Loves' Labour's Lost: fighting austerity and crisis with *obiter dicta*[*].
A gloss on the expediency of constitutional justice in times of crisis

Yiannis Z. Drossos, Professor of Constitutional Law, Athens Law School

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I. The limits of the constitutional guaranties.

The modern Constitution is much more than a mere matrix to translate political decisions into practical legal forms and administrative orders. The value, the pride and the mystical power of the Constitution lie in that it sets limits to the state power and to its holders, both procedural and substantial limits; not any decision, however "unavoidable" or politically feasible is constitutional by the imperatives set by the power-holders or by its necessity alone. Great empires, such as the Byzantine, the Ottoman or the Chinese Empire, produced elaborate legal bodies permitting the full and the practical implementation of the rulers' rules, but Constitutions they had not. But what if "facts" dictate decisions constitutionally impermissible but politically unavoidable?

In a constitutional polity everything possible is supposed to be tried to keep the Constitution going, even in times of crisis. If a crisis situation cannot be legally contained within the constitutional limits, then no constitutional discussion has any meaning at all; then everything will be a matter of force and decisions will be made in Schmittean ways – and I mention this as an assessment, not as a value judgment.

This taken into account, I will bring to your attention two moments of confrontation between legal norms of constitutional relevance and political decisions presented or accepted as inescapable necessities. In both moments the courts' challenge is one and the same: do these decisions fit in the constitutional norms or not? In the latter case, who will pay the ultimate price?

Both moments are moments of scrutiny of pieces of legislation related to the actual financial crisis in the Eurozone. This legislation includes the European Stability Mechanism and the Memoranda. Under the term 'Memorandum' we Greeks (and so do also the Portuguese, the Irish and the Cypriots) understand the detailed list of financial and institutional structural measures politically agreed with our creditors and the involved EU and IMF institutions as a condition for the bail out of our sovereign debt and the financing

[*] Ομιλία στο συνέδριο "*Η κρίση, το Σύνταγμα και η αναθεώρησή του*", Κέντρο Ευρωπαϊκού Συνταγματικού Δικαίου – Friedrich Ebert Stiftung, Αθήνα 16 Οκτωβρίου 2013. Η παρουσίαση και ο σχολιασμός της απόφασης του ΕΔΔΑ στις υποθέσεις 62235/12 και 57725/12 προστέθηκε μετά την ομιλία. **Κείμενο υπό επεξεργασία**. [Speech in the international congress "*The Crisis, the Constitution and its Revision*", organized by the Center of European Constitutional Law and the Friedrich Ebert Stiftung, Athens, 15-16 October 2013. The presentation and commentary on the decisions 62235/12 and 57725/12 of the ECourtHR have been added after the speech. **Working text**, pls. do not quote without prior consultation with the author –ydrossos@gmail.com]

of our state budget at agreed terms, far below what the markets are 'offering'. There have been two successive Memoranda so far and several Revisions thereof. The financial measures are essentially salary and pension cuts as well as cuts of social benefits. The 'Memoranda' appear as annexes to pieces of legislation voted by the Parliament.

The first moment will be the judicial scrutiny of the Memoranda measures by supreme national courts and by the European Court of Human Rights. The second moment is the judicial scrutiny of the European and German legislation regarding to the European Stability Mechanism by the Court of Justice of the European Union and by the German Constitutional Court.

II. "*Memoranda sunt servanda*?"

1. The question has been ingeniously formulated by my good friend George Katrougalos, Professor of Constitutional Law, an exemplary adamant voice against the constitutionality of the Memoranda. To his disappointment the judicial answers so far given are "yes". The first "yes" has been given by the decision 668/2012 of the Council of State.

2. The decision 668/2012 of the Council of State has taken paradigmatic dimensions because it has treated the first (and paradigmatic, as well) Memorandum, more accurately law 3845/2010, which the first Memorandum has been annexed to. The legal battle was framed as a fight over the validity of several administrative acts implementing this Memorandum on the basis of the law it has been annexed to.

   At the hearing of the case the passion of the litigants occasionally overwhelmed legal reasoning, yet the Court responded to the challenge by proving an admirable skill to put everything in an exhaustively detailed technical legal word dressing. The decision is 129 pages long. Its major part –several dozens of pages- is devoted to the character of law 3845/2010 as the ratification instrument of an international agreement. The practical value of this discussion lies in the majority necessary to pass such a law. As per Art. 28 par. 2 and 3 of the Constitution, to ratify an international treaty a majority of 2/3 of the Members of the Parliament is needed, while to pass a law simple majority suffices. Law 3845/2010 was supported by the majority of the Parliament, but not by the two thirds of its members. The court didn't consider the Memorandum a treaty.

   From the substantial point of view, the decision examined whether the salary cuts in the public sector are in breach of the protection of property under Art. 1 of Protocol 1 of the European Convention on Human Rights. Entering into the merits of the case, the Court takes account of the "*acute fiscal crisis ascertained by the legislator*", takes note that the salary and pension cuts have been deemed necessary by the legislator in the

frame of a wider program of fiscal readjustment and, in that sense, the measures under scrutiny, are not, "*in principle*", "*manifestly inappropriate for the achievement of the goals pursued by them*", neither "*can they be considered as not necessary*". The Court passes the cuts also from a proportionality test, mentions in some detail the quantitative fiscal results expected by the legislator form the implementation of the measures for the actual and the next year and finds nothing disproportionate.

The Court did not fail to state that in cases of "*protracted economic crisis, the [...] legislator, to reduce expenses, is entitled to take measures entailing the financial burden of large sections of the population; however this faculty of the legislator finds its limits in the principle of equal participation to the public charges in proportion with each one's possibilities, established by Art 4 par. 5 of the Constitution, as well as the principle of human dignity, established by Art. 2 par. 1 of the Constitution*". Having said so, the Court fining is that the measures examined are not in breach of these principles.

In each and every finding of the decision elaborate dissenting opinions are formulated, only to illustrate the legal and political complexity of the matter.

3. The 668 legacy. The decision 668/2012 has solidified the basic ground general for trying cases related with laws implementing the memoranda. In general, the circumstance of the economic crisis is seriously taken into account, but it has not surrendered its power to review the measures. Two characteristic examples: in its decision 25/2012 the Special Highest Court, deciding after an extremely complicated procedure, had to face the "problem" of a ECourtHR decision [in the *Meidanis* case - case 33977/06, dated 28 May 2008] dismissing the "*fiscal interest of the State*" as lawful ground for a state prerogative of lower default interest. The Special High Court renamed the state's interest to pay lower default interest rate than private agents: the stake now is not just the fiscal interest of the State, it is much higher, it's about preserving the endangered fiscal balance, a matter of foundational character for the subsistence of the state. Thus, the Special Highest Court admitted, in the different word dressing it crafted, exactly what the ECourtHR had dismissed.
However the Greek courts have not swallowed everything. Admitting the compulsory tax collection by the Public Power Corporation, the Council of State did not admit the additional measure providing for the obligation of PPC to stop providing with electricity households that had played for their electric power, but not the special tax that PPC was asked to collect [1972/2012, dated 25/5/2012]. In a very recent decision [3353/2013 dated 27/9/2013], the Court rejected as unconstitutional the Memorandum measure of "pre-pension suspension" leading to automatic dismissal of civil servants.

4. A Portuguese version. The decision 187/2013, of the Portuguese Constitutional Court, issued on April 5th, 2013, is a more than 200 pages piece of adjudication. Although

sometimes hailed as an act of judicial resistance against the dictates of the Portuguese Memorandum, the decision seems to me rather in a line of thinking conform to the line of thinking of the 668/2012 decision of the Council of State.

The decision is about the constitutionality of the articles pensioners of the 2013 State Budget Law [Law n. 66-B/2012, of 31 December 2012] regarding the suspension of the holiday allowance, or equivalent, paid to civil servants, regarding the suspension of the holiday allowance paid to pensioners and regarding the imposition of an extraordinary contribution of solidarity to and is issued in response to a "*request for assessment*" filed with the Constitutional Court on January 2nd, 2013 by the President of the Republic, by fifty parliament members of the Socialist Party, twenty four of the Communist Party, Left Block and Green Party and, except for the article regarding the holiday allowance, by the Portuguese Ombudsman.

In addition, the representatives of the Communist Party, Left Block and Green Party questioned also the constitutionality of the articles regarding the salary reduction applicable to civil servants regarding the suspension of the holiday allowance paid to employees subject to teaching and research agreements, regarding the payment reduction of overtime working hours to civil servants, the taxation of unemployment and sickness allowances, the changes made to the Personal Income Tax ("IRS") progressive tax brackets and the 3.5 % IRS surcharge.

The Court declared unconstitutional the articles regarding the suspension of the holiday allowance, the taxation of unemployment and sickness allowances and the extraordinary contribution of solidarity. On the contrary, it sustained the constitutionality of the rest dispositions questioned, which included the amendments to IRS brackets, the reduction of tax deductions, the IRS surcharge and the extraordinary contribution of solidarity to pensioners.

To reach this outcome, the Court has mainly, but not exclusively, applied equality and proportionality. In an interesting paragraph regarding the suspension of the holiday allowance the Court considered that the sacrifices imposed on civil servants are in breach of the principle of equality, since no equivalent sacrifices are imposed to the private sector employees.

To apply these principles, the Court, interestingly, considered in its *obiter dicta* also the situation of the special vulnerability, due to the lack of labor income fundamental for the vital family needs, of the beneficiaries of some allowances, but also the impact of some of the dispositions under scrutiny on the financing of the social security system, relying on a consistent rationality of an operational strategy that fits within the legislator's freedom of interpretation.

5. <u>The European aftermath : Koufaki and ADEDY v. Greece decision of the ECourtHR (Cases 57665/12 and 57657/12, decision dated 7th May 2013), Mateus and Januario v. Prougal (cases 62235/12 and 57725/12, decusuib dated 8th October 2013.</u>

Unsurprisingly we Greeks have first brought our case before the European Court of Human Rights. Ms Koufaki and ADEDY (the Trade Union of the Public Servants in Greece), both petitioners before the Council of State at the previous case, complained that the Hellenic Republic, by the issuance of the decision 668/2012 had failed to respect primarily Art. 1 of Protocol 1 of the ECHR and other ECHR Articles. The ECourtHR dismissed the case as inadmissible as "*manifestly unfounded*". The Court has admitted in a very detailed form, the line of arguments and each and every one of the particular arguments of the 668/2012.

The Court has reminded that the Member States of the Council of Europe enjoy a large margin of appreciation with regard to their social policy [par. 31] and that, notwithstanding that the general principles governing Art. 1 of Protocol 1 apply also in matters of salaries or social benefits, [par. 32] however, this disposition "*cannot be interpreted as securing a right to a pension of a determined amount*" [par. 33]

The Court held that the restrictions introduced by the laws introducing the Memorandum are not a privation of property, but only a legally permissible interference in the peaceful enjoyment of the possessions in the sense and under the terms of par. 1 of Art. 1 of Protocol 1 [par. 34]. The Court emphatically accepted the motifs of the decision 668/2012, and the reasoning of the Introductory Report to Law 3833/2010 presented by the Government to the Parliament, explicitly speaking, i.a., about "*the biggest crisis of the public finances of the last decades*" and about "*the historic responsibility and the national duty*" for Greece to "*achieve the fiscal consolidation with objectives following a precise timetable*" [par. 37]. The Court, accepting all the essence of 668/2012 [par. 38], refers to the goals served by the measures [par. 40] to end up that it has no doubt that the legislator, by introducing the salary and pension cuts aimed a purpose of general interest [par.41].

Proceeding to the proportionality test, the Court, took note that the economic crisis presents an element traditionally taken into account when examining salary cuts, and has found that the measures were not disproportionate [par. 44]. In a scornfully bitter moment, the Court particularly mentioned that the salary cut of Ms Koufaki -the first plaintiff- from 2435,83 € to 1885,79 € [par. 45] is not of a "*level that risks to put the plaintiff in front of difficulties incompatible with Art. 1 of Protocol 1*." [par. 46] To establish whether the measures affecting ADEDY were in conformity with the proportionality principle, the Court simply referred to the Memorandum itself and the cuts mentioned there, and dismissed the argument that the salary cuts affecting the civil servants represented in ADEDY are disproportional [par. 47].

Finally, with not the slightest element of hesitation, a unanimous Court dismissed the complaint as inadmissible because, as already mentioned "*manifestly unfounded*".

It soon came out that the Koufaki/ADEDY case created a pattern for the treatment of analogous cases. On September 10th and August 27th respectively, Mr. Antonio Augusto da Conceicao Mateus and Mr. Lino Jesus Santos Januario filed a complaint before the European Court of Human Rights challenging the conformity of pension cuts, imposed by the Portuguese legislation implementing Memorandum obligations of Portugal. The applicants, pensioners eligible to receive social security benefits under the Portuguese public pension scheme, had to suffer reductions on their holidays and Christmas allowances. These reductions were inflicted by the State Budget Act of 2012 and have resulted to cumulative losses of 10,8% and 10,7% of the applicants' respective total annual pension payments, including the holiday and Christmas allowances. In a decision dated July 5th, 2012, decision 353/2012, the Portuguese Constitutional Court has found that these reductions were in breach of the rule of the "proportional equality", therefore unconstitutional. However, taken into consideration that it, at the advances stage of implementation the budget was already in, was impossible for Portugal to design alternative measures in order to meet its budgetary objectives and secure financial support from its lenders - "*which was of 'an exceptionally important interest'*"; so the Court that it; own decision should not take effect in 2012, i.e., admitted the cuts for the year 2012 [par. 9]. What the Portuguese Constitutional Court did, was to divide principles from praxis: by virtue of the rules the measures at stake were not permissible; by the force of the facts, they have been admitted. On a complaint lodged by the first applicant before the Constitutional Court challenging the constitutionality of the cuts of his Christmas and holiday allowances, he received a letter from the Court referring to its above decision. So the case arrived to the European Court of Human Rights,

The EuCourtHR followed the path drawn by its decision on the Greek case. This time, to assess Portugal's the financial situation the ECourtHR relied not on the evidence offered by the national Parliament and accepted by the national jurisdiction, but on the European Union's assessment of the economic situation of Portugal. The Court referred to the relevant working paper of the European Commission and to the subsequent Decision of the ECOFIN Council of May 17th, 2011, allowing an "*ambitious but realistic*" program of financial assistance program to Portugal [par. 11].

The Court, after having reminded its constant jurisprudence on Art. 1 of Protocol 1, noted that the cuts at stake "*were intended to reduce public spending and were part of a broader programme designed by the national authorities and their EU and IMF counterparts to allow Portugal to secure the necessary short-term liquidity to the State budget with a view to achieving medium-term economic recovery [...]. The very fact that a programme of such magnitude had to be put in place shows that the economic crisis which was asphyxiating the Portuguese economy at the material time and its*

effect on the State budget balance were exceptional in nature, as the Constitutional Court indeed recognised in its decision of 5 July 2012." [par.25]. The Court, "*as it recently did in similar circumstances relating to austerity measures adopted in Greece (see Koufaki and Adedy [...]*)", considers that these cuts " *were clearly in the public interest within the meaning of Article 1 of Protocol No. 1. Like in Greece, these measures were adopted in an extreme economic situation, but unlike in Greece, they were transitory*." [p.26] Proceeding to the assessment whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the applicants' individual fundamental rights [par. 27], the Court, once again reminding the Koufaki/ADEDY case, considered that the applicants' right to the peaceful enjoyment of their possessions, this time limited both in time and in quantitative terms was not disproportionate to reduce the State budget deficit on the expenditure side [par. 28] and, referring again to the Koufaki/ADEDY case, declared that "*since the legislator remained within the limits of its margin of appreciation and previous measures [...]had proved to be insufficient, it is not for the Court to decide whether better alternative measures could have been envisaged in order to reduce the State budget deficit*" [par. 28]

The obvious final finding was that "*In the light of the exceptional economic and financial crisis faced by Portugal at the material time and given the limited extent and the temporary effect of the reduction of their holiday and Christmas subsidies*" the applicants did not bear a disproportionate and excessive burden [par. 29], therefore the application is "*manifestly ill-founded and must be declared inadmissible*" [par. 30].

III. Queen's gambit accepted[*]: the rise of the German sovereignty and the fall of the non-bail out principle [*BVerfG 1390/12* and *Pringle*.]

1. Both the German *BVerfG 1390/12* and the European *Pringle* decision have treated essentially the same subject: the notorious or famous non-bail out clause, as stipulated in Art. 125 of the TFEU. In the terms of Art. 125 TFEU neither the EU nor any Member State shall "*be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for joint execution of a specific project.*" As a political instrument, the clause is thought of as the non-rescue clause: if a Member State of the EU cannot pay its debts, it's left into the hands of fate. The two decisions have been issued at the

[*] A gambit is a chess opening in which a player sacrifices material in the hope of achieving a resulting advantageous position. The word "gambit" was originally applied to chess openings in 1561 by the Spanish priest Ruy López de Segura from the old Italian expression *dare il gambetto*, meaning to put a leg forward in order to trip someone and make him fall. Queen's gambit accepted: 1.d4 d5 2.c4, 2.c4 dxc4 e.ct. For additional quick information and further references, see Wikipedia under "*Queen's gambit accepted*."

same political and institutional time, but not simultaneously; the German decision was issued on September 12th, 2012 while the European one about two and a half months later, on November 27th, 2012. Evidently, the European judges have framed their decision after having read the deliberations of their German counterparts. Read together, the decisions form an integral whole and give a significant picture of the actual state of the fundamental political, institutional and legal orientations of the EU.

2. Both cases treat the issue of the ESM Treaty. Based on the Decision 2011/199, the EU members have added a 3rd paragraph to Art. 136 TFEU, providing that the Euro-zone Member States "*may establish a stability mechanism*." In addition, the Euro-zone Member States have concluded an international treaty among themselves, establishing the European Stability Mechanism, the ESM, which is given the form of a legal entity of international law. By virtue of Article 11 of the ESM Treaty, its "*shall be to mobilize funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.*" The terms of the conditionality will be reflected in a Memorandum of Understanding with the Member concerned. By virtue of Art. 19 of its Treaty, the ESM may grant support to an ESM Member "*in the form of a precautionary credit line and in the form of loans purchase of bonds issued by an ESM Member on the primary market and operations on the secondary market in relation to bonds issued by an ESM Member*."

3. <u>BVerG 1390/12</u> is a decision issued on a constitutional complaint lodged by a group of Professors and the Party of the Left. The complaint challenges Germany's three internal legislative acts regarding ESM, which are the law ratifying the amendment of Art. 136 TFEU, the law ratifying the ESM Treaty and the law releasing Germany's financial contribution to the ESM.

   The decision indulges into a rather lengthy proclamation of principles of the German constitutional law, in particular with regard to the functioning of the democratic principle and, in more detail and more specifically, with regard to the fiscal autonomy of the German Parliament. The decision sanctifies the absolute supremacy of the German Parliament with regard to budget and fiscal decisions: no-one can bind the German Parliament when it comes to fiscal and budget matters. In addition, the decision declares that the monetary union ["*Waehrungsunion*"] is a "*stability community*" ["*Stabilitaetsgemeinschaft*"]. The language chosen is severe and rigorous, and an unsuspected reader may enter into the feeling that the Court would declare the relevant laws unconstitutional.

This is not the case. The Court, having established rigidly the principles safeguarding Germany's national sovereignty in the matters of financial and fiscal administration, dismisses the complaints on the grounds that the laws under attack –i.e. the whole of the ESM "package"-do not entail any loss of fiscal autonomy for Germany or any Germany's financial undertaking beyond the sum released by the Parliament, do not delegate fiscal powers of the German Parliament to anyone and is not in breach with the democratic principle as stipulated by the German Constitution. To put it simpler: for the German Constitutional Court what matters is the German supremacy with regard to anything new the EU might deem necessary in relation with financing and budgetary matters; the ESM and its moneys is peanuts.

4. In the Case C-370/12 [*Pringle*], the Court of the European Union issued a preliminary ruling on questions asked by from the Supreme Court of Ireland on the occasion of a judicial dispute initiated by the challenges Mr. Thomas Pringle, Member of the Irish Parliament, against the conformity with EU law of the EU decisions regarding the establishment of ESM. The Court, in an elegant interplay between the wording and the assumed purpose of Art. 122 par. 2 and 123 TFEU, finds that these Articles do not prevent the establishment of the ESM.

   I will stay in more detail in the Court's interpretation of the non- bail out clause (Art. 125 TFEU). In the Court's view [par. 130] it is apparent from the wording used in Art.125 TFEU, that the disposition is not intended to prohibit either the Union or the Member States from granting whatever form of financial assistance to another Member State [par. 136]. Given that the objective pursued by Art. 125 TFEU is to ensure that the Member States follow a "*sound budgetary policy*" [par. 135], it must be held that that provision does not prohibit the Union and the Member States to grant any financial assistance to a Member State, but only that type of a financial assistance, as a result of which of the recipient Member State would have the incentive to conduct a sound budgetary policy. Or, more simply, there is no general prohibition of bail out. On the contrary if the objective pursued by Art. 125 is served by fiscal assistance to a Member State accepting –through the mechanism of the Memoranda- to follow a sound budgetary policy, i.e. the economic orthodoxy of the day, neither Art. 125 nor anything else in the TFEU poses any problems to its financing. The non-rescue clause applies for sinners only.[*]

[*] The Court notes also that "*the instruments for stability support of which the ESM may make use [...] demonstrate that the ESM will not act as guarantor of the debts of the recipient Member State*" [par.138] and that "*the granting of financial assistance to an ESM Member […] in no way implies that the ESM will assume the debts of the recipient Member State*." [par.139]. By these affirmations, the Court suggests that, after all, ESM is not bailing out. Wisely, the Court doesn't push this argumenta as far as to say that there is no bailing out element in the ESM structure.

5. To put it mildly, the ESM legal and financial structure is a clear mode to circumvent the non-bail out clause at the cost of national budgets' financing. For the German court, the core issue is whether decisions of strategic character of the magnitude of the decision to establish and finance an institution like the ESM fall within the European realm and, thus, escape the German sovereignty or not; for the European court, it is whether the cardinal for the EU economic and monetary policy non-bail out clause could be by-passed without the impossible immediate change of the relevant Articles of the TFEU.

6. Queen's gambit accepted. There is a sacrifice element in the hope to get advantages – a *gambit*- in both cases: in the German case, the decades' long tradition of encouraging a progressive course toward a European integration has been sacrificed for the sake of German supremacy. In the European case, the non-bail out clause, a bulwark of the stability concept of Europe in general and of the monetary union in particular, has been sacrificed for the sake of saving a Member state of the Eurozone from default.

7. I have found no better way to express the transformative moment of the European Law it better than an earlier Phillip Allott's description: the European Law is presented as an entity by itself, driven by a *Trieb*, an internal impulse in the Freudian sense, eager to capture everything falling within its attention, transform it in its image and likeness, and all this in the name of the supreme finalities of the system, while the European Community's superego, the Court, which is also a powerful part of her ego, uses law to achieve this mutation; thus, European Law becomes an independent process of political development [Phillip Allott, *Adherence to and Withdrawal form Mixed Agreements*, in Adherence to and withdrawal from mixed (EC) agreements, O'Keefe and Schermers, eds., *Mixed Agreements*, (1983), 98]. Allott's accurate picture is best illustrated by the example of the gradual process of jurisprudential law making in the field of international relations is most indicative: through *AETR*, *Kramer* and *Opinion 1/76* [cases 22/70, 3,4 and 6/76, Opinion 1/76] the European Court of Justice ended up in declaring, more or less, that whenever the pursuit of a goal set by (or deducted from) the Treaties calls for, the European Community is entitled to step in, take over and legislate in fields, which, before this encroachment, were thought of as belonging to the national states.

   The German high profile jurisprudence has played an important in the flirting relationship between the European and the national law. This is brilliantly depicted in two monumental decisions of the German Constitutional Court, the *Solange I*, dated 29 May 1974 [BVerfGE 37, 271 2 BvL 52/71] and the *Solange II*, dated 22 October 1986 [BVerfGE 73, 339 2 BvR 197/83]. The German word "*solange"* means "*for as long as*". In the terms of *Solange I*, for as long as the integration process has not progressed so far that Community law offers a binding catalogue of fundamental rights of adequate

protection, in comparison with one offered by the German Constitution, the German Constitutional Court will admit constitutionality control of a European Communities' act on grounds related with fundamental rights' protection. In the terms of *Solange II*, for as long as the European Communities, and in particular the European Court case law, ensure in a way substantially similar to the protection of fundamental rights ensured by the German Constitution, effective protection of fundamental rights against the sovereign powers exercised by the Communities, the German Constitutional Court will reject as inadmissible recourses for constitutional review of an act of the European Communities on grounds related with fundamental rights' protection.

There is only one message out of a combined reading of the *AETR*, *Kramer*, *Opinion 1/76* and the *Solange* cases: if and for as long as you do not do it for me, I will do it for you; once I will do it for you or you will do it for me, both of us will relaxingly enjoy it. BVerfG 1390/12 scores a full speed reversal of the integrational logic characterizing the adolescent years of the European Law and *Pringle* accepts it. The German Court proclaims that, Germany, by virtue of her Constitution, is and will always be the master of the decisions at stake, *ad perpetuum*, forever; the EU may exercise powers with regard to budgetary issues only for as long as, *solange*, she does *not* step into the correspondent sovereign German competencies, as and to the extent they are proclaimed by the German Constitutional Court.

The *Pringle* decision marks the reversal of the past and the introduction of a new political climate in the European jurisprudence. To overcome textual shortcomings, the Court masterfully utilizes its well-known method of recourse to the scopes, the *telos* of the system. Only this time the Court uses the method not to acquire powers from the states, but to surrender powers to them. Some shabby remains of the old language –e.g. that states' ESM activities should be in conformity with EU Law- are no more than a poor attempt to remind the once upon a time shining European pride and self-sufficiency.

The European Court declares that the *telos* of the system is the pursuit of a *sound budgetary policy*, but it doesn't identify its content. The German Court completes the job: the monetary union is a "*stability community*" - not a development community, not a social cohesion community, not some other form of community, but only a stability community. "Stability" is a vague term as well, but not as vague as the term "sound". There is a common understanding that "stability", more or less, equals or leads to austerity policies.

Although framed in conceptual terms, the critical issue here is not a matter of definition but a matter of power. In my understanding the main legal message of the German decision is not whether Europe's monetary union is a stability union or

something else, but that the highest and most prestigious German Court, by the force and might of a decision of constitutional relevance, declares that Germany –i.e. any German government or Parliament, actual or future- has no constitutional possibility to see in the monetary union anything else but a stability community. The European Court, some weeks later, tacitly admits the new borderline

Europe's *Trieb* is fading away, if it still exists; the resistance to the *Trieb* defeats the *Trieb*. Europe is stepping back.

IV. Loves' Labour's Lost?

Volumes of legal work, among which also pages of excellent legal refinement, have been mobilized to convince the good old times to come back. It didn't help. There is no grumble in this statement; it's just the acknowledgment that, in conditions of the extremity of the actual crisis, something else precedes and law follows. In Shakespeare's play a King and three lords have lost their labours, since their disguise into somebody else did not help them to successfully suit a princess and three ladies; ultimately the objects the King's and the lords' desires have asked them to seek them again at a better time. In the cases discussed here, the legal labours to disguise the resentment against the inescapable new realities as breach of the existing constitutional order are lost, to the extent that they have not stopped the new course of things; more pleasant adjudication has to be sought for at better times.
At the end of the day, the Courts have saved the face of the constitutional normalcy. No-one has declared the existing legal order null and void *in toto*. However, the changes in the application of the existing legal texts are radical. Paraphrasing the Roman saying *Caesar dominus grammaticae*, we can hardly avoid observing that the crisis has dominated over words and phrases and has twisted them to accommodate with the overwhelming new realities. These new realities have arrived like calm water, seemingly harmless at the beginning, and then overflow everything and no force seems strong enough to stop them. Somewhere in between all these changes a new kind of Schmittean moment seems to arrive as well, a very different from the archetypical one, one, but not less effective.