Preface

The Agenda and the Contents of this Volume and an Acknowledgement

I.

This book concludes—and proceeds with—more than a decade of interdisciplinary research on the legitimacy *problématique* of European and transnational governance. The project was organised in the larger context of the Collaborative Research Centre 'Transformations of the State' at the University of Bremen,[1] and directed there by Josef Falke and Christian Joerges. Very close co-operation was established with the European University Institute in Florence where Christian Joerges held the chair for European Economic law until 2007 and also with the Oslo-based RECON project on 'Reconstituting Democracy in Europe'.[2]

The focus of the project as it was originally designed was on the tensions between trade liberalisation and social regulation. These tensions were explored both within the European Union and at international level. European regulatory strategies, problems and accomplishments were contrasted with functional equivalents in the trade order of the WTO, the SPS and the TBT Agreements. The volume on *Constitutionalism, Multilevel Trade Governance and Social Regulation*, edited by Christian Joerges and Ernst-Ulrich Petersmann,[3] was the first milestone of these activities. Thereafter, we expanded our research beyond the focus on health, safety and environmental protection into the development of standards of social protection, an expansion that was accompanied by the discovery of economic sociology as pioneered by Karl Polanyi and its integration into our analyses of the dynamics and the political dimensions of transnational markets and their institutional frameworks. The volume on *Karl Polanyi: Globalisation and the Potential of Law in Transnational Markets*, edited by Christian Joerges and Josef Falke,[4] documented this phase of the research.

The ambitions of our work extend far beyond the technicalities of trade liberalisation and its context into legal and constitutional theory. Ever since our first

[1] Details at: www.sfb597.uni-bremen.de/?SPRACHE=en.

[2] Details at: www.reconproject.eu.

[3] C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford-Portland OR, Hart Publishing, 2006), 2nd edn, with modified title: *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford-Portland OR, Hart Publishing, 2011); see, also, previously C Joerges, I-J Sand and G Teubner, *Transnational Governance and Constitutionalism* (Oxford-Portland OR, Hart Publishing, 2004).

[4] C Joerges and J Falke (eds), *Karl Polanyi: Globalisation and the Potential of Law in Transnational Markets* (Oxford-Portland OR, Hart Publishing, 2011).

presentation of the project,[5] we have continued in our search for an alternative to the conventional juxtaposition of democratic governance within constitutional states, on the one hand, and the not-so-democratic transnational governance, on the other, with the EU figuring as the superior and ever more legitimate model of governance beyond the state. We first sought to re-conceptualise the precarious legitimacy of European law; rather than understanding the EU as an unfinished democratic project on its way to perfection, we argued that European law could, and, indeed, should, derive its legitimacy from its potential to constrain the parochial and selfish legacy of the sovereign nation state. In particular, constitutional democracies had to become, and, indeed, have become increasingly aware that democratic governance is only conceivable co-operatively. In line with the fundamental democratic principle that those who are affected by public rule should have a say in its formation, we argued that supranational and transnational law should and could derive its legitimacy from the provision of legally-structured fora designed to cope with the external impact of one-sided national policies through the fair resolution of conflicts which the diversity of states and societies is bound to generate. In this conflict-resolving and mediating potential, we argued, lies the *inherent* democratic vocation of transnational law, which is categorically different from that of nation states.

This basic intuition was gradually developed further in two steps. One was an internal ('three dimensional') differentiation. With this step, our approach responded to the very general developments of legal systems, namely, the emergence of legal frameworks for regulatory politics and for governance arrangements. The second step concerned the international system. Co-operative problem-solving and fair conflict resolution are certainly more difficult to accomplish outside the well-developed frameworks of EU law in global arenas, but these difficulties in no way militate against its more extensive use. In particular, WTO law lends itself to re-constructions in such perspectives.

II.

When we were preparing the application for the final stage of our project, we assumed that we could dedicate the concluding phase to the further elaboration of our concept of conflicts-law constitutionalism and eventually its comparison with, and defence against, competing projects such as societal constitutionalism and global pluralism. Such academic endeavours, however, seemed no longer particularly attractive after we became aware of the impact of the financial crisis. To be sure, the crisis has, by now, been already with us for half a decade. The proceedings of the 2009 conference on the 'social embeddedness of transnational

[5] C Joerges and C Godt, 'Free Trade: The Erosion of National and the Birth of Transnational Governance' in Stephan Leibfried and Michael Zürn (eds), *Transformation of the State* (Cambridge, Cambridge University Press, 2005) 93–117.

markets', which were published in the above-mentioned volume,[6] were sensitive to the sudden topicality and renewed explanatory force of Polanyi's 'fictitious commodities'—land, labour and money—as a framework for the analyses of institutional responses to transnational institutional conflict constellations. Since then, the financial crisis has gained such momentum that a conclusion of our project by mainly consolidating our initial ambitions was no longer possible. The contents and structure of the present volume mirror this impact, which is, however, by no means uniform or comprehensive. We observe transformations of paradigmatic dimensions in the character of European rule, the institutionalisation of unprecedented regulatory activities which address Europe's crisis management directly, and significant, albeit less dramatic, changes in the long-established regulatory machinery and in European governance practices. Another essential objective of our project, namely, the comparative evaluation of European developments in which we used to assume an avant-garde function of European developments needs to be re-thought. Last, but not least, we have to re-consider self-critically the premises, the ambitions and accomplishments of our conflicts-law approach. This book seeks to respond to all of these challenges.

III.

Sabine Frerichs opens the volume with a prologue on money that responds to the overwhelming, albeit unwelcome, topicality of Polanyi's third fictitious commodity, and re-constructs the links and tensions between Polanyian perspectives and the general theoretical bases of conflicts-law constitutionalism.

The first part of the book pursues the three-fold objective of critique, self-critique, and re-orientation. Both Christian Joerges and David Schneiderman (in Chapters one and two respectively) re-visit the 'argument from external effects', a core premise of both 'conflicts-law constitutionalism' and 'deliberative supranationalism', its precursor. Can this argument justify the obligations of developing countries to respect the interests of investors in the success of their investments? Does it justify the 'strict conditionality' of the rescue(s) measure in the 'Memoranda of Understanding' which countries of the eurozone have to sign when they ask for financial support under the European Stability Mechanism? If this were so, the entire machinery of the authoritarian crisis management which Europe has established would seem defensible. We disagree: the 'argument from external effects' must not be (ab-)used to justify undemocratic intrusions either into the countries of the European periphery or countries which need foreign investment for their economic and social development. Both authors add, however, that this clarification does not offer positive yardsticks for either Europe's crisis management or the fairness of co-operative arrangement between developing countries and investors.

[6] Note 4 above.

Joerges argues in his defence of the premises of the conflicts-law approach as an alternative to supranational constitutionalism that effects of democratically-legitimated policies beyond nation borders are neither avoidable nor illegitimate per se. But those affected may have good reason to insist that their concerns should be taken into account. Conflict mediation, however, must occur in frameworks which are in line with democratic requirements. External effects of national policies must not be compensated for with the authoritarian methods of executive federalism.[7] This defence of the normative premises of the conflicts-law approach notwithstanding, Joerges underlines the need for its re-conceptualisation. The crisis has not only profoundly damaged the legitimacy of European rule, it has also generated new conflict configurations, to which the conflicts-approach should seek answers which foster the return of 'emergency Europe' into a constitutional condition.

International investment law constitutes an illustrative example for Alexander Somek's argument that a 'transnationally corrected representation' of economic interests 'infuses into democracy an oligarchic element'.[8] David Schneiderman analyses how international investment law reduces the political space of host states 'on behalf of a global oligarchy of investors',[9] and finds that the argument of transnational effects—that investment law aims at compensating for the lack of representation of foreign investors in host-state political processes—is misused in order to justify a highly asymmetrical outcome, as investors are neither vulnerable nor unaccounted for in political processes. This is even more so in cases of economic crisis. Instead of relying on third-party arbitration marked by secrecy and closure, investment disputes should be settled through deliberative processes based upon the principle of *audi alteram partem* ('the right to be heard') accessible to independent media and therefore in the public sphere. This would enable the investor to be heard but would also recognise national political processes.[10]

Students of European integration tend to treat international asymmetries and injustices with benign neglect. The parallels with the new intra-Union asymmetries seemed all the more shocking and came unexpectedly as the experience of a dramatic Schmittian moment rather than a new constitutional moment. The two comments by Christian Kreuder-Sonnen and Ming-Sung Kuo focus on the political and legal challenges of the apparent European emergency; Kreuder-Sonnen in primarily analytical and political theory perspectives, Kuo against the background of the post-9/11 debates in the US, and the affinities between the American emergency power regime and the legalisation of European responses to the crisis.

[7] C Joerges, Chapter one in this volume (Section III.2).

[8] A Somek, 'The Argument form Transnational Effects I: Representing Outsiders through Freedom of Movements' (2010)16 *European Law Journal* 315 et seq, at 342.

[9] D Schneiderman, Chapter two in this volume.

[10] Ibid.

IV.

Social Europe is something like the poor relative of the integration project. Historical, but also systematic, accounts deal first with the 'market', then with its regulation and governance, and only thereafter with the gradual emergence of a social dimension. We have reversed this order in view of the fact that the impact of the crisis is nowhere more drastic and depressing than in the turn to 'austerity' and 'competitiveness'; the deliberate subordination of social protection and social rights to the exigencies of the 'financial stability of the euro area as a whole'.[11] It is also with respect to the social that the former *avant-garde* function of the Union has given way to an asocial rigour which can be more effectively exercised in the Union than at international level.

The turn to austerity in the present crisis was drastic but, as Florian Rödl and Raphaël Callsen point out (in Chapter three), neither surprising nor without precursors. The roots of social austerity are to be found in the social deficit of the integration project, its asymmetry, and the neo-liberal tilt which the cautious moves towards a 'more social Europe' could never reverse. The jurisprudence of the ECJ in *Viking*, *Laval* and *Rüffert* added the weakening of national core institutions of industrial relations. The Maastricht EMU and the Stability Pact deprived the Member States of macro-economic steering potential. Thereafter, the only conceivable response to imbalances in their trade-relations was the devaluing of wages and social entitlements. The present turn to austerity follows these patterns. It seems only logical that the prime targets for an improvement of competitiveness are labour costs and the reduction of social entitlements. Free collective-bargaining systems are directly threatened in all the pertinent Memoranda of Understanding. There is hence not much left of 'social Europe' with institutions such as the 'social dialogue'. However, as Rödl and Callsen argue, it does not seem to be impossible to erect an ultimate legal limit against the de-stabilisation of national systems of collective bargaining by invoking Article 28 EU Charter of Fundamental Rights, even if this remains fraught with considerable difficulties.

Kerry Rittich (in Chapter four) highlights parallels with precarious labour conditions in many sectors in the global North and South, which are characterised by the weakening of the bargaining power of trade unions and further worsened by a transfer of economic risks and costs to workers as a response to transnational competition. However, the perception (and defence!) of these developments as functional necessities and dictates of market logics is unwarranted. In her view, the management of the crisis is clearly technocratic, albeit guided by political orientations which are dominated by, and dedicated to, neo-liberal beliefs. This holds true with regard to fiscal and monetary policy and also to labour law reforms. The fiscal policy maxim that 'debts must be serviced rather than re-structured' is a political maxim which implies that residual taxpayers have to 'pay the bill'; the decision

[11] Case C-370/12 *Pringle v Government of Ireland, Ireland and the Attorney General*, eg, para 65 (CJEU).

to base debt services on 'expenditure cuts rather than tax increases' is a further political favour to the wealthy. What seems particularly troublesome in her view is the one-size-fits-all monetary policy under the Maastricht EMU, which prioritises price stability and cannot take the varieties of European capitalism into account, and which, for the time being, does not provide for transfer arrangements which would compensate for the asymmetries.

V.

The focus of our research was upon the tensions between trade liberalisation and social regulation, and the idea of 'a three dimensional conflicts-law as constitutional form' was developed as a response to the problems that we have encountered in our theoretical work and case studies. In its 'first dimension', the conflicts-law approach deals with 'horizontal', 'vertical' and 'diagonal' conflict constellations both within and beyond the EU. The 'second dimension' conflicts law reflects the need for transnational regulatory politics and provides frameworks for the co-operation of national and supranational administrative bodies. Conflicts law of the 'third dimension' is concerned with the establishment of transnational co-operative arrangements which build upon the participation of non-governmental actors and epistemic communities. We have retained this analytical frame and the normative commitments in the structuring of the following chapters which will hence first deal with markets (understood as 'polities'), then with regulatory politics, and thereafter with comitology and new modes of governance. Europe's recent crisis law has not done away with these institutions, but it has established new regulatory bodies, and assigned new functions to existing ones; but, most importantly, it has extended the intensity of its regulatory activities into fields which were formerly exclusively within the legislative domain of the Member States or beyond the reach of European rule.

V.1

Harm Schepel's essay (Chapter five) is concerned with the social embeddedness of the economy and the dis-embedding moves of the ECJ's interpretation of the free movement of capital in the treatment of public corporations, 'golden shares' and the establishment of shareholder primacy. This jurisprudence, he argues, is part and parcel of an intellectual and legal project that has 'disconnected finance from the real economy and substituted "financialism" for capitalism'. It contributes to a structural transformation of the entire economy, where corporations cease to invest in productive activity and instead act as 'cash machines, taking on huge amounts of debt only to pass the proceeds on to shareholders', according to a logic which makes 'no sense outside the stock market itself'. There is a two-fold lesson to be learned from this analysis. The first is that the scope

of this debate must not be restricted to the newly-enacted crisis law and its regulatory frameworks, but must also encompass how the 'financial' crisis is not just a crisis of financial and monetary matters, but a reflection of a re-configuration of the relationship between the financial and the 'real' economy. The second lesson is that these transformations are brought about through deliberate moves in the legal framework. Financialisation resists legal controls, but this resistance has been produced through law.

European integration has generated inter-dependencies which overburden both European law and its political potential. What became apparent in the financial crisis can also be observed with regard to other important projects. Germany's *Energiewende* is a case in point. This project cannot be organised hierarchically but requires a multitude of co-ordinative efforts already at national level. The European context increases these challenges again very significantly. Carola Glinski (in Chapter six) analyses different strategies to deal with these tensions and shows how the recent ambitions of the Commission and the judicial efforts to integrate the market for renewable energies further, based upon neo-classical 'least-cost approaches', would not only jeopardise national political concerns such as structural development, the promotion of small- and medium-sized producers and the promotion of renewable energies as such, but would, in effect, also reject political solutions at European level. However, in a policy area as sensitive and as highly contentious as energy policy, further harmonisation should be based upon political understanding, instead of the market-promoting activism of the Commission and the CJEU which will not generate a constructive alternative to Europe's political deficit.

Jotte Mulder's contribution (Chapter seven) is part of a larger project which seeks to synthesise Polanyi's economic sociology and the conflicts-law approach. Mulder's understanding of social embeddedness is quite comprehensive. He suggests that independent and self-sustainable rationales for non-economic objectives need to be developed in order to overcome the existing asymmetries and to provide for a new perspective of the social dimension of the EU. His quest that 'conflicts should be resolved upon the basis of a process of negotiated co-ordination', providing for 'deliberative space that allows the inclusion of broader than managerial, monetary or efficiency based considerations', is in line with the intuitions of deliberative supranationalism, but opens new perspectives.

V.2

In the parlance of our approach, Chapters eight to twelve deal with the second and the third dimension of conflicts-law constitutionalism. The impact of the financial crisis is sometimes only indirect, but everywhere it is intense.

European regulatory agencies which would not copy the American model but chose to adapt it to the European constellation should become the core institutions for the regulatory task(s) that the 'completion of the internal market' required.

The discrepancy between Giandomenico Majone's pioneering suggestions[12] and current developments are drastic. European regulation is no longer concerned with the 'sustained and focused control by a public agency over activities, that are valued by a community'.[13] Both Deirdre Curtin and Michelle Everson focus, in their analyses of European 'regulatory' politics, on the recent transformation of these activities.

Curtin's contribution (Chapter eight) proceeds with her long-term project on European executive power and elaborates how the recent crisis management 'aggravates a long-standing problem of executive domination in the EU'.[14] In her account, the establishment of an autonomous executive layer is to be understood as the cumulative effect of under-specified legal requirements, de-formalised procedures and a steady increase in both the number of decisions to be delivered and the complexity of the tasks to be handled. By now, the executive layer no longer merely side-lines and/or complements the functioning of democratically-legitimated institutions, but actually replaces them. The shifts of power to the European Council, the 'least transparent branch' of Europe's compound executive, deepens Europe's steadily-increasing legitimacy gap further. The 'economic government' entails discretionary executive decisions and is dominated by a 'diplomatic paradigm' which turns parliaments and the general public into structural outsiders. The developments which fostered the rise of the executive power cannot be reversed. But the potential of increased parliamentary involvement, at national as well as at European level, and new modes of accountability exist and could be used.

Curtin's analysis of a transformation of public rule is complemented by Everson's diagnosis (in Chapter nine) of a structural transformation of the market sphere. Technocratic dominance, Everson argues, is not only a challenge to democratic statehood, but also to the functioning of markets. Whether conceived of as a Hayekian spontaneous order or as micro-economic rational machinery, technocracy cannot replace the rationality of markets or correct their assumed failures. Her generalising observations are substantiated by an illustrative analysis of the European System of Financial Supervision, established in 2010, and the supervision of British insurance industries by the UK Prudential Regulatory Authority. Behavioural economics, presented by its advocates as the philosopher's new stone, rather than providing reliable guidance, will instead serve to foster the 'pursuit of market utility in manipulation of industry and consumers alike'.

The European Central Bank is, in the perception of many observers, the winner in the struggle for institutional influence, but it is certainly not the frontrunner in the quest for new legitimacy of European governance. Established and expected

[12] G Majone, *Regulating Europe* (London, Routledge, 1996).

[13] P Selznick, 'Focusing Organizational Research on Regulation' in RG Noll (ed), *Regulatory Policy and the Social Sciences* (Berkeley CA, University of California Press, 1985) 363–67, at 363.

[14] See J Habermas, 'Bringing the Integration of Citizens into Line with the Integration of States' (2012) 18 *European Law Journal* 485, 487.

to pursue its stated goal of price stability in a political vacuum, the bank was confronted with ever more socio-economic diversity within the Union and a crisis with asymmetric effects in both the centre and the periphery states, and massive conflicts over distributional conflict among (and within!) the states 'whose currency is the euro'. 'With conflicts over re-distributive issues becoming more salient', Henning Deters observes (in Chapter ten), 'the chances diminish to argue over these differences in a reasonable and consensus-oriented fashion' which could be characterised as deliberative in the noble Habermasian sense. The (at least on paper) super-independent Bank is anything but a European independent agency in the Majonian understanding. Majone refers to it as a 'constitutional monstrosity',[15] and indeed, the bank became involved in (re-)distributive bargaining, the design of policy memoranda, *and* their implementation. Its internal decision-making can no longer be understood in deliberative terms, but mirrors the controversies over the sharing of financial risks and burdens which the crisis continues to generate.

V.3

The study of the comitology system as it operated in the 1990s has inspired the concept of 'deliberative supranationalism', a mode of innovative problem-solving organised by a pluralistically-composed network of experts and administrators, orchestrated by the European Commission, under-legalised but worthy of deeper constitutionalisation—the prime example of the second dimension of conflicts-law constitutionalism.

Josef Falke's contribution (Chapter eleven) is an analysis of the recent legislative changes which concludes that the Lisbon amendments on delegated acts and the reform of the comitology procedure have structurally 'weakened the conditions that comitology can function as a means of deliberative democracy'. Delegated regulation can now operate in somewhat autopoietic modes, no longer relying on committees, but subjected to political supervision and ex-post control by the European Parliament and the Council (Article 290 TFEU). The importance of these controls is marginal, however. Moreover, it seems unlikely that the ex-post control will allow for political debate on the content of a delegated act.

The comitology procedure for implementing acts remains, at least on paper, based upon deliberation-enhancing rules. De facto, the Commission has gained a stronger role. The advisory procedure is informal and cannot ensure accountability on the part of the Commission. The examination procedure, on the other hand, does not function in controversial policy areas. In practice, the vast majority of appeal cases end in the same deadlock as the regular committee procedure,

[15] G Majone, *Europe as the Would-be World Power: The EU at Fifty* (Cambridge, Cambridge University Press, 2010) 34 et seq, 162.

because the appeal committee fails to obtain the qualified majority which is needed for a negative or favourable opinion, which, in turn, again strengthens the position of the Commission. Furthermore, the written procedure does not allow for effective exchange of arguments and makes it difficult for the members of the committee effectively to control the Commission. 'In sum, [the reforms] have strengthened the position of the Commission and changed the incentives for deliberation'.

The authorisation of genetically-modified organisms (GMOs) is the most contested field of European regulatory politics. In her analysis (Chapter twelve), Maria Weimer points to a striking contrast between the legislative ordering and the practices of its implementation. The regulatory framework can be read as a codification of deliberative 'ideals'. It provides for a separation between risk assessment and risk management, thereby reconciling two potentially conflicting rationalities of risk regulation: scientific and political rationality. Both procedures institutionalise horizontal co-operation, which should ensure the inclusion of different policy goals as well as respect of the principle of precaution. However, the typical problems of risk regulation such as scientific uncertainty, strong economic incentives and market pressure, have provoked controversies and political deadlock, to which the implementation machinery has responded with top-down technocratic decision-making. Weimer re-frames the problem of GMO regulation as one of a precarious co-production between the *scientification* and the *politicisation* of the authorisation process. She shows that both processes are mutually accelerative, ultimately leading to a breakdown in deliberation at EU level. This contradicts the assumption expressed by some authors that deliberation is fostered by technocratic 'behind closed doors' decision-making. In the GMO case, the top-down imposition of epistemic authority has only increased politicisation, thereby contributing to the de-legitimation of all the EU institutions involved.

VI.

The avant-garde function of the European models of transnational governance can obviously no longer be taken for granted. If the story of Europe as the magician and the globe as its apprentice is no longer plausible, its re-writing will have to consider the advantages of a less structured ordering and a more modest, rather than an ever closer, Union. When contrasting European and international examples in the preceding chapters, we did, in fact, observe such inversions. The studies in Part III of this volume will confirm this impression.

Olga Batura explores the deliberative elements of conflict resolution beyond the EU in her study (Chapter thirteen) on the UN Specialised Agency for Information and Communications Technologies (ITU) and contrasts it with the European developments. The ITU originally presented a 'typical second-dimension arrangement' in the terms of the conflicts-law approach, driven by the common goal of co-ordinating the technical requirements for the operation

of telecommunications services. However, with technological change and its expanding scope, liberalisation, privatisation and the growing concerns of the global South, new distributional conflicts have arisen which challenge the competence and legitimacy of this agency. Batura analyses the efforts of the ITU to internalise these political conflicts and to provide a forum in which 'technical expertise meets political discourse' through procedural arrangements that allow for inclusive deliberation and the balancing of all concerns. To be sure, these attempts have not remained unaffected by the liberalising and dis-embedding agenda of the WTO/GATS system, which have also led to adjustments in the ITU approach to the WTO's liberalising rationale in order to retain its authority vis à vis the WTO dispute settlement mechanism. And yet, expert-driven activities such as information input and exchange, consultancy, risk assessment, monitoring, etc, are forms of interaction with deliberative elements; the impact of supranational or transnational committees and networks seems, to a significant degree, to depend upon the quality of professional practice.

Professional practice and the ethos of professions are by no means mere fairy-tales, Martin Herberg adds (in Chapter fourteen). He distinguishes between two types of professional practice: a quality-oriented, reflective, context sensitive, client-oriented approach committed to the principles of professional integrity, impartiality and self-restraint, on the on the hand, versus a context-insensitive, theory-driven, standardised, quantity- and efficiency-oriented commercialised technocratic type of approach, dominated by a managerial paradigm, on the other. He argues that globalisation 'in which quantity dominates over quality, in which the standardisation of all products and services becomes a dogma, and in which professional ethics are sacrificed in favour of efficiency' advances the latter. However, he insists that there are also self-constitutionalising norms and standards of good practice emerging within the professions which could even be regarded as a counter-movement against the dominant neo-liberal and managerial paradigm. Therefore it is important that supra- and transnational governance arrangements are 'shaped in a way that supports [good] professional practice'.

VII.

What is left of conflicts-law constitutionalism as we have designed it in the course of our research? Is there even a future for this approach? The introductory chapter by Joerges (Chapter one), in its concluding section, explores this potential. The premise is again the hope that technocratic rule will not be able to replace political processes—together with the expectation that the responses to the new conflict configurations which the European crisis and Europe's crisis management generate will not simply be resignation and despair, but also contestation and political struggle.

The survival of the project of conflicts-law constitutionalism will depend on an elaboration of such perspectives. It will also depend on its perception by, and

interaction with, related efforts. The concluding chapters by Joseph Corkin and Karl-Heinz Ladeur (Chapters fifteen and sixteen respectively) as well as Hauke Brunkhorst's epilogue are encouraging signals.

Corkin points to the ambivalences of the 'argument from external or transnational effects' and underlines the need to become aware of and understand the precarious balance between the results of (nuanced) national political balancing processes amongst competing national concerns and interests and their (potential) impact upon 'foreign' concerns and interests. For Corkin, this balance is all about achieving the 'delicate and complex task' of a 'perfect blend of horizontal and vertical accountabilities' in order 'to stem a seemingly inexorable drift towards de-legalisation and de-politicisation'. The second aspect concerns the no less precarious tension between the legitimacy and accountability of governance architectures and their 'problem-solving efficacy' related to functional necessities, increased societal complexity, limited knowledge and persistent uncertainty both in day-to-day governance and in cases of crises. In the absence of conflict, the focus of horizontal co-operation is not then on the constitutional legitimacy of the architectures, but simply on their institutionalisation of mutual learning and on their problem-solving capacity; which, of course, changes in cases of conflict. Thus, European or transnational governance arrangements face the challenge of co-ordinating legal difference through mutual recognition, mutual law and mutual learning.

How could we talk so often and at such length about the social embeddedness of markets and the economy without substantiating this notion with social norms? Karl-Heinz Ladeur's contribution fills this deplorable gap in our argument and, by the same token, in our critique of Europe's authoritarian crisis management. Social norms not only underlie the different national legal systems but are, in fact, instituting the different legal orders. Thus, some conflicts deriving from legal difference can be resolved through (European) law, whilst others cannot be addressed by law—even in fields of law that are already harmonised. The problems relating to the governance of the euro are so highly complex and politicised that it would be an illusion to pretend that a common economic or budgetary policy could be governed by the European Commission or the European Parliament. Consequently, 'more intense integration requires a paradoxical "diversity management", [and] it would be better to refine the new version of the conflict-of-laws approach as a tool-box for this task and to accept limits of integration instead of piling up ever more explicit European norms and competencies'. In Ladeur's opinion, it might 'turn out to be an even more destructive decision to deepen the political union in order to mitigate the bad consequences of the common currency'. Also, the necessary 'like-mindedness' of societal actors for a new move towards 'constitutionalisation' of the EU, which is meant to replace the emergency regime and to compensate for (the recent) dis-integrating tendencies, cannot be pre-supposed either.

Do our efforts deserve some philosophical blessing? Hardly so, but Brunkhorst's epilogue does deal with the concerns which we pursue in our defence of

conflicts-law constitutionalism against the European turn to authoritarian managerialism. We differ in our assessment of the difficulties of liberating Europe from this entanglement and also in the democratic credentials of the conflicts-law approach. But there is unity in this diversity. We seem to share the view that unity is not an accomplishment per se and the defence of the euro would be too high a price for the loss of democracy and the destruction of the rule of law. The efforts in the contributions to this book to find ways out of the crisis explore a great variety of options, but nonetheless remain tentative and cautious. We refrain from providing any comprehensive, let alone, harmonising, assessment of their relative merits. However, we do believe our re-conceptualisation of conflicts-law constitutionalism to be an option that deserves to be pursued further, and we can even explain why this is a thorny task for both conceptual and practical reasons: 'Europe', and, for that matter, those studying it, find their object and themselves 'squeezed between the impotence of national politics, the democratic deficit of European policies and the growing mistrust of the markets'.[16]

VIII.

A Preface without acknowledgments may be possible but would, in our case, be thoroughly inadequate. All of the books cited in note 3 above and all of our articles produced during the long life of the projects mentioned in notes 1–2 above have been edited with great care, patience and understanding of the difficulties which non-native speakers have with the use of his language by Chris Engert. Thousands of pages, countless hours, stressful last-minute submissions, and many other things that money can't buy: we have every reason to be very grateful.

Carola Glinski & Christian Joerges
Bremen/Berlin

[16] I Krastev, 'The Political Logic of Disintegration: Seven Lessons from the Soviet Collapse', CEPS Essay, 9/2012, 1–10, at 1; text available at:www.ceps.eu/book/political-logic-disintegration-seven-lessons-soviet-collapse.