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A European Union of, by and for the Citizens: How Can Europe Provide for Better Participation of its Citizens?

Abstract: *Since the adoption of the Maastricht Treaty two decades ago, we have witnessed intense debates on the future of democracy in Europe, mostly fuelled by the hope and expectation that we would sooner or later figure out how democratic processes could function in the European multi-level system, and how they should be institutionalised. Under the impact of the financial crisis however, the confidence in such perspectives has been shaken. Rather than institutionalizing 'more democracy', Europe's crisis management system has established authoritarian modes of economic governance, executed by an administrative-governmental compound. Thus it remains all the more important to keep democratic aspirations alive and to search anew for firm constitutional grounds for implementing more democracy. At present, the prospects for such efforts are anything but encouraging.*

Introduction

The debate on European democracy has intensified enormously since the European Citizens' Initiative was institutionalised. Unfortunately, the new debate is primarily defensive. This is because the financial crisis and the praxis of crisis management in the Euro zone has become the prime concern of European debates and of citizens, who are not only afraid to lose their social entitlements or tax money, but are also concerned about the threats to democratic governance which the efforts to tame the crisis entail. We are

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living today at a crossroads between technocratic crisis management and democratic governance in the Union. This is not just a financial crisis; it is, at the same time and by the same token, an institutional crisis and a litmus test for the democratic credentials of the European project.[1] The steps toward new forms of democratic participation which were undertaken with the institutionalisation of the ECI are thus more important than ever. But the discussions on the future of democracy in the Union cannot be separated from today's very uncomfortable and disquieting context.

This article proceeds in three steps. First, as an inveterate lawyer, I start with black letter basics: a textual analysis of the pertinent treaty provisions. Second, I comment briefly and critically upon two recent suggestions for strengthening the democratic involvement of EU citizens, one developed by a group of colleagues at the EUI, the other contained in a manifesto signed by, *inter alia*, Jürgen Habermas. Finally, based both on these suggestions and in contrast thereto, I present my own views on the tensions between crisis management and democracy, and illustrate their implications.

1. What does the Treaty tell us about participatory democracy?

The relevant Treaty provisions can be summarised in short fashion. Article 11, paragraph 1 of the Lisbon Treaty (TEU) reads: '*The Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action*.' This represents the implementation of the European Convention's Article I-46 No. 1, which elucidated its commitment to the new 'principle of participatory democracy'. Paragraph 2 of Article 11 of the TEU modifies and complements this commitment.[2] There was no grand theoretical design from which we could infer the relationship between the new principle ('participatory democracy') and the commitment to 'representative democracy' in Article 10 TEU. What we can safely assume is that the principle of representative democracy cannot claim exclusive validity, and that we have to come to terms with the tensions between the two principles.

[1] See in detail C. Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, ZenTra Working Paper in Transnational Studies, No. 06/2012, available at http://ssrn.com/abstract=2179595 (unless indicated otherwise the cited websites were last accessed in December 2013).

[2] Article 11 TEU reads: '*1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.*'

Let me hence recall the famous, or infamous, pertinent pronouncements of the German Constitutional Court in its Lisbon judgment of 30 June 2009:[3] Representative democracies require '*free and equal elections. This core content may be complemented by plebiscitary voting on factual issues*.'[4] And '*even after the entry into force of the Treaty of Lisbon, the European Union lacks a political decision-making body created in equal elections... [T]he European Parliament is not a representative body of a sovereign European people*'. It is instead '*designed as a representation of peoples*'.[5] And the Court left no doubt that, in its view, the new principle of participatory democracy and its mechanisms were not sufficient to compensate for the lack of direct representation according to the principle of electoral equality inherent in representative democracies.[6] Has the Court therefore led the integration process into a dead-end alley? The Union is a multilevel system of governance with interdependent semi-autonomous actors. It is simply impossible to organise decision-making in that polity according to the requirements of representative democracy.

Fortunately enough, the German Court typically operates with 'yes-but' arguments. The Lisbon judgment uses the same strategy: *Yes*, '*it is true that the merely deliberative participation of the citizens and of their societal organisations in the political rule... cannot replace the legitimising connection based on elections and other votes*'. But, '*such elements of participative democracy can... complement the legitimation of European public authority*'. And 'decentralised participation' has the potential to render '*the primary representative and democratic connection of legitimation more effective*.'[7]

Anyway, we can make inferences from what we know from the theoretical literature about the concepts of representative and participatory democracy. These are not alternative, let alone contradictory, notions. Elements of participatory democracy can be identified within constitutional states. Both of them can be read in the perspective of deliberative notions of democracy. To cite a famous philosopher: '*Democratically constituted opinion – and will formation depends on the supply of informal public opinions that, ideally, develop in structures of an unsubverted political public sphere*'. However,

[3] See: Bundesverfassungsgericht, judgment of 30.6.2009, available at: www.bundesverfassungsgericht.de; for the English translation see: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html

[4] Para. 270.

[5] Para. 280.

[6] Paras. 290–292, 272. The Court has confirmed this position in its judgment of 26.02.2014. invalidating the three-percent electoral threshold in the law governing European elections, BVerfG, 2 BvE 2/13 of 26.2.2014., Absatz-Nr. (1–86), see further: http://www.bverfg.de/entscheidungen/es20140226_2bve000213.html (retrieved on 9.03.2014).

[7] Para. 272.

'*although power of public discourses originates in autonomous public spheres, it must take shape in the decisions of democratic institutions of opinion- and will-formation*' with, *inter alia*, '*clear institutional accountability*'.[8] It seems plausible to assume and to argue that adoption of the notion of participatory democracy was intended as an 'anti-stealth' approach, against complacent portrayals of the '*average citizen as lacking the time, interest, expertise, direct stake, as well as appropriate forums needed to contribute meaningfully to collective decision-making*.'[9]

Rather than digging deeper into the theoretical literature or criticising the German Court for erecting barriers to integration, or making complaints about the opaqueness of the Court's pronouncements, our task is to understand how democratic will-formation can be promoted and organised in the current European constellation. To be more specific: Can we understand participatory democracy, and in particular its procedural dimensions as defined in Article 11 and the ECI, as a democratically valid response to the structural specifics of the Union? My argument is that it can be so understood, but in order to be fully aware of the implications of such an understanding it is necessary to dig deeper into the theoretical debate and practical implications.

2. Two recent suggestions for strengthening democracy in the Union

Two important and far-reaching recent proposals, which are miles apart, are worth examining in detail. It is unsurprising that they both concern the financial crisis, and both strive to be responses to the tensions between crisis management in the Union and its democratic commitments. I will not try to define their positions in the context of the wider agenda, but confine myself to focusing on those contours which explain my own views as set forth in Section 3.

2.1. Democratisation through parliamentary involvement in the election of the President of the European Commission

The first proposal was developed by Miguel Poiares Maduro, former Advocate General at the Court of Justice of the EU, later professor at the

[8] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg, Cambridge, MA 1996, pp. 308, 486; for a recent restatement, see: idem, *Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research*, "Communication Theory" No. 16/2006, pp. 411–426.

[9] A.W. Dzur, *Four Theses on Participatory Democracy: Toward the Rational Disorganization of Government Institutions*, "Constellations" No. 19/2012, pp. 305–324, at 311.

European University Institute (EUI), and now Minister for Regional Development in the Cabinet of the Prime Minister of Portugal; and Mattias Kumm, Professor at NYU School of Law, Research Professor at the Social Science Research Centre and the Humboldt University in Berlin. Their proposal was set forth in a policy report on the 'democratic governance of the Euro',[10] which was presented on 10 May 2012 at a high-level policy seminar in which the European Commission (EC) President participated.[11] President Barroso explicitly confirmed his support of the proposal in an interview with the "Frankfurter Allgemeine Sonntagszeitung" of 16 September 2012.[12]

Two elements of the reasoning in this report are of crucial importance. The first concerns the structural limitations to autonomous democratic decision-making on the part of the Member States of the Union. The report subscribes to the so-called 'argument from external effects', which I have defended in principle for many years:[13] that the decision-making in one Member State of the Union tends to affect the concerns of its neighbours. One of the basic functions of European law is to insure that such 'foreign' concerns, i.e. EU-wide repercussions, are taken into account in domestic politics. The policy report applies this argument to the sphere of fiscal policy – and radicalises it dramatically. Where '*national politics is not able to incorporate the existing*

[10] See: Policy Report, *The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis*, available at: http://globalgovernanceprogramme.eui.eu/research-publications-2/strands/modes-of-global-governance Cf. also the piece by M. Maduro in this volume.

11 See the report by J. Croon and M. Maduro, available at: http://globalgovernanceprogramme.eui.eu/provacommenti; and the contribution by M. Kumm, *Democratic Governance of the Euro: Two Practical Suggestions*, in the Berlin Verfassungsblog On Matters Constitutional of 23.05.2012, available at: http://verfassungsblog.de/democratic-governance-euro-europe

[12] So did the President of the European Parliament, see: http://www.europarl.europa.eu/thepresident/de/press/press_release_speeches/speeches/sp-2012/sp-2012-may/speeches-2012-may-4.html (last accessed on 14.12.2013). In a recent manifesto initiated by sociologist Ulrich Beck and signed by a broad alliance of prominent politicians, academics and public intellectuals this opportunity is characterised as nothing less than a '*political quantum leap, because the same discussion will be taking place throughout Europe in various languages at the same time and on the same subjects... a discussion about people and their programmes*'; see: http://vote4europe.eu/ (last accessed on 9.03.2014). These expectations seem overly daring.

[13] For a critical account, see: A. Somek, *The Argument from Transnational Effects I: Representing Outsiders Through Freedom of Movement*, "European Law Journal" Vol. 16/2010, pp. 315–344; and *The Argument from Transnational Effects II: Establishing Transnational Democracy*, "European Law Journal" Vol. 16/2010, pp. 375–394. But see also: J. Habermas, *Does the Constitutionalization of International Law still have a Chance?* in: J. Habermas, *The Divided West*, Cambridge 2007, pp. 113–93, at 176: '*Nation-states... encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level*.'

European interdependence' and hence '*cannot, itself, provide appropriate and legitimate democratic solutions*', the resolution of '*that democratic problem requires developing instruments of governance to prevent those externalities and, if necessary, impose particular economic and financial policies on some States*'.[14] This is a radical extension not only of the 'argument from external effects', but of the existing state of affairs. The extension has both a legal and a theoretical dimension. With respect to the legal aspect, the report pleads for European interference within core spheres of national politics, regardless of the limits to European competences and the principle of enumerated powers. To add a more theoretical query: Can one cure a failure of democracy by measures outside the framework of Union law? The report insists that the cure for democratic failures must – in itself – be democratic, and provides us with a kind of *deus ex machina.* It proposes that in the electoral campaign for the European Parliament, the parties (or rather, groups of parties) should present candidates for the Commission Presidency in their campaigns. '*If the election campaign were focused on this, the European Council would, in practice, have to appoint the winning candidate*.'[15] To put this slightly differently: Union citizens shall, via election of the European Parliament, concomitantly select their leading figure as President of the Commission, who will thus gain a measure of democratic authority to tell Member States and national citizens exactly which of their democratically-legitimated policies are acceptable to the Union and which are not.

Both steps of this argument are fatally flawed. There is no conceivable constitutional principle which would justify the correction of democratically-legitimated national politics by some supranational executive. governor, or intergovernmental authority. The electoral suggestions which are meant to supply legitimacy for such transnational governance not only lack any legal basis, but the factual expectations and assumptions implicated in them also lack any basis[16] in the real world. This is neither a step towards participatory democracy, nor can it claim to be compatible with the requirements of representative democracy.[17] Thus I refrain from pursuing this suggestion any further and turn now to Jürgen Habermas.

[14] Policy Report, op.cit., at 2–3.

[15] M. Kumm, *Democratic Governance of the Euro*, op.cit.

[16] Mattias Kumm, however, in a contribution for the online edition of the "Frankfurter Allgemeine Zeitung" of 10.08.2012, went so far as to infer from Article 23 of the Basic Law a duty on the part of the German government to support in the Council the election of the candidate nominated by the European Parliament; see: http://www.faz.net/aktuell/politik/staat-und-recht/gastbeitrag-ein-signal-fuer-europa-11848587.html

[17] See in more detail, C. Joerges and F.Rödl, *Would the election of a Member of the European Parliament as President of the Commission make democratic sense?*, available at: http://verfassungsblog.de/election-member-european-parliament-president-commission-democratic-sense

2.2. Time for referenda and a constitutional convention?

No one is more passionately committed to the European project than Jürgen Habermas, a social philosopher and political citizen. His passion explains the tone of his countless interventions in recent years,[18] which are becoming ever more intense, and shifting in their emphasis from institutional deficits to the failure of the institutional personnel and politicians. Habermas sees Europe on the road to 'executive federalism' driven by a 'technological (mis-)management', which is threatening democracy, the rule of law, and the legitimacy of the European project. The suggestions contained in his manifesto of 4 August 2012, which was co-authored by the economist Peter Bofinger and the philosopher Julian Nida-Rümelin,[19] are equally radical in their critique of the European praxis. It can safely be assumed that Habermas masterminded the most challenging sections of this manifesto, which build upon his idea of a European citizen with the '*twin capacity as a **directly** participating citizen of the reformed Union on the one hand, and an **indirectly** participating member of one of the participating European nations on the other*.'[20] He continues: '*As the representative of the biggest donor country in the European Council, the Federal Republic should take the initiative and table a resolution for summoning a constitutional convention*.' It does not take a federal state to establish a collective government with the power to '*impose effective fiscal discipline and guarantee a stable financial system*' or to ensure '*closer coordination of financial, economic and social policies in the member countries, with the aim of correcting the structural imbalances within the common currency area*'.

[18] Beginning with his alarming comments at the beginning of the financial crisis in an interview conducted by Thomas Assheuer and published in "Die Zeit" on 06.11.2008. The English translation (*Life after bankruptcy*) was published in "Constellations" No. 16/2009, pp. 227–234.

[19] *Einspruch gegen die Fassadendemokratie*, "Frankfurter Allgemeine Zeitung", 04.08.2012, No. 180, p. 33; the charm of this title was lost in its English translation: *The Case for a Change of Course in European Policy*, "Social Europe Journal", 09.08.2012., available at: http://www.social-europe.eu/2012/08/the-case-for-a-change-of-course-in-european-policy

[20] This concept was elaborated in his essay *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, "European Journal of International Law" Vol. 23/2012, pp. 335–348. It differs innovatively and constructively from the type of executive federalism to which Kumm and Maduro fail to provide an alternative. Habermas argues that effective European governance will not require the transformation of the Union into a federal entity. His perspective is theoretically attractive, particularly in the context of the agenda of this hearing. But I have to repeat my reservation. The indirectly participating citizen is embedded in the context of a specific polity with distinctive and diverse features. It remains indispensable to organise the co-operation of different polities in a way which involve their '*demoi*'; see the most recent work of K. Nicolaïdis, *Germany as Europe: How the Constitutional Court unwittingly embraced EU demoi-cracy. A Comment on Franz Mayer*, "International Journal of Constitutional Law" No. 9(3–4)/2011, pp. 786–92; and J.-W. Müller, *The Promise of Demo-icracy: Diversity and Domination in the European Public Order*, in: *The Political Theory of the European Union*, eds. J.Neyer and A.Wiener, Oxford 2010, pp. 187–205.

Such quests are in line with Habermas' life-long engagement on behalf of democracy, his more recent praise of the Irish after their 'No' referendum vote on the Lisbon Treaty,[21] and his later critique of Europe's post-democratic practices, which the Greek Left Review was happy to (re-) publish.[22]

Nonetheless one may question how welcome German leadership really would be. We will have to respect 'the markets', political elites and the less well-off, especially in the South of Europe. Furthermore, Habermas' democratic commitments have to be contrasted with the praxis of Europe's crisis management. Only four weeks after the publication of the manifesto, the ECB decided to purchase government bonds in unlimited quantities. The bank added, however, that its supportive activities will be accompanied by the imposition of the type of austerity policies which Ireland, Portugal and Greece have been forced to undergo. This type of conditioned 'solidarity' is anything but democratic. I do not assume that Habermas is as complacent in that respect as the policy report of Kumm and Maduro.[23] Last but not least, the expectations or hopes of the manifesto with regard to the potential of Europeanised governance seem unrealistic. Together with so many advocates of the transfer of new powers to European institutions, Habermas seems to assume that strong regulatory powers and stringent policies will overcome the steadily deepening socio-economic, political, and cultural diversity in the Union. He does not take into account the core insights of economic sociology. The economy is a polity, and markets are socially-embedded institutions.[24] The systematic neglect of that 'normative fact', together with the integration project's reliance on a 'one-size-fits-all' philosophy has led to inefficiencies in European politics and caused social disintegration.[25] Is there no alternative path? At this point I turn to my own vision.

3. Unity in diversity: an alternative perspective

How likely is it that the crisis will generate a new democratic energy and alternatives to the austerity programmes, through which European crisis management is transforming the integration project? Rather than oscillating

[21] In „Süddeutsche Zeitung", 17.06.2008., p. 7.

[22] See: http://greekleftreview.wordpress.com/tag/habermas

[23] See: Section 2.1 above.

[24] See: C. Joerges, B. Stråth, and P.Wagner, *The Economy as Polity: The Political Constitution of Contemporary Capitalism*, London 2005; C.Joerges and J.Falke, eds., *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, Oxford 2011.

[25] See the recent works of G. Majone, e.g., his *Europe as the Would-be World Power: The EU at Fifty*, Cambridge 2010, or *Political and Normative Limits to Piecemeal Integration*, Keynote Lecture at RECON Concluding Conference, 24–26.11.2011, Oslo, available at: http://www.reconproject.eu/main.php/Majone_RECONconcluding_Oslo_25nov11.pdf?fileitem=5374065

between anxiety and hope, I would like to sketch out a conceptual perspective which responds to the socio-economic state of the Union and integrates the arguments of both the Kumm/Maduro policy report and the Habermas *et al*. manifesto. Its normative reference-point is the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty – 'Unity in Diversity'.[26] The normative appeal of this formula rests on solid grounds in the real world. To be sure, the Member States of the European Union are no longer autonomous. They are, in many ways, inter-dependent and hence dependent upon co-operation. It is also true, however, that Europe's socio-economic diversity is deepening, and that the potential and/or willingness to pursue the objectives of distributional justice, and to respond to economic and financial instabilities are anything but uniform. Kumm and Maduro are right to underscore that decisions taken unilaterally by one Member State of the Union will often impact upon the neighbouring polities, and that a function of European law is to control such external effects. They go much too far, however, when they conclude that the inter-dependencies within the Union justify the establishment of transnational regulatory powers. The fallacy here is twofold. The differences in political preferences and socio-economic conditions, together with the political and social embeddedness of markets and institutions, all militate for diversity in the governance of Europe. Equally important, the quest for centralised powers grossly over-estimates the capacities of the regulatory machinery which Europe can establish with the aim of fostering technocratic uniformity. There is a trade-off between centralisation, especially when guided by a one-size-fits-all philosophy, on the one hand, and socially and economically adequate responses to regulatory issues on the other.[27] Europe should neither camouflage its socio-economic, political and cultural diversity nor turn a blind eye to the conflicts generated by these differences. It should search for ways to deal constructively and fairly with such conflicts and thereby turn its plurality into an asset.

How should this be reflected in the institutional configuration of the integration project? As I said at the 2011 conference on the ECI,[28] the constitutionalisation of Europe should realise two principles and aspirations:

[26] Article I–8, Draft European Constitutional Treaty, OJ 2004 C 310/1.

[27] M. Everson, *European Agencies: Barely Legal*, forthcoming in: *European Agencies in Between Institutions and Member States*, eds. M. Everson, C. Monda and E. Vos, Kluwer Publishing, 2014, chapter 3; and *European Agencies: From Institutional Efficiency to 'Good' Governance?*, "European Union Studies Association Review" No. 14/2001, Special Issue on the European Commission's White Paper on Good Governance, available at: http://aei.pitt.edu/archive/00000074/01/GovernanceForum.html

[28] For an elaboration of this argument, see: C. Joerges, *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form*, forthcoming in: *The Changing Role of Law in the Age of Supra- and Transnational Governance*, eds. A. Greppi and R. Nickel, Baden-Baden 2014, chapter 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723249

1) It should compensate for the deficiencies of nation-state democracies, which stem from their inability to realise a '*normative order in which those who are subject to binding legal norms should also be the normative authority that deliberates and decides on these norms in an active sense, in the context of a practice of justification*'.[29]
2) It should respond to the eroding potential of nation-states to cope autonomously with the concerns of their citizens, not through uniform regulatory provisions but through co-operative problem-solving.

Habermas's construct of a 'twin capacity' of a European citizen-participant in Union politics who at the same time is '*an **indirectly** participating member of one of the participating European nations*' quite accurately mirrors these two dimensions of political will-formation in the Union. We should acknowledge, however, that Europe's diversity and the – relative – autonomy of the Member States will continue to generate areas of disagreement, and that, with respect to such issues, no authority has a *Kompetenz-Kompetenz* which would legitimate a binding decision. The ECI, as I argued in my intervention last year,[30] can – and indeed should – be understood in such a perspective. It has the potential to generate transnational political exchanges on issues which nation states must not handle autonomously. The example I used then was nuclear energy. The prime concern today is the fiscal crisis. There are structural affinities between these two examples. Through the opening of the national economies and the establishment of the Economic and Monetary Union, we have created an inter-dependence with a dynamic which cannot be tamed within the legal framework of the Union. The current crisis management system and the imposition of austerity measures are responses to an existing emergency. The risks which we incur are, however, enormous. Whether Europe's crisis management will save the Euro remains to be seen. What we can see clearly is its social disintegrative impact on European citizenry, and also the damage it is doing to democracy and the rule of law.

[29] This standard formula is used by R. Forst, *Transnational Justice and Democracy*, RECON Online Working paper, No. 2011/12, p. 10 ff.; indebted to the same tradition and hence quite similar is J. Bohman, *Democracy across Borders. From Demos to Demoi*, Cambridge, MA 2007, 135 ff., who argues: *'The crucial points at which democratic legitimacy is at stake in the EU have to do with the institutional distribution of normative powers of initiative and the institutional capacity of those regularised powers and initiative and reform to the claims made by communicatively free participants in various public spheres.'* And later: *'The core of democratic constitutionalism is the "capacity to make the basis of democracy itself the subject of democratic deliberation of citizens"'* (at p. 156).

[30] See C. Joerges, *The timeliness of direct democracy in the EU and the contest over atomic energy in conflicts-law perspectives* in: *International Constitutional Law in Legal Education. Proceedings of the Erasmus Intensive Programme NICLAS 2010–2012*, eds. J. Busch *et al.*, Wien 2014, pp. 89–100.

Jürgen Habermas deserves every praise for his efforts to make us aware of these trade-offs. A German lawyer can hardly refrain from referring to the German constitutional court and its decision of 12 September 2012.[31] The European political community, 'the markets' themselves, and the German government all felt relief: The Court did not foreclose the deepening of European integration; it did not interfere with the current crisis management; and it managed at the same time to defend a central democratic tenet, namely, the budgetary powers of the *Bundestag* and its involvement in ESM decision-making. While all this is true, the Court's declaration in para. 274 should not be overlooked: '*By virtue of its approval of stability aids, the Bundestag exercises the influence demanded by the Constitution and is a participant in decisions on the amount, conditionality and length of stability aids. It therefore determines the most important conditions for future successful demands for capital disbursements under Article 9, Para. 2 ESMS*'.[32] As a German citizen, I can feel relief – my national democratic rights are observed. As a citizen of the Union I am not so sure. What about democracy for the rest of the Union? Why is budgetary autonomy not understood as a common European constitutional legacy? Is the German court creating a link between economic stability and social austerity? This dimension of the judgment is all the more disappointing as the Court, in an earlier Paragraph of its judgment, opened the door to another and more constructive perspective: Departure from its much criticised de-contextualised reading of the 'eternity clause' (Article 79 of the German Basic Law). In that context the Court explained that it is '*Article 79 (3) of those structures and procedures which keeps the democratic process open and, in this context, safeguard parliament's overall budgetary responsibility*.'[33] This type of reasoning suggests that a resolution of the conflict between the exercise of budgetary powers must not be sought in prescriptions by an economic hegemon. As in the case of the conflicts over nuclear energy, the legitimacy must be anchored in political processes,

[31] See: http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html

[32] The official translation is still incomplete. In view of the complexity and importance of this pronouncement, I 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 hilfesuchender Mitgliedstaaten mitbestimmen kann, legt er selbst die wichtigste Grundlage für später möglicherweise erfolgende Kapitalabrufe nach Art. 9 Abs. 2 ESMV*.'

[33] Para. 206 in the English extract, para. 222 in the German original. This fits precisely into my understanding of 'conflicts law constitutionalism' as developed in the essay cited above: C.Joerges, *Unity in Diversity*..., op.cit. Josef Falke and Claudio Franzius have made me aware of the quite spectacular changes in the jurisprudence of the Court, which contrasts so nicely with its one-sided and parochial pronouncements on Germany's budgetary autonomy.

indeed in 'procedures which keep the democratic process open'. The German Court is the guardian of the German constitution, but it is not entitled to define the economic constitution of the Union. It would be equally questionable to assign that task to the CJEU.[34] The reconstitution of Europe's economic constitution is a highly sensitive political issue. The institutional actor assigned with the task to defend the democratic legacy and quality of commitments is first of all the European Parliament.[35]

[34] The CJEU, on 27.11.2012 handed down its judgment in Case C-370/12 Pringle v. Ireland, nyr; see: M. Everson and C. Joerges, *Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?*, LSE 'Europe in Question', Discussion Paper Series, LEQS Paper, No. 63/2013, June 2013, available at http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPapers.aspx, discerning a judicial alliance with the German Federal Constitutional Court in the readiness to accept the primacy of the political.

For the first time in its history the German Federal Constitutional Court has, in its decision of 15.01.2014, referred questions to the Court of Justice of the European Union for a preliminary ruling, BVerfG, 2 BvR 2728/13 of 14.01.2014, Absatz-Nr. (1–105), see further: http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html. The case concerns the OMT Decision of the Governing Council of the European Central Bank of 6.09.2012. In the view of the Federal Constitutional Court, there are '*important reasons to assume*' that this decision '*exceeds the European Central Bank's monetary policy mandate and thus infringes the powers of the Member States, and that it violates the prohibition of monetary financing of the budget*.' The matter is too complex to be discussed in a footnote; my own sympathies lie with the two dissenting judges of the 2nd Senate (Lübbe-Wolff and Gerhardt) who argue that this matter is beyond the mandate of judicial adjudication. See also: press release of 7.02.2014, http://www.bundesverfassungsgericht.de/en/press/bvg14-009en.html (retrieved on 9.03.2014).

[35] The judgment of the German Constitutional Court of 12.09.2012 was discussed in the concluding panels of the *Deutsche Juristentag* in München with Jürgen Habermas, Vasdilios Skouris, President of the CJEU, and Andreas Voßkuhle, President of the *Bundesverfassungsgericht*. To my delight, Habermas criticised the judgment with arguments which are at least compatible with those in this text, and left no doubt about his view that a strengthened economic governance in the Union must be democratically generated and controlled. The debate was documented in the "Süddeutsche Zeitung" of 22.09.2012; for the Habermas' intervention see: http://habermas-rawls.blogspot.de/2012/09/habermass-talk-at-deutscher-juristentag.html