Saving the Euro, Saving Europe: The Role of Law and Institutions

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The Legal Dimension

I. The Shifting Balance
II. The Shifting Balance and the Courts: The ECJ
III. The German Constitutional Court
IV. Conclusions: Between Tragedy and Irony
I. Shifting Balances

• 1. “Neutrality” by Separation of Economic from Social Functions: Protection of Member State Sovereignty
  • After 60 years of integration: Still no “thick political space”
  • EU: Establishment of free markets; social policies delivered on the national level
  • Protection of self-determination through “ring-fencing” of EU competences and policies
  • EU activities in the social sphere: additional protection: minimal harmonization.
  • *Now*: Deep intrusion into Member State regulation of fiscal, economic and social policies; expectation of a “cultural” change
    • Prescription of policies (taxation/spending, capital/labour etc.)
    • Severe limitation of budgetary policies (Fiscal Treaty)
I. Shifting Balances

2. Decision Making Modus

- “Deliberative” consensus finding; negotiations with little pressure options
- Commission – European Parliament – Council
  - Balancing of interests – implicit veto powers – legal culture of restraint and compromise – “package deals”
- **Now:**
  - Modus: Emergence of distributional conflicts of “essential” quality; imposition of reciprocal agreements (“quid pro quo”) in the shadow of severe consequences
  - From “Community method” to “Union method”
    - European Council as main decision maker
    - Decline of the role of the European Commission and the European Parliament
    - Informalization of decision making processes and instruments
I. Shifting Balances

3. The Role of Power

- The institutional setting: Necessity of a “settled consensus” between EU institutions (Commission – European Parliament – Council) and Member States
  - Bracketing of existing arrangements (agricultural policies, single market etc.)
  - Protection of the role of small countries
- Now: Distributional conflicts reveal the underlying power structure
  - Big – small? Creditor countries – Debtor countries!
  - E.g.: ESM–voting is based on capital contributions; most decisions can be taken even in situations where 12 of 17 members object (contrast QMV in Council)
- Turn towards flexibility; conditionality of ESM-Help
II. The Shifting Balance and the Courts: The ECJ

- The Doctrinal Elements of “Pringle”
  - Defense of the Treaty Amendment (Art. 136 Para 3 TFEU)
    - Judicial Review of Treaty Amendment
    - But: Economic policy, no effect on the functioning of the Monetary Union (Is this convincing?)
  - Defense of the TESM
    - No Breach of Art. 123 TFEU (no monetary financing of Member States)
    - No Breach of Art. 125 TFEU
      - Narrow interpretation, no restriction of Member State freedom to provide guarantees or help
      - ECJ insists on requirement of conditionality
        - (Why, if this is just economic policy? Equivalence of market Discipline and negotiated conditionality?)
II. The Shifting Balance and the Courts: The ECJ

• No Need for Art. 136 Para 3 TFEU
  • Time gap between the establishment of the TESM (September 2012) and the adoption of the treaty amendment (January 2013) no problem

• What is missing? No acknowledgement of shifting balances, no acknowledgement of a fundamental reconstruction of the basic principles of the Monetary Union
II. The Shifting Balance and the Courts: The ECJ

- The political quality of “Pringle”
  - “Unpolitical” judgement that falls short of the “constitutional aspirations” of the European Court of Justice
  - Could the Court have decided differently? Would there have been the possibility to protect the decision making modus and the (vertical) balance of power? Or has the Court reached the limits of its judicial authority?
III. The Shifting Balance and the Courts: The German Constitutional Court

• The Background of the Case
  • Temporary injunction against the ratification of the TESM, the Fiscal Treaty and the decision on the Amendment of Art. 136 TFEU

• Standing
  • Constitutional complaint of 37000 citizens, several professors and Members of Parliament: the “right to vote” comprises the protection of a democratic system
  • Inter-organ litigation between the parliamentary group of the party “Die Linke” and the German Parliament (Bundestag)

• Scope of Review
  • Normally: Balance of consequences; here: summary examination of facts and law
III. The Shifting Balance and the Courts: The German Constitutional Court

- The Doctrinal Approach: Limited and “institution-oriented”
  - Acknowledgement of the fundamental reconstruction of the Monetary Union
  - But: No constitutional implications of the shift; role of Germany in the new setting is strengthened; the principled concerns about a transfer of power to the EU do not apply
    - (Political, but not constitutional dimension of the role of Member State as “bully”? Constitutional quality of a shift from market discipline to negotiated discipline?)

- No attempt to define substantive limits of “rescue policies”
  - No mention of parts of the Sept. 2011 decision on the Greek Bailout Package
  - From a substantive approach to the management of an institutional setting
III. The Shifting Balance and the Courts: The German Constitutional Court

- Protection of Budgetary Autonomy
  - No “automatic mechanism” beyond the control of the legislature
    - Necessity of an interpretative declaration: Binding quality of the maximum operative capacity of the ESM; requirement of parliamentary consent in case of an amendment
- Protection of the procedural role of the German Parliament
  - Protection against involuntary developments
  - Protection through German Veto power (contrast Estonia!)
  - The importance of the role of the German Parliament (Bundestag) in the management of the ESM
    - “Executive function” of Parliament
    - Interpretative declaration on the provisions of inviolability of documents and professional secrecy of ESM representatives
- No objection to Fiscal Treaty: equivalence with “Golden Rule” in the German Constitution
III. The Shifting Balance and the Courts: The German Constitutional Court

• In sum: Acceptance of wide political discretion; no attempt to describe the future path
  • Manifestation of judicial restraint
  • Conceptual return to openness? No objection to the strengthening of intergovernmental mechanisms.
  • No petrification of the ESM status quo
  • But: Further supranationalization will still problematic; the debate about the “limits” of integration powers within the current constitution is not concluded

• The new focus of the principal proceedings
  • The Role of the ECB (OMT-Program)
  • Standing? Legal standards? How can a national court restrict the decisions of the ECB?
IV. Conclusions: Between Tragic and Irony

- The View of the Public: Crisis management within the framework of the EMU
  - Expectations of implementation of the current (firm) legal framework
  - But: Reconstruction of the EMU as essentially political project
- The EU Perspective: The Tragedy of the ECJ’s Options
  - Objectability of the general development, however: The price of a challenge would be too high.
  - Distributional Conflicts and Supranational Decision Making? EU Determination over Member State Budgets?
- The German Perspective: The irony of a constitutional challenge of the new “balance”
  - Could the Court define a constitutional framework that is less sovereignty-oriented? Could it take into account the economic development of the debtor countries and the situation of the people?
  - Can it take an outward oriented perspective?
  - Can the Court be expected to protect the “old” balance?
Thank you!