Public lawyers and the Euro crisis in the German media: legitimating Eurosceptical positions through legal discourse?


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Introduction

Public debate over European integration in the various European union (EU) member-states during the “Euro crisis” from 2010 onwards has taken many shapes, but one can’t escape the impression that it has taken an unprecedented scale and an overall existential tone. A quick look toward the German debate, however, also confirms that most of the themes and arguments revolving around the EU – such as the compatibility of European integration with the basic law and constitutional democratic principle – had already been present for a long time in public discourse, at least since Maastricht. One element that can be singled out to help explain this continuity is the involvement of legal specialists in public debate. Law academics, constitutional judges or other legal specialists were prominent among the many voices that could be heard arguing about the future of European integration.

Although legal discourse has traditionally dominated debates over European integration in Germany, there is today very little research addressing the consequence of this dominance on the broader public discourse. Of course, the significance of many landmark rulings of the German Federal Constitutional Court (FCC) of Karlsruhe has not escaped scholars of European integration. Nonetheless, most analysis has remained confined to the legal domain (notably Weiler 1995) and tried to measure the consequences of these rulings on the broader international legal landscape of the EU. We would like to suggest that, with the focus very much on the outcomes of judicial decisions, the relationship between legal discourse and the broader public debate has been overlooked. Indeed, various legal specialists have been contributing to public debate besides Karlsruhe judges, from academics debating the various legal aspects of European integration through the media to representatives of the petitioners in constitutional case making their arguments public (who sometimes happen to be the same people). Crucially, the possession legal knowledge appears to allow developing and voicing a legitimate point of view on the European union. How do this specialized knowledge contribute to the shaping of a public discourse on the European union? What entitles legal specialists to speak about Europe? And – more crucially – what does it tells us about the way the European union is legitimated and contested in the public sphere? We argue that looking at the debates surrounding the “euro crisis” and its various episodes – including the shaping of new legal frames at European level, again several complaints and rulings by the German Federal Constitutional Court over constitutional aspects – offers the opportunity to advance some answers to these questions.

The central aim of this contribution is not to assess the legal “responses” of legal specialists to the debt crisis. We contend that, aside from the legal debate strictly speaking, legal specialists were necessarily involved in public (de)legitimation of the EU through their interventions in
the media. Therefore, as we would like to point out, the first element to elucidate are the conditions enabling legal specialists to have an agency on the public debate. In other words, what matters is to understand how these specialists became participant in the production of the public discourse on the European union.

Therefore, we propose to formulate our research question as follow: How did legal specialist contribute to shaping the way the EU was debated in public discourse during the Euro crisis? We would like to suggest, in order to answer this question, a slightly counterintuitive hypothesis: public interventions of legal specialists have contributed to a greater politicization of the EU debate. This hypothesis appears counterintuitive, given that legal discourse has a reputation of having soothing virtues on political antagonism. We will try to show, however, that legal discourse, as soon as it is performed in public, may also be put to use to engage with the (de)legitimation of the EU. We suggest that the role of legal specialists in the politicizing the EU should be measured against two distinct criteria. The first one rests on a definition of politicization as the existence of a possibility for controversy and alternative arguments to develop within public discourse. In this respect, we suggest that legal specialists may have contributed to politicization by making things controversial. That is to say that, through their public discourse, they may “reveal” a potential conflict by questioning the legality or the legitimacy of political action – thus creating a controversy that wouldn’t have become public otherwise. The second criterion rests on a definition of politicization as “polarization”, or put shortly as a broadening of the space between antagonistic positions within public discourse. We may advance legal specialists contributed to politicization by legitimating positions. Here, we suggest that the formal qualities of legal discourse may have allowed specifically for Eurosceptical positions to be translated and articulated in the public space.

These two dimensions, as we will show, are complementary rather than exclusive. They both rest on the condition of an agency of legal specialists on the public debate, which can be explained by two central factors: one favors the social proprieties of legal specialists as a source of public agency; while the other rather insists on the quality of the discourse they produce. These two dimensions, we argue, forms the core on how a specialized discourse is translated in the broader public space (section 1). Then, we will turn to the two complementary hypotheses of politicization as the making of controversy and politicization as legitimation of Eurosceptical positions (section 2).

In order to test our two hypotheses related to politicization, we base ourselves on an exploratory survey of the interventions of public law scholars in major German newspapers during the various episodes of the “debt crisis”. For this purpose, we systematically researched the interventions of legal specialists in four major national newspapers (Die Zeit, Süddeutsche Zeitung (SZ), Die Welt/Welt am Sonntag, Frankfurter Allgemeine Zeitung (FAZ)) from February 2011 to December 2012. The objective is not here to propose a full-fledged sociological analysis, but rather to answer the question of how legal specialists participated in the production of a public discourse on the crisis. Consequently, our approach will be an exegetic, qualitative one, focusing on the content of the “public” discourse of public law scholars.

1. Assessing the role of specialized knowledge in the politicization of the EU

In this section, we begin by reviewing the literature on EU politicization. The mainstream research-agenda on EU politicization tends, in its “classical” formulation, to overlook the agency of actors in politicizing the EU. Nonetheless, recent research has proposed to focus on
the role of discourse in politicization and to stress the “public” nature of EU contestations as a source of politicization. We then suggest that the crucial point is to conceptualize how specialists come to articulate publicly a discourse on the EU. In this respect, analyzing the relationship between specialized knowledge and politicization requires to borrow some conceptual tools to the sociological literature, in particular from the “sociology of intellectuals” (Eyal & Buchholz 2010).

From public opinion to public interventions: EU politicization in the literature

The role of specialists and, more broadly speaking, “elites” in the contestation and politicization of the EU has generally stayed out of focus of the mainstream literature in European studies. Indeed, as great deal of the theoretical effort in European studies has targeted what we could term a “popular Euroscepticism” as the main phenomenon to be explained. What we call the “classical formulation” of the research agenda on contestations of the EU has been addressing the link between preferences of the individuals in the general population and party positioning – a point that can be illustrated by the still influential pioneer contributions on Euroscepticism by Kopecky & Mudde (2002) and Sczerbiak & Taggart (2004). Research undertaken under this classical formulation tends to lend political and intellectual elites only a mere “responsive” role, whereby political parties tend to “cue” their voters. One of the more influential historiographical thesis suggests an evolution from a “permissive consensus” to a “constraining dissensus” phase in European integration, which rests precisely on the assumption that politicization of European issues grows as the integration process becomes less and less driven by political elites and more of a popular concern (Hooghe & Marks 2008 : 6). Therefore, politicization is seen as an essentially structural process, while very little attention is dedicated the role of “political entrepreneurs”. Generally based on large-number opinion surveys, this literature typically tries, with good reasons, to assess and to predict electoral behavior of individuals with regard to European issues, which will eventually decide the future of European integration. This is one of the main reasons why, while this literature has generated crucial theoretical insights and comparative research, it has so far overlooked the agency of various actors in framing and giving discursive content to the opposition to European integration.

Some recent research has endeavored a move away from an exclusive focus on popular adhesion and rejection, to engage with the discursive content of the contestations of European legitimacy. This move encompasses a very broad area of research and many approaches, ranging from reflexive history of ideas to content analysis of discourse. Particularly challenging for the “classical” approach to EU legitimacy and its contestations are what we can term “interpretative” approaches. Interpretative here denotes not only a methodological focus on the content of discourse, but also the principled refusal to build a priori criterion of legitimacy (Schrag Sternberg 2013 : 1). One of the main assets of this approach lies in its demonstration that EU legitimation is, and has been, constantly contested through various discursive constructions. Thus, politicization and conflict over Europe does not occur at the sole partisan level, but also and more importantly through public discourse. More notably, questioning the role of intellectuals in producing alternative narratives of European integration is at the core of a collective endeavor led by Lacroix and Nicolaidis (2010), following the former’s inquiry on the ideological basis of French intellectuals’ conflicted relationship to European integration (Lacroix 2008). In the former book, individual contributions each dealing with individual member-states clearly makes appear the diversity in the conceptions of “intellectuals” and of public engagement with European issues across the EU. The “internalist” point of view chosen in these works, nonetheless, limits itself to the
reconstruction and interpretation of intellectual visions of Europe. Thus, it leaves the issue of public intervention and, crucially, of who is entitled to speak about Europe out of its scope.

Another recent trend of literature seems to engage straight away with the question of public contestation of the EU as the main driver of its politicization (Statham & Trenz 2013 : 960). Contrary to the above mentioned “classical” approach to politicization, Statham & Trenz have emphasized the role of the media, rather than party politics, as “the important location (and data source) for contestation by political actors that can lead to EU politicization” (Statham & Trenz 2013 : 968). Media, here, is central as a locus of participation in “claim-making”, that is to say the practice a diversity of actors may endeavor to represent opinions toward the EU in one way or another (De Wilde 2011 : 570-571). Thus, public interventions on the EU occur in a broader space of claim-making practices. De Wilde & Trenz have accordingly proposed “an understanding of Euroscepticism as part of a more general practice of assessing the legitimacy of European integration” (De Wilde & Trenz 2012 : 541).

Unlike the classical approach, this literature emphasizes the agency of a multitude of actors in the (de)legitimation of the EU. Nonetheless, it is more concerned with the space in which claim-making occurs (here chiefly the media) than the agent making these claims. Consequently, it doesn’t bother to explain what are the limits to accessing this space for agents – in other word to make one’s claim a part of public discourse. While interventions of agents can be conceived as a public performance, the mere fact that they occur in public is here treated lightly. To sum up, we would like to stress that if we chose to consider, Euroscepticism as a “quality of public discourse”, as De Wilde and Trenz (2012) do, then we can hardly avoid the following question: under what conditions can Euroscepticism be performed as a public discourse? Indeed, (we are here stating the obvious) not anyone engages in public statements about Europe. While politicians usually and economists sometimes do, we more rarely hear representatives of, say, sporting associations like the UEFA engage with public justification of the EU as a polity (despite the fact they could well have interests to do so). Conversely, not all statements about Europe become part of public discourse. Legal discourse, in our case, is mainly performed through specialized publications, congresses, etc., and do not form a priori part of public discourse. Nonetheless, legal discourse over Europe may indeed become public discourse, as may other specialized discourses. The question, then, is how this transformation from a specialized discourse into a public one occurs. What we are trying to show with this brief development is, put shortly, that, to be coherent with the conceptualization of EU contestation as public performance, the analysis must engage with the twin questions of who performs it as well as of how it is performed.

Between qualities of agents and quality of discourse: sociological insights on conditions of public intervention

At this point, we are in fact asking a question that classical “sociology of intellectuals” has vied to answer for a long time. According to Eyal & Buchholz, classical sociology of intellectuals tries to elucidate “the movement by which knowledge acquires value as public intervention” (2010 : 119). They suggest that the common ground on which the classical sociology of intellectuals has based itself is the idea that intellectuals “intervened in political life on the basis of […] two defining features, that is, abstract knowledge and the commitment to universal values” (123). These features, they argue, are classically conceived of as properties of individuals. But this definition also stresses the intrinsic qualities of the discourse they manipulate (first among them its abstractness). In order to explain the conditions of public intervention of legal specialists, these two dimensions need attention.
The first condition used to explain why some individuals are legitimate to speak when others are not is the qualities held by individuals. Here, one could state that the qualities of the actors, who incorporate signs of social authority such as curriculum vitae, academic positions or judiciary functions, makes them legitimate to speak about Europe. In our case, it could be argued that legal specialists possess a particular kind of authority in their domain of expertise, from which they can draw to assess their quality of experts. These qualities are essentially “possessed” by individuals, and might consequently be conceptualized as a “capital”. The concept of capital also denotes its capacity for being traded and converted: converting authority in the restraint legal domain into recognition in the public sphere. Thus, public agency of actors is enabled by the mobilization of symbolic resources, which would constitute what Bourdieu has termed a “symbolic capital” (Bourdieu 1994).

A second condition of public agency lies in the formal quality of the discourse that is performed. Here, the formal quality of legal discourse makes this movement of translation from specialized to public discourse possible. More specifically, this condition suggests that formal quality precisely enables a double movement to take place. In the first place, it can be argued that the high degree of formal quality and abstraction of legal discourse makes it potentially efficient in the public space, as it readily match the qualities that are expected of a discourse performed in public. In the second place, legal discourse, through its formal quality, can convert political positions into more universal, abstract form. This conversion process is at the same time a transformation, where the political discourse that is converted is rendered unrecognizable (Bourdieu 1988). Then, where public performance of illegitimate political positions (such as Euroscepticism in Germany) would be impossible, public performance of these positions under a formal, technical discourse is recognized as legitimate.

**Legal discourse and politicization: how legal specialists can contribute to politicization.**

Various authors have already made the point for this “quality of discourse” argument about Germany and the involvement of legal specialists. As far as the structuring of public discourse on the European Union is concerned, Germany can be described in many ways as a “special case” when compared to other EU member-states: not only was it immune (until recently at least) of structured partisan Euroscepticism; it also has a long-lasting tradition of publicly debating European integration among rather narrow circles of specialists – chief among them legal academics – insulated from political conflict. A central historical explanation that allows linking those two features is to state that the absence of political conflict among mainstream political parties over European integration has led to the “migration” of this debate in legal discourse, or in another version, to this conflict being “expressed” by the judiciary (Davies 2012:6). For instance, Müller states that in Germany, “given the large political consensus, debates about the basics of European integration have, so to speak, migrated into legal discourse” (Müller 2010:88). Following this argument, legal discourse allows for a kind of low-key version of political debate to take place.

A similar, yet slightly different, point is made by Davies, in his attempt to explain the resistance of the FCC to European jurisprudence in the first phases of European integration until 1979. According to him, the judiciary, and more broadly legal academia, came to reflect “the broader unease with the path taken toward a European constitutional system in West German society, which could not, nor wanted to, be articulated by the FRG’s [Federal Republic of Germany] political elites (Davies 2012:6).” In these two versions, we find a link between the absence of structured political conflict on the one hand, and the investment of legal specialists in the debates over European integration on the other hand. Where the second version differs however, is in postulating a link of “representativeness” between production of
legal discourse, especially when opposing European integration, and society at large. Rather than in insulation from political space, legal discourse is here conceived as participating functionally to political representation. This argument is very similar to the one made by Statham & Trenz about “claim-making” in the public sphere, through which various actors can enter the business of representation.

Still according to Davies, the judiciary can successfully claim to represent public opinion – here opposition to Europe – thanks to the formal quality of legal discourse. Legal discourse possesses a quality that makes it legitimate where political discourse isn’t: “because of the claims to objective legal interpretation, the judiciary was less open to criticisms of being nationalist or anti-European” (Davies 2012 : 6). To put it another way, we have here a classical case illustrating the double movement of, on the one hand, conversion of political positions into abstract, universal discourse, and on the other hand, specialized discourse entering the space of “claim-making” and representation.

That’s why, while legal discourse may seem at first sight to “euphemize” political conflict by converting it into technical controversy, ultimately resulting in depoliticization on the debate over European integration; it can in fact push political positions to being represented in public discourse through a successful “claim-making”. This suggests, then, that legal specialists can contribute to making opposition to European integration legitimate in public sphere, by converting Eurosceptical position into legal discourse.

The absence of contentiousness of European issues between political parties in the German public sphere is then to be conceived as enhancing the opportunities for lawyers to successfully represent opposition to European integration – or, to push a little further the analogy between claim-making and business, it offers an unoccupied market-share for public entrepreneurs. With regard to the more specific context of the Euro crisis, we can propose the hypothesis that it also constitutes a favorable configuration of opportunities, raising the potential contentiousness of EU issues, of which legal specialists can take profit in order to strengthen their capacity to produce a discursive contestation of the EU. There again, legal specialists could be conceptualized as “political entrepreneurs”, who used the crisis context to make their voice heard beyond their narrow circle of expertise, thus affecting the way the EU is (de)legitimated in the broader public discourse.

2. Politicizing public discourse: Controversy making and legitimating opposition

In order to grasp the forms of agency of legal specialists on the public debate, we have to move away from a definition of politicization which “refers to increasing influence of elected or appointed politicians in decision-making processes at the expense of professionals, like bureaucrats, experts and lawyers” (De Wilde 2011 : 561). Rather, we take on De Wilde’s (2011) suggestion to consider politicization as composed of three elements : “polarization of opinion”, “intensifying political debate” and “public resonance” (De Wilde 2011). While we lack here empirical ground to assess public resonance, we propose to explore how legal specialists may have contributed, through their public intervention, to politicization in the two first dimensions. Our empirical survey of generalist newspaper suggest that lawyers have, on the one hand “intensified political debate” by making political decisions designed to tackle the Euro-crisis controversial; and, on the other hand, “polarized opinion” by taking over representation of opposition to Europe. These two contributions are enabled by the quality of

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1 This can’t fail to evoke J.Habermas famous accusation of a prominent German legal scholars (Dieter Grimm) of endorsing a “constitutional Euroscepticism” (Habermas 1995)
legal discourse, that allows adversarial positions to be expressed in legitimate terms, and by the qualities that legal specialists can mobilize to assess their expertise on EU matters.

It is worth noting that these two aspects refer to a quality of public debate over Europe. If we hypothesize that making Eurosceptical positions “politicize” public debate over Europe, hence situating politicization as equivalent to “polarization”, politicization describes here the breadth of the space between opposing positions, or, in other words, the scope of public debate. The “intensifying of public debate” is harder to assess in qualitative terms, as it seems to refer mainly to the amount of “claim-making” made about Europe – something that typically grows during ratification phases of European treaties. But intensification also supposes that the issue at hand, here the EU, is being made controversial, that is to say it requires the possibility of alternatives opinions to come to the fore. In this sense, it refers to the diversity of public positions that are able to exist at the same time in public space.

In the following sections, we examine successively these two dimensions. Each time, we shall proceed chronologically, to show how legal specialists took advantage the various episodes of the Euro crisis to make their voice public.

**Legal specialists and intensification of public debate: “controversy making”**

In this section, we suggest that legal specialists were pivotal in making the various legal measures and political decisions related to the Euro crisis a matter of controversy, in relation to which several distinct positions can come to existence.

The first dimension of the conflict that emerges from these early controversies revolves around the measures of financial support decided in intergovernmental arenas for avoiding the insolvency of Greece. The first issue that has arisen around these instruments concerns their compatibility with the existing European treaties. The drafting of an European Stability Mechanism (ESM) in the first semester of 2011 has in particular led to put into question the validity of the proposed measure with the so called “No bailout” clause of the TFEU (Art 125 §1).

The controversy here opposes two rival interpretations. For the supporters of a financial support of debt-stricken countries, the interpretation of article 125 as prohibiting the overtaking of a single member-state’s financial obligations by other member-states is abusive. They argue that “principles” that are explicitly stated in the treaties (“solidarity”) or general principles guiding the interpretation of the treaty (“loyalty”) must be recognized has having priority and thus allow the adoption of solidarity measures. Opponents to this measure offer a rival interpretation, where they stress the priority of the letter of the treaties against “doubtful constructions”, and thus the illegality of the measures decided in intergovernmental arenas. They also claim, at the same time, to provide a more accurate interpretation of the political intentionality that is reflected in legal texts. According to this interpretation, financial independence of European member states from one another must be considered as reflecting a decided political will. As Frank Schorkopf puts it, the no-bail-out clause “precisely defend the Euro states from meddling too far into financial, economical and

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2 Christian Calliess in *FAZ*, 06.29.2011
4 Ibid
5 Reiner Schmidt in *FAZ*, 04.05.2012
6 Lüder Gerken in *Die Welt*, 06.22. 2011
social matters, which Union member-states have chosen with good reason to keep for themselves.\(^7\)

Maybe more crucial to make the supranational decision controversial however were the various constitutional complaints addressed to the FCC during the ratification processes of supranational legal instruments designed to tackle the crisis – targeting here again the ESM, but also the unlimited acquisition of state obligations by the European Central Bank (ECB).

Firstly, the public campaigning of complainants has been supported by a set of legal arguments designed by high-level academics. Dietrich Murswiek, which as acted as a supportive legal expert of one of the most active complainants during the debt crisis, Peter Gauweiler, has published a brief version of its principal arguments in the economic pages of the *FAZ*. \(^8\) In this contribution, he directly engages with the question of democratic legitimation and parliamentary control of supranational organs. We can remark however that, despite their diversity, the various constitutional complaints have all contributed to raise the issue of the democratic legitimation of supranational instruments. As we will show later, this question has led not only to put into question the role of parliament in overseeing the action of executives at the supranational level, but ended up envisioning a possible recourse to direct popular legitimation through plebiscite.

Secondly, as various complaints were introduced over the constitutionality of supranational measures, the FCC engaged in a process of constitutional review, which could hypothetically end up in rejecting the decisions of the EU member state governments. As a result, its decisions became not only widely expected by political elites, but also followed closely by financial actors, as a ruling contrary to the European political decisions would have had necessarily entailed consequences on the financial markets. Hence, predicting the outcome of the process became highly strategic, even if the FCC was widely expected to validate the essential part of the measures. One of the principal forms of legal specialist’s public intervention, in this context, has been what we propose to call the “prosopopeia” of the FCC. By prosopopeia, we mean the operation through which legal specialists “make the court speak”, that is they personify the FCC by speaking in its stead. This operation typically entails both a suggestion (what the court *should* decide) and a prediction (what the court *will* decide).

For instance, opponents of the financial rescue measures state that the FCC will not, bend to “state reason”.\(^9\) It will only opine to these measures if there are guarantees that it stays under parliamentary scrutiny and accountability, and doesn’t pose any existential threat to the community. Other, such has Ulrich Fastenrath, contend that the FCC will limit itself to “fill out the gaps” that are present in the legal text it has to examine.\(^10\) Central in these operations is the expectation that the FCC will, in its final ruling, decide if Germany participation in the EU can still be legally situated within the frame of the Basic Law. If it decides that it can, then the ratification process may go through a classical parliamentary process, but in the other case it could decide that the only way to ratify these instruments is the plebiscite.

That the FCC’s role is precisely to determine where this border lays makes no doubt to the eyes of legal specialists,\(^11\) and judges of the constitutional court do not shy away from expressing diverging opinions. In an interview with, judge Peter Müller, when asked where,

\(^7\) Frank Schorkopf in *FAZ*, 06.29.2011  
\(^8\) Dieter Murswiek in *FAZ*, 08.12.2012  
\(^9\) Frank Schorkopf, ibid  
\(^10\) Ulrich Fastenrath in *FAZ*, 09.05.2012  
\(^11\) See, nonetheless, Christoph Möllers in *FAZ*, 10.20.2011
according to him, passes the red line, answers that the “possibility for sovereignty transfers are not yet exhausted”\textsuperscript{12}. Another judge, Peter Michael Huber, states to the SZ that “I can’t define it [the border], but I will recognize it when I see it”\textsuperscript{13}. The vice-president of the FCC, expresses his view that he now holds the recourse to plebiscite for compulsory in order to legitimate EU decisions\textsuperscript{14}. Others have also underlined the “populist” nature of arguments opposing the parliament and the “people”\textsuperscript{15}.

Thus, the question as to whether the oversight of the parliament is enough in European matters or if the people must have the final say has become a matter of controversy, which politicians have ultimately taken over, by advocating for example the introduction of direct democratic instruments in Germany. Here again, not all legal specialists have advocated a strict interpretation of the German Basic Law. For opponents of the plebiscite option, the Basic Law has already shown its plasticity and ultimate adaptability to European integration\textsuperscript{16}.

In a sense, these operations of interpretation and prosopopeia are quite usual in the legal realm, where expression of diverging opinions is encouraged, especially before an important case is decided. This has frequently been the case in Germany in constitutional matters, where the FCC has been using a “delay tactic” in order to leave an adequate time frame for the academic debate to take place (Davies 2012 : 6). They difference being (and it is essential) that it now occurs in the public sphere and not in specialized academic publications.

This publicity have the effect that even an apparently “technical” matter such as the ratification process of European legal instruments become a matter of public controversy, in relation to which a wide range of opinions can be expressed. We have here an example illustrating how the conversion of legal controversy into the public sphere can have the effect of making EU legitimation questionable.

**Legal specialists and polarization: legitimating Eurosceptical positions through legal discourse**

In this section, we suggest that legal specialist’s public interventions also had the effect of voicing a legitimate opposition to EU, which would have otherwise remained outside of the public sphere.

As we already underlined, the strong consensus on European integration of German political elites have resulted in the quasi-absence of voices opposing radically the EU in the public sphere. This adhesion could be described as “unconditional”, as opposed to an “instrumental” attitude, which would rest on a “cost versus benefits” type of estimation.

In which way, then, could legal specialists use legal discourse to break away from this consensus and legitimate what we call “Eurosceptical” positions? We argue that this movement can occur in two principal aspects. First, legal discourse can be used to contest the principle of legitimacy on which the EU rests as a polity. Secondly, it can deny the “ethical” dimension of the German commitment to European integration to put to the fore its national interest as a basis for any action at the European level. As far as these two aspects are

\textsuperscript{12} Peter Müller in Welt am Sonntag ,12.23.2012
\textsuperscript{13} SZ, 09.19.2011
\textsuperscript{14} Ferdinand Kirchhof in Welt am Sonntag, 05.02.2012
\textsuperscript{15} Franz C. Mayer in SZ, 03.20.2012
\textsuperscript{16} Mathias Herdegen in FAZ, 04.04.2012
concerned, some intervention of legal specialists effectively shows distinctively at the same
time a radical contestation of the principles of legitimation of the EU and a denial of its
“ethical” dimension.

Several legal specialists, in the first place, point that the EU contradicts more and more the
principles of democratic self-determination that are guaranteed by the German Basic Law.
These principles suppose that “the Bundestag as national parliament decides over the amount
of expenses and not that it follows decisions made by other actors”. Under the new legal
frame, then, decisions will be automatically imposed to Germany without parliamentary
supervision. Democracy principle, they argue, demands an autonomous decision of the
representation of the people over the budget. While the arguments over European
democratic deficit are not Eurosceptical per se, we can see that all these arguments tend to
justify and to call for autonomy of the German people from supranational rule, rather than
say, a democratic reform of the EU. Some legal specialists, moreover, even question the
adequacy of the parliament to preserve the “constitutional identity” of Germany, thus calling
for the people to resist European infringement through constitutional complaints. That it, in
facts, touches a kind of political taboo is well indicated by Franz C. Mayer’s remark that
“opposing the people to the parliament has in Germany an especially unhappy tradition. It
has, in the time of Weimar, let to discrediting the parliament”. Besides, we find here all the
elements of an opposition between “the people” and European integration, which is an
element of discourse relatively absent from “mainstream” political discourse.

One of the most repeated arguments states that supranational intergovernmental decisions had
the effect of breaching the legal frame that Germany had opined to, specifically with regards
to the “no bail-out clause”. A professor of public law speaks of “the end of the Community of
law”. The German approbation of the Maastricht Treaty, several recall, was conditioned by
this clause. This historical reminder, of course, evokes the intense legal debates that already
surrounded the ratification of the Treaty of Maastricht. Meanwhile, the conditioned nature of
the agreement justifies a break away from an ethical conception of the EU and reduces it to an
international agreement, which should serve all parties. In these conditions, “the program of
an ‘ever closer union of the peoples of Europa’ has become questionable”. We can see here
that legal discourse is used to stress the instrumental, and therefore reversible, commitment of
Germany to European integration.

Under these two aspects, legal discourse effectively seems to make Eurosceptical positions
“speakable”. The call to direct legitimation through plebiscite, opposing the sovereign people
to supranational rule, all these elements attest of a qualitative depart from the public
consensus over EU, which was structuring the political space. Nonetheless, it doesn’t entail
automatically that the German public space is less “constrained”, or censored, that it used to
be. Indeed, since the Euro-crisis some politicians form mainstream parties have taken over the
call to plebiscite and an officially Eurosceptical party had some (limited) electoral success.
Nonetheless, most of the calls to the people and to independence from the EU still occur
under the abstract, formalized aspect of legal discourse.

17 Rainer Wernsmann in FAZ, 09.10.2012
18 Wolfgang Kahl and Andreas Glaser, ibid
19 ibid
20 Franz C. Mayer, ibid
21 Reiner Schmidt, ibid
22 Ibid, see also Wolfgang Kahl und Andreas Glaser, FAZ, 03.08.2012, and Frank Schorkopf, ibid
23 Frank Schorkopf, ibid.
Conclusion

Given the exploratory nature of this paper, we cannot pretend to advance clear-cut conclusions. Definitive empirical confirmation would without doubt require a larger scale longitudinal survey to assess for the potential changes of lawyers involvement in public debate on European integration across the years and various controversial moments.

These limitations notwithstanding, our contribution illustrate, we hope, the main assets of both assessing empirically and thinking theoretically the potential contribution of specialized discourse to the politicization of the EU. More attention should be paid to the role of expertise and specialized knowledge in the struggle for the European union. Moreover, the study of the EU has suffered for a long time from a confinement to the field of European studies and shied away from borrowing conceptual tools to neighboring disciplinary fields. The contribution of sociology to fully think out the theoretical insights elaborated around the EU within the field of European studies, however, can hardly been overlooked anymore.

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