A DISINTEGRATION OF EUROPEAN STUDIES?

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I. The European integration project is in troubled waters. All branches of European studies document its difficulties, explore the reasons and discuss the potential to cure its failings. Diagnoses, of course, differ widely both across and beyond the Eurozone and the European Union, and, unsurprisingly, these debates are not immune to distorted perceptions and wrongful ascriptions. The title of this comment points to a schism which is not new, but which seems to be deepening. The schism mirrors the discrepancies in the various disciplines concerned with the integration process. Jürgen Habermas has pointed to them in one of his earlier essays on constitutionalism.[1] Legal scholars and political scientists, he explained, each tend to approach law according their respective disciplinary logic, which cannot be communicated across the disciplinary borders. Lawyers focus on normative issues and the art of legal reasoning. Social scientists tend to perceive law – if they see it at all – from external perspectives. They do not engage in the business of a *lege artis* application of rules, but explore their impact on society, their effectiveness, or they analyse its processes of implementation. They thus tend to avoid the prescriptive dimension of law; normative issues, as dealt with by lawyers, are an *aliud* to truly scientific operations. This constellation corresponds precisely. The present state of the Union offers ample evidence for the cogency of Habermas' observation. Suffice it here to point to the work of two of my colleagues and friends from the Hertie School of Governance in Berlin. The integration project is now reaching into core state functions, observes Markus Jachtenfuchs in an article co-authored with my former Bremen colleague Phillip Genschel.[2] So perceived, the crisis has triggered a move to "more Europe" and further deepening of the integration project. Within economics, by

[1] J. HABERMAS, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, in *Political Theory*, 2001, p. 766 *et seq.* (the original German version was published in 1994).

[2] M. JACHTENFUCHS, P. GENSCHEL, *Conflict-minimizing Integration: How the EU Achieves Massive Integration Despite Massive Protest*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity*, Cambridge: Cambridge University Press, 2016, p. 166 *et seq.*

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now the leading discipline in European studies, the focus is on functional necessities and crisis management. "The first victim of the crisis is democracy", writes my renowned colleague Henrik Enderlein.[3] This is an observation, which does not affect his work on the economic problems of the crisis and the search for their solution.[4] We lawyers should be concerned about such legal and normative complacency.[5]

But we cannot and should not expect our neighbouring disciplines to deliver some *lege artis* analyses of the transformation of Europe's constitutional constellation caused by the financial crisis, let alone the elaboration of a new institutional architecture, which would deserve recognition. What we should be deeply concerned about, however, is an intrusion of normative complacency into our own realms, the spheres of law, and a takeover there of purely instrumental and functionalist categories, which damages the law's integrity. It is this latter concern, which will be addressed in the following deliberation. They are by no means comprehensive in their scope but will instead focus on one single case, albeit one of extraordinary, and by the same token exemplary, importance, namely, the *Gauweiler* judgment of the Court of Justice of the European Union (CJEU),[6] handed down as a response to "the first reference ever" by Germany's Federal Constitutional Court (BVerfG).[7] The two courts are engaged in a litigation whose end is not in clear sight. On 16 February 2016, the BVerfG re-opened the proceedings on the response that it received from Luxembourg. The first session lasted eight hours.[8] Prior to this return to the Outright Monetary Transactions agenda (OMT), Herr Gauweiler had filed a new constitutional complaint, this time directed against the European Central Bank's (ECB) quantitative easing which has complemented its former OMT programme.[9]

Thanks to the re-opening of the OMT-litigation in Karlsruhe, we know at least that the CJEU did not have the last word. But the Luxembourg Court may well have had the final say; it is as unlikely as ever that Karlsruhe will shoulder the responsibility for the destruction of the common currency. What we can hence expect is the search for some

[3] H. ENDERLEIN, *Das erste Opfer der Krise ist die Demokratie (The First Victim of the Crisis is Democracy): Wirtschaftspolitik und ihre Legitimation in der Finanzmarktkrise 2008-2013*, in *Politische Vierteljahresschrift*, 2013, p. 714 *et seq.*

[4] See, e.g., H. ENDERLEIN, *Economic and Monetary Union as a Showcase of Exploratory Governance: Why There Are No Simple Answers to the Future of the Euro-area*, in HERTIE-SCHOOL OF GOVERNANCE (ed.), *The Governance Report 2015*, Oxford: Oxford University Press, 2015, p. 25 *et seq.*

[5] See, even if a long while ago, C. JOERGES, *Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration*, in *European Law Journal*, 1996, p. 105 *et seq.*

[6] Court of Justice (Grand Chamber), judgment of 16 June 2015, case C-62/14, *Gauweiler et al. v. Deutscher Bundestag*.

[7] Bundesverfassungsgericht, judgment of 14 January 2014, no. BvR 2728/13, paras 1-105.

[8] *Ivi*, paras 1-105.

[9] The brief (176 pages) is available at www.jura.uni-freiburg.de.

face-saving compromise formula.[10] Such an outcome is conceivable, even likely, but would this be a happy ending? With its *Gauweiler* judgment, the highest court of the Union gave its legal blessing to a deep and problematical transformation of Europe's economic governance. This is the consummation of a process, which occurred step-by-step through what the European University Institute (EUI) in Florence has somewhat oxymoronically called Europe's "crisis law".[11] This *law* had already met with highest judicial approval in the previous *Pringle* judgment.[12] But it had not yet been so transparently clear that the Court supports the establishment of a technocratic regime with unlimited discretionary powers and without credible accountability. This is certainly a highly critical characterisation. But this critique does not suggest that legally valid alternatives were available. The deeper dilemma and tragedy of the present state of the judicial responses to Europe's crisis management is the overburdening of the judiciary with its assessment. To cite from the introduction to a collection of essays by Karl Polanyi, which deal with the great financial crisis of 1929 and the Great Depression: "Today, it is easy enough to see past mistakes. But it is much less easy to undo their consequences".[13] Seventy-nine years later, we seem to be entrapped in the same kind of constellation. We have to take stock of what happened after 2008 and try to understand the situation in which we find ourselves.

II. To go back to the introductory observation and thesis: what we can observe is a strengthening of European powers. We have learned to understand any move towards more Europe as a signal of progress. This used to be an assumption, which all the disciplines engaged in the study of the integration process shared. But the kind of transformation to which we are now exposed has been generated by a crisis of enormous dimensions whose end is not in sight. This crisis confronts us with dilemmas rather than praiseworthy accomplishments. As a lawyer, I would substantiate: this crisis attests to nothing less and nothing better than the inability of European politics to remain faithful to the commitment to the project of a democratic mode of European governance, to the respect of human and social rights, and to a law-mediated legitimacy of the integration project. This is a discomforting reading of the state of the Union. In a nutshell, it is, by now, widely held that the separation of monetary policy from fiscal and economic policy, which the Treaty on European Union (Maastricht Treaty) established, constituted a design failure of the Economic and Monetary Union (EMU). The move to a common

[10] A prominent suggestion: the BVerfG should accept the result reached by the CJEU but reject its reasoning; see L.P. FELD, C. FUEST, J. HAUCAP, H. SCHWEITZER, V. WIELAND, B.U. WIGGER, *Das entgrenzte Mandat der EZB. Das OMT-Urteil des EuGH und seine Folgen*, Berlin: Stiftung Marktwirtschaft, 2015, p. 37.

[11] See www.eurocrisislaw.eui.eu.

[12] Court of Justice, judgment of 27 November 2012, case C-370/12, *Thomas Pringle v. Governement of Ireland, Ireland and The Attorney General*.

[13] K. POLANYI, *Europe To-Day*, London: Workers' Educational Trade Union Committee, 1937.

currency should have been accompanied by the establishment of political union, we read over and over again.[14] This is anything but a consolidating message, however. The defence of national powers in the realms of fiscal and monetary policy by the Member States cannot really be called irresponsible. "The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated". What Alexander Hamilton had stated in no. 78 of the Federalist Papers back in 1788 defines an essential feature of a constitutional democracy.

The Europeanisation of democratic rule as a pre-condition of Monetary Union was utterly inconceivable back in 1993. What the Maastricht Treaty has, instead, brought about is an irresolvable *diagonal* conflict constellation. To explain this briefly: the socio-economic conditions, political orientations and cultural legacies of the Member States were – and still are – not uniform. The implications of this diversity are threefold: for one, the differences between the fiscal and economic policies both within and beyond the Eurozone rest upon good *democratic* reasons. It follows that the single monetary policy, which the ECB has to deliver cannot fit *anyone*. And it was hence neither surprising nor *wrong* that the Union was empowered only with a competence to co-ordinate national policies, and the Stability and Growth Pact (SGP) of 1997 was not cast in hard rules. Monetary policy cannot claim supremacy with respect to fiscal and economic policy.

These problems could be kept latent for a short while. But conflicts were bound to break out when, in the course of the financial crisis, American rating agencies and *the markets* became aware of Europe's socio-economic diversity, and then adjusted their grading of national economies and their credit conditions accordingly. The spread between the interest rates of Eurozone members widened steadily, and became unsustainable until a break-up of the common currency seemed imminent in 2012. At this point, Mario Draghi stepped in with his legendary announcement of 26 July in London: "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough".[15] The markets calmed down. The "stability of the Eurozone as a whole" was sustained.

Not to everybody's liking, we have to add. Ever since the controversy over the ratification of the Maastricht Treaty, constitutional complaints have being filed with the *Bundesverfassungsgericht* against any further Treaty amendment, often by the ever same complainants. Herr Gauweiler, member of the *Bundestag* for the Christian Social Union (CSU) is the most prominent among them. This time, he was supported by the parliamentary group DIE LINKE and another 11,692 complainants. This looks and this was

[14] See the prominent explanation of the former President of the Bundesbank Helmut Schlesinger during the course of the original challenge to EMU made before the BVerfG, no. 2 BvR 2134/92 and 2159/92, BVerfGE 89, 155. English translation: *Manfred Brunner and Others v. The European Union Treaty*, in *Common Market Law Reports*, 1994, para. 92.

[15] M. Draghi, *Verbatim Remarks, President of the European Central Bank at the Global Investment Conference in London*, 26 July 2012, www.ecb.europa.eu.

quite spectacular. But nobody could, and hardly anybody did, expect that the German Court would, let alone should, strive for the destruction of what Mario Draghi had accomplished. Can we close our files? "Lieb' Vaterland magst ruhig sein, Fest steht und treu die Wacht am Rhein!". The emotional and nationalist *Lied* from 1840 conveys the message that the German Fatherland needs not to worry about its arch-enemy because it is so strongly guarded by its watchposts on the Rhine. Draghi's strong statement protected the Euro at least for the time being. But how about the guardian of Europe's constitutionalism? The unconventional financial rescue operation came at the price of a major collateral damage.

III. Draghi's intervention was a measure that did not accept – but instead corrected – the operation of the financial markets. It revealed that we cannot place our trust in the disciplining functions which the stability philosophy of the EMU had expected the markets to exercise. The action announced by the ECB and Draghi was not foreseen within the EMU framework, neither legally nor conceptually. This is not in itself unusual and problematical. What is so discomforting is the lack of a political infrastructure and an institutional framework in which democratic political contestation could have legitimated the correction or improvement of what had been ratified. Mario Draghi could not – and did not – invoke such a mandate. This is why he transformed the conundrum of legal *lacunae*, political failure and malfunctioning of the common currency into an epistemic challenge, which required sophisticated expertise, rather than political deliberation and legal changes. The kind of challenge which he defined was instead accessible and manageable only by the ECB. What else could he have done in view of the desperate situation in 2012? A considerable interdisciplinary body of scholarship refers to the notions of emergency and state of exception in their characterisation of the financial crisis.[16] Conceding that he responded to an apparent emergency, we still have to ask whether the CJEU really had no choice other than to legalise Draghi's move into unconventional modes of monetary politics? To cite Alexander Hamilton again: "The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution" while "the Executive not only dispenses the honors, but holds the sword of the community". Can we accept and *normalise* the fusion of both branches within the ECB? In the OMT case, the alliance between the *sword* and the *least dangerous branch* may have been economically successful. We cannot be too sure about the social effects

[16] Following the lead of former constitutional judge E.W. BÖCKENFÖRDE, *Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung' (Does Necessity Not Know Rules?, Design Flaws of the EU and the Necessity of a New Political Decision)*, in *Neue Züricher Zeitung*, 21 June 2010; C. JOERGES, *Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration*, in *Constellations*, 2014, p. 249 *et seq.*; most recently, C. KREUDER-SONNEN, *Beyond Integration Theory: The (Anti-)constitutional Dimension of European Crisis Governance*, in *Journal of Common Market Studies*, 2016, forthcoming.

and the long-term impact of unconventional monetary policy measures. Be that as it may: this alliance was not a holy one. Its replacement of the rule of law by assumed economic necessity and political expediency threatens the integrity of law. Two judges of the Second Senate of the *Bundesverfassungsgericht* (Gertrude Lübbe-Wolff and Michael Gerhardt) had delivered two Dissenting Opinions in which they pleaded that the complaints brought against the OMT programme be rejected as inadmissible. Did they do a better service to the law? Not even this is certain. Judicial self-restraint could become a cure only if the judiciary both intended to *and* were able to help to initiate responsible political deliberation about a re-construction of Europe's legitimacy. For the time being, we have to conclude, sadly, that Europe is without a guardian of its constitutionalism.

Christian Joerges*

* Professor of Law and Society, Hertie School of Governance, Berlin, joerges@hertie-school.org; Co-Director, Centre of European Law and Politics, Bremen, cjoerges@zerp.uni-bremen.de.