ which

⁹ R. Dehousse and J.H.H. Weiler, ‘The legal dimension’, in: William Wallace (ed), *The Dynamics of European Integration*, London: Pinter, 1990, 242-60, 243.

¹⁰ Suffice it here to point to the introductory chapter of M. Dawson, B. de Witte and E. Muir in their volume on *Judicial Activism in the European Court of Justice*, Cheltenham: Edward Elgar 2013, 1-11.

¹¹ C-438/05, *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779; C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan und*

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assigned supremacy to economic freedoms over national labour law traditions, provide the most spectacular example of this type of failure.¹²

Currently, the factual erosion of the Court's legitimacy is similarly converging with the on-going, if widely unnoticed, transformation of the integration project and the ever more insistent conflict constellations that surround it. An uncompromising defence of the former authority of the Court has become both factually and normatively implausible. The once quite belligerent contest between the German constitutional court,¹³ on the one hand, and the allies of the ECJ, on the other,¹⁴ has lost its intensity and very provocative nature.¹⁵ It is now largely evident that there can be no one and single guardian of constitutionalism in the Union. The insistence of the 'Kirchhof' Court, in the course of its infamous Maastricht Judgment, on a cooperative relationship ('*Kooperationsverhältnis*') with the ECJ tells us much about the willingness of national judiciaries to engage with Europe, albeit as equal partners. By the same token, any effort to construe such constitutional dialogue as on-going disobedience can only be substantiated with reference to the untranslatable German dichotomy between *Staatenbund* and *Verfassungsverbund*. There is nonetheless both irony and tragedy in this insight. While pragmatic responses to the *Kompetenz-Kompetenz* issue have become imaginable, the transformation

Svenska Elektrikerförbundet, [2007], ECR I-11767; C-346/06, *Rechtsanwalt Dr. Dirk Ruffert v Land Niedersachsen*, [2008], ECR I-01989.

¹² See our critique: C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', (2009) 15:1 *European Law Journal*, 1-19; M. Everson, 'From Effet Utile to Effet Neoliberal: Why is the ECJ Harming the Integrity of European Law?', in C. Joerges and T. Ralli (eds.), *European Constitutionalism without Private Law - Private Law without Democracy*, ARENA Report 3/11/RECON Report No 14, Oslo 2011, 37-54.

¹³ See in particular *Bundesverfassungsgericht*, 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].

¹⁴ Most prominently, J.H.H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', (1995) 1 *European Law Journal*, 219-258.

¹⁵ See, I. Pernice, *Europäisches und nationales Verfassungsrecht*, (2201) 60 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer*, 163 ff.; F.C. Mayer, 'Wer soll Hüter der europäischen Verfassung sein?', (2004) 129 *Archiv des öffentlichen Rechts*, 411-435; cf., previously, *idem*, *Kompetenzüberschreitung und Letztentscheidung*, Munich: C.H. Beck 2000, 323 ff.

of the European constellation through the financial crisis is eroding the prospects for a *legal* re-conceptualisation of Europe's diversity. The crisis, we will submit, is establishing a new de-legalised primacy of the Political in the Union in which constitutional adjudication is losing its disciplining functions.

III. Crisis 'Law'¹⁶

Current responses to the financial crisis depart significantly from European law and governance as we once knew it. One extraordinary feature of Europe's new activism is its intensity. Crisis summits have become routine and the drafting of ever more ersatz-legislation, or '*Ersatzunionsrecht*' (international law substituting European Union law)¹⁷, memoranda and policy papers is breath-taking.¹⁸ Comprehensive accounts are available.¹⁹ Here, we will restrict ourselves to a few highlights:

In March and May 2010, respectively, the Commission developed the 'Europe 2020 strategy'²⁰ and the 'European Semester'²¹; followed in June 2010 by the EFSF Framework Agreement²² and in March 2011 by the European Council's

¹⁶ The following passages draw on C. Joerges, 'The European Economic Constitution and its Transformation through the Financial Crisis', in Dennis Patterson and Anna Södersten (eds.), *A Companion to European Union law and International Law*, Oxford: Wiley-Blackwell (forthcoming 2013).

¹⁷ That term, coined by a German lawyer, was taken up in the ESM judgment of the German Constitutional Court (note 41 *infra*) at para. 226 to denote the resort to international law for measures which European law does not foresee.

¹⁸ For continuously updated information see <http://www.consilium.europa.eu/press/press-releases/economic-and-financial-affairs?lang=en&BID=93>.

¹⁹ E.g., M. Ruffert, 'The European Debt Crisis and European Union Law', (2011) 48 *Common Market Law Review*, 1777-1806; P. Craig, 'Financial Crisis, Response, and Europe's Future', in *idem*, *The Lisbon Treaty*, 2nd paperback edition, Oxford: OUP 2013, 457-517 (forthcoming).

²⁰ Communication from the Commission of 3 March 2010, COM(2010) 2020 final.

²¹ Communication from the Commission of 12 May 2010, COM(2010) 250 final.

²² 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.

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'Euro Plus Pact.'²³ Simultaneously, on the basis of the simplified revision procedures laid down in Article 48 Paragraph 6 TEU, the European Council also decided, on 25 March 2011, 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 2013.²⁴ 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 2011.²⁵ The definite high point and cornerstone of the whole new edifice is the Treaty on Stability, Coordination and Governance (TSCG), drafted in December 2011, approved at an informal meeting of the European Council on 30th January 2012,²⁶ 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, with one Member State bringing action against another. 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; it entered into force on 30 May 2013.²⁷

²³ Conclusions of the European Council, Brussels, 24/25 March 2011, EUCO 10/11, CO EUR 6, CONCL 3 (Annex I).

²⁴ 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.

²⁵ The five regulations 1173-1177/2011/EU and directive 2011/85/EU of 8 November 2011, OJ L 91/2011, 1.

²⁶ 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.

²⁷ 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/20130312IPR06439/20130312I>

There is much to scrutinise here: legal problems as well as the way they are dealt with in legal scholarship. We will restrict our discussion here to the particular form of authoritarian crisis management, which the new machinery has established. This managerialism is delicate for three inter-dependent reasons. *First*, through the supervision and control of imbalances, it disregards the principle of enumerated powers, and, by the same token, disrespects the democratic legitimacy of national institutions, in particular, the budgetary powers of parliaments. *Secondly*, in its departure from the one-size-fits-all philosophy orienting European integration in general and monetary policy in particular, it nonetheless fails to achieve a variation, which might be founded in democratically legitimated choices; quite to the contrary, the individualised scrutiny of all Member States is geared to the objective of budgetary balances and seeks to impose the necessary accompanying discipline. Under the conditions of monetary unity, the Member States can only respond to pertinent requests through austerity measures: reductions of wage levels and of social entitlements. *Thirdly*, the machinery of the new regime with its individualised measures which are oriented only by necessarily indeterminate general clauses, is regulatory in its nature, establishing a 'political administration' outside the realm of democratic politics and the form of accountability which the rule of law demands.²⁸

Dariusz Adamski was among the first to highlight and underline that core concepts used by new economic governance cannot be defined with any precision, either by lawyers or by economists, and are therefore not justiciable.²⁹ This implies that rule-of-law and legal protection requirements

[PR06439_en.pdf](#) and the recent Memorandum of the European Commission of 27 May 2013: MEMO/13/457, available at http://europa.eu/rapid/press-release_MEMO-13-457_en.htm.

²⁸ See, for a more positive account, D. Chalmers, 'The European Redistributive State and the Need for a European Law of Struggle', (2012) 18 *European Law Journal*, 667-693; but see also his 'European Restatements of Sovereignty', LSE Legal Studies Working Paper No. 10/2013.

²⁹ *Cf.*, his 'Europe's (Misguided) Constitution of Economic Prosperity', paper presented at the conference 'Crise et droit économique', organised by the Association Internationale de Droit

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are being suspended. This type of de-legalisation is accompanied by a highly discretionary evaluation of Member States performance, which economist Andrew Watt has revealed in his analysis of an in-depth review of thirteen EU countries considered to have macroeconomic imbalances undertaken by the Commission.³⁰ It is worth noting that the Fiscal Compact provides that, if the Commission reports non-compliance of a Contracting Party with Article 3(2), one or more Contracting Parties may bring this matter to the CJEU. The Court is hence not expected to determine whether a budget is “balanced”, “structurally balanced” or “exceptional circumstances” prevail. which justify temporary deviations as defined in Article 3 1. TSCG). That would constitute an impossible mission. But precisely for that reason one must wonder what the effect may be of the entrustment of the Court with the task of assessing the proper incorporation of the rules set out in that provision into national law. And how likely is it that the Contracting Parties will engage in such unfriendly activities?³¹

What is specific about Europe’s new economic governance? Characterisations by commentators oscillate between notions such as ‘Executive Federalism’³², ‘Distributive Regulatory State’,³³ ‘Consolidating State’,³⁴ ‘Authoritarian Managerialism’³⁵, ‘New Sovereignty with Unfettered Power of Rule’³⁶. They

Economique and the Law Faculty of the University of Wroclaw, Poland, on 8-9 November 2012 in Wroclaw (on file with C. Joerges) and previously, *id.*, National power games and structural failures in the European macroeconomic governance, (2012) 49 *Common Market Law Review*, 1319-1364.

³⁰ A. Watt, ‘Commission Makes a Mockery of Imbalance Procedure’, *Social Europe Journal* of 19 April 2013, available at <http://www.social-europe.eu/author/andrew-watt/>

³¹ See the critique of D. Chalmers at <http://blogs.lse.ac.uk/euoppblog/2012/03/07/european-court-of-justice-enforcer/>.

³² J. Habermas, ‘A Pact for or against Europe?’, in U. Guérot and J. Hénard (eds.), *What does Germany Think about Europe?*, European Council on Foreign Relations, Berlin, 83-89.

³³ D. Chalmers, ‘The European Redistributive State and the Need for a European Law of Struggle’, n. 28 above.

³⁴ W. Streeck, *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus*, Berlin: Suhrkamp, 2013, Ch. III.

³⁵ C. Joerges and M. Weimer, ‘A Crisis of Executive Managerialism in the EU: No Alternative?’, Maastricht Faculty of Law Working Paper 2012/7, Maastricht 2013.

³⁶ D. Chalmers, ‘European Restatements of Sovereignty’, n. 28. above.

all acknowledge the design failures of EMU as it was institutionalised by the Maastricht Treaty of 1992 and the Stability Pact of 1997.³⁷ They all conclude that compliance with that poorly designed framework would have disastrous consequences. Does that mean that the new regime of an ersatz-law does in ‘deserve recognition’? Both the FCC and the CJEU have wrestled with this problem – but neither appears to have mastered it.

IV. The Law or the Political as Constitutional Guardian

The German Constitutional Court has a much contested record with respect to its European commitments and loyalty – even though signals of disobedience have always remained rhetorical. The ECJ has overruled national law in countless cases – but has hardly ever found European legal acts to be at fault. Investigating each of these Courts against the background of the new economic governance now evolving within Europe accordingly promises to provide us with nuanced insights into the management of the crisis.

IV.1 Is the German Court a ‘Dog that Barks and never Bites’?³⁸

The attention which the complaints before the FCC against the ESM Treaty and the Fiscal Compact have attracted is as unsurprising as the outcome of this controversy which the court delivered in its judgment of 12 September

³⁷ Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 209 , 02/08/1997, 6.

³⁸ The metaphor is from J.H.H. Weiler, ‘The “Lisbon Urteil” and the Fast Food Culture’, (2009) 20 *European Journal of International Law*, 505-9, 505, commenting on *Bundesverfassungsgericht*, judgment of 30 June 2009, available at: www.bundesverfassungsgericht.de; English translation at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

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2012.³⁹ What the highest judicial authority of Europe's most potent economy has to say about well-argued complaints matters. And yet, it was easy to 'hazard a pretty good guess at the ending'. Paul Craig's observation concerns the Pringle Case of the CJEU⁴⁰ but is equally valid with respect to the German case. It seemed simply inconceivable that the courts would interfere with high politics in matters of utmost importance. That, however, is not good enough a reason to close the academic files and shrug of the shoulders.

On closer inspection, the Judgment reveals a number of ambivalences. The most important one is the Court's defence of the budgetary power of the German *Bundestag*. This power is a democratic essential, protected by the eternity clause of the Basic Law. Its importance was already underlined in the previous Judgment on the rescue package for Greece⁴¹ and its validity cannot be questioned in principle. Is it a principle with bite? In both judgments, the Court underlined that the *Bundestag* enjoyed wide latitude which the judiciary must respect.⁴² Through this move, the rights of the *Bundestag* were re-defined in a proceduralising mode: the Parliament must be adequately informed, enabled to deliberate, and prevented from delegating its evaluation. This reading is in line with a principle of 'integration responsibility'⁴³ which the Court developed in its Lisbon judgment; a contested notion, but one which can, in our view, be understood as a search for a response to the tensions between integration and democracy. Such a benevolent reading is not evinced by the 12th September Judgment. To be sure, the form of judicial restraint,

³⁹ An incomplete English translation is available at:

http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html.

⁴⁰ See his 'Guest Editorial: Pringle: Legal Reasoning, Text, Purpose and Teleology', (2013) 20 *Maastricht Journal of European Law*, 3-11 (forthcoming).

⁴¹ 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.

⁴² See FCC, judgment of 7 September 2011, previous note, para.s 130-132 and judgment of 12 September 2012, n. 38, para. 180.

⁴³ FCC, judgment of 30 June 2009, available at: www.bundesverfassungsgericht.de; English translation at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

which the German court exercised when it gave the green light to the extensive indebtedness of the Federal Republic, is again embedded in procedural and institutional notions. The Court is not careful of ‘foreign’ concerns. The weight constitutionally placed upon the budgetary powers of the *Bundestag*, so we learn and understand, requires that the German Parliament retains the power to determine the most important conditions for future successful demands for capital disbursements.⁴⁴ In this passage, the Court once again strengthened the link between the *Bundestag*’s budgetary responsibility and a distinctly German philosophy of stability (*i.e.*, price stability and the independence of the ECB above all). As a consequence, the nature of the EMU as a stability community (*Stabilitätsgemeinschaft*) is even seen as being protected by the ‘eternity clause’ of Article 79 (3) of the German Basic Law as an unamendable core of Germany’s constitutional identity.⁴⁵ After this move, the stability principles become the core of a refurbished European economic constitution.⁴⁶ All this, the Court hopes, will protect the democratic rights of German citizens. Non-German citizens of the Union, however, should not at all be amused. Why is budgetary autonomy not understood as a *common* European constitutional legacy, respect for which might surely be argued to be deducible from the respect paid to national

⁴⁴ Para. 274; this section is not yet translated. The official translation is still incomplete. In view of the complexity and importance of this pronouncement, we add the German original: ‘Da der Bundestag durch seine Zustimmung zu Stabilitätshilfen den verfassungsrechtlich gebotenen Einfluss ausüben und Höhe, Konditionalität und Dauer der Stabilitätshilfen zugunsten hilfeschender Mitgliedstaaten mitbestimmen kann, legt er selbst die wichtigste Grundlage für später möglicherweise erfolgende Kapitalabrufe nach Art. 9 Abs. 2 ESMV;’ for a critical comment, see C. Joerges, ‘Der Berg kreite - gebar er eine Maus? Europa vor dem Bundesverfassungsgericht’, (2012) 65 *WSI-Mitteilungen*, 560.

⁴⁵ Para. 220, which reads in German: ‘Die haushaltspolitische Gesamtverantwortung des Deutschen Bundestags wird in Ansehung der Übertragung der Währungshoheit auf das Europäische System der Zentralbanken namentlich durch die Unterwerfung der Europäischen Zentralbank unter die strengen Kriterien des Vertrages über die Arbeitsweise der Europäischen Union und der Satzung des Europäischen Systems der Zentralbanken hinsichtlich der Unabhängigkeit der Zentralbank und die Priorität der Geldwertstabilität gesichert.’ And ‘Ein wesentliches Element zur unionsrechtlichen Absicherung der verfassungsrechtlichen Anforderungen aus Art. 20 Abs. 1 und Abs. 2 in Verbindung mit Art. 79 Abs. 3 GG ist insoweit das Verbot monetärer Haushaltsfinanzierung durch die Europäische Zentralbank.’

⁴⁶ See paras 219-220, 232-233, 239-279, and 300-319.

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identity by Article 4 (2) TEU? Why should the German Court not be bound to respect budgetary powers claimed by other Member States? One does not need to resort to European law for such a suggestion but can simply rely on constitutional conflicts law.⁴⁷ The one-sidedness of this argument is all the more disappointing as the Court, in an earlier paragraph of its judgment, had opened another and more constructive perspective: The Court explained that 'Article 79 (3) seeks to protect those structures and procedures which keep the democratic process open'.⁴⁸ The Court did not indicate that it would be prepared to address the tensions between democratic commitments and the integration process, which would include the concerns of all Member States. Instead, the Court's reasoning leads to a strengthening of the links between economic stability and social austerity. This form of judicial self-restraint seems even more questionable in the light of – or, rather, in the shadow of – the Maastricht judgment discussed above.⁴⁹ In that judgment, the *Bundesverfassungsgericht* had made German participation of Germany in the EMU conditional upon the European-wide acceptance of Germany's economic and institutional philosophy. This move is now repeated and significantly modified. While the Maastricht judgment assumed that Europe's economic constitution could be an essentially legal project, the new judgment is moving from law to governmental and executive managerialism, with requirements defined mainly by Germany and its Northern allies. To put it slightly differently, we find it deplorable that the FCC acted as (only) the guardian of the German constitution. The qualification of financial assistance as a matter not of European monetary but of national economic policy,⁵⁰ as well as the somewhat euphemistic statements on the respect of the stability

⁴⁷ See the seminal essay by H. Bernstein, 'Ein Kollisionsrecht für die Verfassung', (1965) 19 *Neue Juristische Wochenschrift*, 2273-2278.

⁴⁸ Para. 206 in the English extract, para. 222 in the German original.

⁴⁹ Section IV.1.

⁵⁰ Para 169.

commitments,⁵¹ are anything but robust indicators of truly European commitments. They are embedded in the conditionality of existing crisis management. The FCC talks about democratic essentials, Jürgen Habermas has observed, but has Germany in mind.⁵² The one-sidedness of its decision seems indeed obvious – and difficult to overcome. The German Court is not entitled to act as the Guardian of Europe. What we would expect, however, is a readiness to define Germany as a Member of a Union in which the concerns of all the Member States and their democratic rights deserve recognition. Only then would the Court document an understanding, or *Integrationsverantwortung*, which might reflect common European commitments.⁵³

IV.2 ‘Lets Close our Eyes’ – No Alternative for the CJEU in Pringle?⁵⁴

What would have happened to the European Union had its Court of Justice found that Thomas Pringle’s concerns about Europe’s crisis management were well founded, that the support-mechanisms which the EFSF and the ESM have established interfere with the exclusive European competence for monetary policy, that the amendment of Article 136 TFEU were not possible under the simplified revision procedure enshrined in Article 48(6) TEU, that new policies adopted and pursued by the Member States jeopardised the primacy of price stability, that the bail-out provision of Article 125 TFEU prohibited the granting of financial assistance to Member States whose currency is the Euro, that the functions assumed by the Commission, the ECB, and the IWF were irreconcilable with the principles on the conferral of powers

⁵¹ Para.s 201 ff.

⁵² ‘Drei Gründe für “Mehr Europa” (three reasons for ‘more Europe’), Forum Europa, Juristentag, Munich, 21 September 2012.

⁵³ For a similar critique *cf.*, H. Deters, ‘National constitutional jurisprudence in a post-national Europe: the ESM ruling of the German Federal Constitutional Court’, (2013) 19 *European Law Journal* (forthcoming).

⁵⁴ Case C-370/12 *Pringle v Ireland*, Judgment of 27 November 2012

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laid down in Article 13 TFEU, or that the mandate allocated to the CJEU in the ESM Treaty exceeded judicial powers? Only a fool would dare to predict the dire consequences. The same kind of uncertainty governs with regard to the success of all of these measures. Under such circumstances, the CJEU could not and should not be expected to interfere, one might conclude. Nonetheless, in so doing, one must similarly concede that this conclusion implies a complete secession of law to discretionary political power. The onus must surely be one – for the lawyer at least – to commence the search for alternatives to this devastating legal default.

The search for such alternatives should allow for escape from the impasses to which Europe's crisis managements must respond, namely the design defects of EMU, its conceptually monetarist background, upon which the dedication of EMU to price stability rests and which has now become the cornerstone and sole possible value of the European economic constitution. It has by now become a *communis opinio* that European monetary policy with its pre-defined objectives and institutional frameworks cannot operate in tandem with the multitude of national actors which are pursuing economic and fiscal policies under a very loosely constructed machinery of European supervision. That insight has triggered the quests for enhanced controls and generated the new machinery of authoritarian managerialism. There is, however, a twofold flaw in the reasoning of the CJEU in the assumption that the failures of the past justify the unrestrained activism of the present.

The first flaw is the Court's failure to address the implications of its own explanation of the conceptual background to the bail-out clause. '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.⁵⁵ This is indeed a fair restatement of an ordo-liberal legacy which we can still identify within EMU. However, the Court is then silent with regard to the philosophy which underlies our current cure to the failures of the past. This is by no means to suggest that the Court should have advocated an ordo-liberal renaissance. Nonetheless, what truly disappoints in its presentation of the new modes of economic governance is the lack of any kind of conceptual deliberation about their background and their adequacy. As we have argued in Section III, the new modes of European economic governance amount to nothing less than a deep transformation of the state of the European Union. The organisers of that transformation should be asked to explain their objectives and the adequacy of the means which they are employing. The lack of any plausible explanation of the means-end relationship within Europe's crisis management reveals a second flaw in the judgment. Wherever the court responds to objections about the legality of the new regime, it merely parrots the orthodoxy of 'conditionality' as a justification.

Conditionality ensures respect for the exclusive European competence in monetary policy and thereby 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.⁵⁶

Conditionality is the glue that keeps transnational actors together:

⁵⁵ Para. 135.

⁵⁶ Para 68

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[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.⁵⁷

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.

The deeply undemocratic nature of conditionality goes unnoticed or uncommented upon. The CJEU imposes on the whole of Europe the form of discipline which the FCC has imposed on Germany's neighbours.

V. De-judicialisation: Europe's Schmittian Moment

Germany's constitutional court feels exclusively committed to the country's constitution. The CJEU is certainly motivated by its commitment to the integration project. The discrepancy between these commitments was once perceived of as threat to the European project. That risk did not materialise as

⁵⁷ Para 18.

anticipated. But we are now concerned with a risk of a new kind. The converging attitudes of both courts in the assessment of the *praxis* of Europe's crisis management is disquieting because it accepts the primacy of discretionary politics in the management of the crisis and fails to develop any criteria against which the legitimacy of these practices might be assessed.⁵⁸

At this point we return to our reference to the 'state of exception' made at the beginning of this essay. Schmittian notions are certainly always engraved in a specific context.⁵⁹ History does not repeat itself and situational contexts remain distinct. And yet, recourse to Schmitt is anything but far-fetched.⁶⁰ Crisis management practices which are neither foreseen in EU primary law, nor in national constitutions are justified with the argument that compliance with the letter of the law would cause more harm than its breach or daring interpretation. Even Carl Schmitt did not conceive of the state of exception as a permanent condition; his justification of a 'commissarial dictatorship' included an effort to overcome the problems that precipitated departure from the rule of law and to regain normal constitutionality.⁶¹ In the present state of the Union, pertinent suggestions are urgent – and abound. However, they are mostly merely pragmatic and managerial, albeit that some constitutional

⁵⁸ We should underline that we do not object in principle to the FCC's efforts to insist on parliamentary involvement. One can read this tendency as a step towards a proceduralisation which seeks to engage concerned institutional 'stakeholders' in Europe's crisis management (see O. Lepsius, 'ESM-Vertrag, Fiskalpakt und das BVerfG', (2012) 23 *Europäische Zeitschrift für Wirtschaftsrecht*, 761-762; see also H. Deters, n. 51 above..

⁵⁹ Cf., E. Kennedy, 'Emergency Government Within the Bounds of the Constitution: An Introduction to Carl Schmitt, The Dictatorship of the Reichspräsident according to Article 48 R.V.', (2011) 18:3 *Constellations*, .284-297 with references to the German original writings and the translations into English.

⁶⁰ E.-W. Böckenförde, formerly a judge of the *Bundesverfassungsgericht* and renowned connoisseur of Schmitt's oeuvre, was among the first to characterise the crisis of the Euro and of Monetary Union as an '*Ausnahmezustand*' (state of exception/emergency) which would suspend the rule of law: E.-W. Böckenförde; 'Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung', *Neue Züricher Zeitung*, 21 June 2010, available at:

http://www.nzz.ch/nachrichten/kultur/literatur_und_kunst/kennt_die_europaeische_not_kein_g_ebot_1.6182412.html.

⁶¹ See Carl Schmitt, 'Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)', (1938) 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 252-267.

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lawyers and political philosophers have formulated some new propositions for a new constitutional architecture.

We have little room here to enter in these debates. We have presented our alternative of 'conflicts-law as Europe's constitutional form' elsewhere.⁶² This is an approach which takes, 'unity in diversity', the fortunate motto of the ill-fated Draft Constitutional Treaty of 2003 seriously, and rejects the notion that federalist state building is a sustainable project. We argue instead for a radical 'proceduralisation' of the integration project in which the European judiciary engages in continuous juris-generative efforts (a '*Rechtfertigungsrecht*'), which seek responses to Europe's complex conflict constellations.⁶³ Democratisation through conflicts-law constitutionalism cannot deliver ready-made responses to the financial crisis, but it can nevertheless claim to provide perspectives for a return to a constitutional European condition. To substantiate this perspective with respect to *Pringle*: monetary policy, fiscal policy and economic policy are assigned to different levels of governance in the Union. They are, however, interdependent. In the terminology of the conflicts-law approach, this generates 'diagonal' conflicts. Their 'resolution' within Europe's crisis management is currently occurring through establishment of the primacy of 'the Political'. Conflicts-law constitutionalism, by contrast, would require legally structured ('constitutionalised') cooperative deliberation.

⁶² In condensed form the introductory chapter to see the introductory chapter to C. Joerges, P.F. Kjaer, T. Ralli (eds.), *Conflicts Law as Constitutional Form in the Postnational Constellation*, (2011) 2 *Transnational Legal Theory* (Special Issue) with contributions by A. J. Menéndez, F. Rödl, M. Amstutz, P. F. Kjaer, M. Herberg and M. Everson.

⁶³ See M. Everson and J. Eisner, *The Making of the European Constitution*, n. 8 above, 13 ff.(22 ff on *Rechtsverfassungsrecht*) and C. Joerges in '[Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form](#)', LSE 'Europe in Question' Discussion Paper Series (LEQS), No. 28, London 2010, revised, 2013.

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