

# An Historic Moment for Germany's Constitution

by Rainer Apel

The two days of public hearings on June 11-12 at the Constitutional Court of Germany, at its seat in Karlsruhe, drew intense attention both inside and outside of Germany: Hearing testimony for and against the Eurozone's facility for bailouts, the European Stabilization Mechanism (ESM), and the massive bond-purchasing programs of the European Central Bank (ECB), the Court is the only one in all of Europe with the authority to deal with Constitutional challenges against these two leading European institutions. Even if the Court were, as in previous such cases, to basically rule in favor of "Europe," and only pose certain restrictions and conditionalities on the ESM and ECB, bailouts of the Eurozone banks could not be continued on the same scope as in 2008-12—at least not through these two institutions.

Faced with difficulties in carrying out the bailouts, since the expected big capital flows into the ESM from outside of Europe have not materialized, the European Union and the Eurozone are preparing bail-in procedures that would simply grab deposits without the consent of the depositors; but these procedures are not in place yet, at least in part because the German government is being especially cautious at this time, with national elections coming at the end of September.

At the Court hearings, the government and the pro-bailout majority of the parliament, tried, as in previous such cases, to convince the judges to dismiss the eight legal challenges on sophisticated grounds. The challenges, the government said, were on "European," and not national, issues, and therefore not in the purview of this Court. The Court did not give in to this arrogant posture, and declined to dismiss the cases, stating that if it could be proven that ESM and ECB measures were not authorized by either the German Constitution or by existing EU treaties, the Court had the authority to rule against them. After some back and forth on the procedures and competences, the hearings began with the

pleadings of the plaintiffs, delivered by their legal representatives.

The high point of these arguments was the one by Professor of Public Law Dietrich Murswiek, who said, "This hearing is an historic moment" and the ruling which the Court will make "could prove to be the most important ruling in decades, and for decades to come." The ECB's policy of interventions, outside of any democratic control, is typical for a "euro rescue" policy which is ruining democracy, Murswiek charged. The ECB was apparently acting on the assumption that seeming "economic success" justified everything, even if this "success" was, in reality, a failure. To claim that rescuing the euro had to occur "at any price," was the "most irresponsible statement," doing damage to democracy, Murswiek said.

## Not Democracy, but 'Expertocracy'

The ECB is not legitimized by democratic procedures, but rather is based on "expertocracy," Murswiek said, and a red line has been crossed: "Now, the point has arrived, at which the Constitutional Court has to apply its own principles. The line of euro-rulings so far has been to put up warning signs, to build in restrictions, but otherwise give the go-ahead for the politicians—the famous 'Yes-But' rulings," Murswiek said. "This line cannot be pursued any longer. The Senate [Court] is faced with the limits it has formulated itself, before. That is the historic moment. A 'Yes-But' will no longer help. Now, there is a demand for a clear 'No.'"

The financial markets will scream against such a ruling, Murswiek said, but "were democracy to capitulate to the banks, it would be lost. . . . The state under the rule of law must not give in to the pressure, which, after all, does not come upon us like a natural event, but is being created by the players of the financial markets themselves." Murswiek's excellent argument resembled many of the points made in the ongoing anti-euro, pro-Glass-Steagall campaign of the LaRouche movement in Germany (the Civil Rights Solidarity Movement/BüSo, led by Helga Zepp-LaRouche), and in other European states.

Naturally, Murswiek's charges were denied in the counter-pleadings presented by the representatives of the pro-bailout camp, including Finance Minister Wolfgang Schäuble and ECB directorate member Jörg Asmussen, performing their soap-opera of how much they allegedly "care for Europe," and how much they alleg-



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*The LaRouche movement in Germany (BüSo) has challenged the bailouts and bail-ins of the Euro-dictatorship, with its fight for “The Real Trennbanken-System,” i.e., FDR’s Glass Steagall. Here, the BüSo organizes in Berlin, March 2013.*

edly do to “fight the crisis.” Their anti-democratic views were, however, amply exposed by their recurring core argument that the euro crisis posed an unabated “emergency” which required “special and unprecedented interventions,” even if the legal basis for these did not exist, and even if they were conducted without the explicit consent of the elected parliaments.

### **Carl Schmitt: Back from the Crypt**

This argument, in favor of special emergency privileges, was then harshly attacked from the side of the plaintiffs, as reviving the thinking of the infamous Nazi

crown jurist Carl Schmitt: Andreas Fisahn (legal representative of the Linke party, one of the eight plaintiffs) said that this was leading back to Schmitt and his emergency ideology, at the sacrifice of democracy; plaintiff Markus Kerber, of the Europolis group, also said that this argument had a striking semblance to the utterings of Schmitt, especially his Heidelberg essay on the “constitutional emergency,” which attempts to justify the creation of a new institution which would override all other institutions—for the duration of the emergency.

With these two interventions, the issue of “dictatorship” which Murswiek had already pointed to, was addressed in clear terms. Other plaintiffs called on the judges to keep in mind that this Court was the “last institution to turn to for a citizen,” to have his rights protected against the supranationalist grab for total power, which the European Union bureaucracy was pursuing.

The question now is, will the Court live up to its responsibility? Will it state a clear “No” in its ruling (which is not expected to occur before the German national election)? That will also depend on factors outside the Court, particularly, on how much resistance and protest against the Eurocrats will surface in the broader public, to increase the pressure on the government to change its views. A wave of public protest, featuring the LaRouche movement in a leading position from late 2007 on, contributed to a ruling of the Constitutional Court on the Lisbon Treaty of the European Union, in June 2009, specifying consultation rights of the German parliament on all key aspects of the European integration process.

And although the Court, in September 2012, dismissed demands by plaintiffs for an injunction against the newly created ESM, and against the ECB’s bond-purchasing, giving a preliminary go-ahead to the government and the Eurocrats, it announced, at the same time, that it would hold extensive, and public, hearings sometime in the Spring of 2013. These are the hearings that were just held now, and they put the alternative on the table: Either the Constitution of Germany, and implicitly also those of the other EU member-states, will be upheld, or the pro-dictatorship Eurocrats and the monetarist financial markets will prevail. This case at the German Constitutional Court is an historic moment, indeed.