CONFLICTS-LAW CONSTITUTIONALISM:
AMBITIONS AND PROBLEMS

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1. INTRODUCTORY REMARKS

This contribution has a background in my work on European integration and also in the projects on transnational governance pursued in Bremen and at the EUI for a good number of years. I had hoped to provide a synthesis of these efforts. The project which I have defined as “conflicts-law constitutionalism" (c-l-c)¹ is rooted in European law. The approach was designed as a counter-move to the orthodoxy of European legal doctrines and an alternative to the mainstream of European constitutionalism, on the one hand, and a defence of the integration project against both the gradual destruction of Europe's welfarist legacy and its clandestine de-legalisation, on the other – with the constructive ambition to defend the European commitments to democratic governance and the rule of law. In many policy areas, it seemed indeed reasonable to understand the EU as a very advanced transnational configuration with stable political commitments which were supported and continuously moved ahead by its sophisticated juridified patterns. As c-l-c argued that such objectives could and should be pursued without an imposition of uniform regimes, it seemed promising, precisely because of its relatively modest intra-European ambitions, to explore its viability in the debates on globalisation and transnational law.

Under the impact of the present crisis such expectations need to be reconsidered. To be sure, the European integration project has survived many setbacks. The financial crisis, however, is of a new quality. It has affected the state of the European Union in many respects and is generating dramatic transformations. The crisis did not come out of the blue, however, and the implications which we are witnessing now had their not so readily visible precursors. The re-statement of the c-l-c project in the following section will point to such worrying tendencies as

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“de-legalisation”, “technicity” and “de-politicisation”, which have, by now, in the midst of the financial crisis, overwhelmed the integration-through-law project (II.1.-3.). It even seems that the conceptual apparatus of European legal scholarship is unable to capture these challenges, which Section III will therefore seek to elucidate with the help of Habermasian visions and Schmittian counter-visions.

The lessons for c-l-c beyond the European Union which will be sketched out in Section IV are only seemingly paradoxical. 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.

2. CONFLICTS-LAW CONSTITUTIONALISM: A MELANCHOLIC RE-STATEMENT

The two core assumptions upon which European c-l-c builds continue to seem sound in principle:

The first reflects upon the shortcomings of democratic constitutionalism within national states:

The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies pre-suppose and represent collective identities, they have very few mechanisms to ensure that ‘foreign’ identities and their interests are taken into account within their decision-making processes.2

European law has the vocation to compensate for the democracy failures of the nation states. This thesis turns the debates on the democratic legitimacy upside down: where European law compensates for the democracy failures of the Member States, its legitimacy seems well established. This foundation and objective of c-l-c contrasts sharply with the legacy of continental private international law and Anglo-Saxon conflict of laws, which was focused on the selection of the proper jurisdictional rules.

The second core assumption concerns the eroding potential of nation states to cope autonomously with the concerns of their citizens. European law has the vocation to organise co-operative problem-solving. Jürgen Neyer and I have ascribed this function to the opaque institutional arrangement of comitology committees, Europe's infranational “quark”.3 This “quark”, so we argued, has proven

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