

Finality of European Integration? – The Lisbon Treaty and the German Federal Constitutional Court

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The main tension

- Participation in Europe-building enterprise v. preservation of national sovereignty;

Question

- Has the BVerfG set the limits to further integration? What is the response of the ECJ, if any?

Issues

- Democracy
- Ratification of supranational decision making
- Ultra vires acts
- Dual preliminarily

Democracy

EU law – a derived fundamental order

- “the source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with their democratic constitutions in their states.
- The “Constitution of Europe”, the law of international agreements or primary law, remains a derived fundamental order.” (§ 231)

Democracy

No Kompetenz-Kompetenz

- The EU can not establish itself as a higher democratic order and does not have Kompetenz-Kompetenz (§ 232)
- The German Constitution does not authorize state bodies to such a transfer of powers (§ 233).

Democracy

Member States – Masters of the EU

- Germany accepted membership in the EU in which the powers conferred are in balance with the level of democracy, and any change of that balance requires a sovereign decision under the Constitution.
- The European Parliaments factually remains, due to the Member State's contingents of seats, a representation of the peoples of the Member States (§ 284)

Democracy

Comparator – a constitutional state

- Measured against requirements in a constitutional state, the European Union lacks, even after the entry into force of the Treaty of Lisbon, a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people, What is also lacking in this connection is a system of organisation of political rule in which a will of the European majority carries the formation of the government in such a way that the will goes back to free and equal electoral decisions and a genuine competition between government and opposition which is transparent for the citizens, can come about. (§ 280)

Democracy – Conclusion

- European Parliament is not a genuine representative body, but a representation of the peoples of Member States
- The balance of conferred powers and democracy is adequate
- EU can not constitute itself without a constitutional revolution or consent of all the Member States

Ratification of Supranational Decision Making

- Two meanings of “ratification”
 - *Ex ante* enactment of national procedures necessary for implementation of the Lisbon treaty by adoption of necessary national legislation which is subject to constitutional review
 - On grounds of the former, imposition of substantive and procedural *ex post* ratification of certain decisions adopted by institutions of the EU

Ex ante ratification

- Domestication of conflict
 - Mechanism: There is nothing wrong with the Treaties, it is national law which is unconstitutional
 - Earlier example: Unconstitutionality of national law implementing the European Arrest Warrant (Judgment of 18 July 2005 – 2 BvR 2236/04 –)

Ex post ratification

- Future enactment of secondary law requires consent of the Parliament
- Effect: Some secondary EU law is subject to parliamentary ratification

Instances of *ex post* ratification

- The Parliament may not give a tacit approval when it comes to switching from unanimity to qualified majority voting in the Council;
- The government representative in the Council may consent to a pasarella only subject to prior permission of the Parliament;
- Recourse to specific pasarella clauses (Art. 31.3 TEU, Art. 153.2(4) TFEU, Art. 192.2(2) TFEU, Art. 312.2(2) TFEU and Arts. 333.1 and 333.2 TFEU), is permissible only subject to an approval of the Bundestag, or when appropriate, the Bundesrat;
- Otherwise, such decisions may not be binding on the FR Germany. Silence may not be interpreted as a consent.

Instances of *ex post* ratification

- Recourse to the Art. 352 flexibility clause requires adoption of a specific law to that effect;
- In so-called emergency brakes procedure under Arts. 48(2), 82(3) i 83(3) TFEU, the federal Government may act only subject to instructions of the Bundestag, or when appropriate the Bundesrat;
- Adoption of minimum common rules defining criminal offences and penalties under Art. 83(1) TFEU, requires enactment of a law

Ratification - conclusions

- Wyatt's question revisited: "a new legal order or old ?"
- Variola bypass: domestication of EU law leads to priority of constitutional jurisdiction over European
- Marginalisation of EU regulatory process and strengthening of national parliaments
- Others are taking notes

Ultra vires acts

- Maastricht judgment – BVerfG withholds power to declare ultra vires acts inapplicable
- Honeywell (judgment of July 6th 2010 - 2 BvR 2661/06 -)
 - The national court has to interpret national law in EU-law-friendly way
 - The BVerfG can only declare an act of the EU institutions to be invalid after the Court of Justice had been given the possibility to rule upon that question under Art. 267 TFEU
 - There is an obligation to refer before declaring an act ultra vires.
 - breach of competences by an EU institution has to be sufficiently serious (the contested act has to lead to a structurally significant shift in the arrangement of competences between the Member States and the European Union to the detriment of the Member States.

ECJ strikes back

Is ECJ's doctrine of general principles of law ultra vires?

- Mangold, Bartsch, Maruko Küçükdeveci...
- General principle of equality precludes national rule ...
- Similar to BVerfG judgment Lüth (15. 01. 1958. BVerfGE 7, 198) – radiation theory (Ausstrahlung)
- Similar to “substantive due process” theory of the US Supreme Court (e.g. Griswold v. Connecticut)

Dual Preliminarity

- Origins – Simmenthal 2
 - Problem 1: if the same legal issue is governed by national constitutional law and EU law, which court has priority
 - ECJ says 267
 - National (constitutional) courts have different practice
 - Problem 2: Variola
 - Problem 3: Why Küçükdeveci?

Dual Preliminarity – a resolution?

- Joined cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli*
 - Preliminary reference from the Cour de Cassation, asking whether Art. 267 of the TFEU precludes national legislation requiring an ordinary judge to refer the question of constitutionality of a national law on grounds of infringement of EU law, to the Conseil Constitutionnel.

ECJ in Melki

- Art. 267 TFEU precludes national legislation establishing interlocutory constitutional review, insofar that procedure prevents "... all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling.

Minimum Requirements

- In any case, a national judge deciding the case has to be in position:
 - to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary
 - to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and
 - to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law."

Melki – a concession to national constitutional courts?

- Simmenthal 2 obligation to set aside follows only after a national constitutional court has spoken on the issue, unless the issue of constitutionality is identical to the issue of validity of a rule of EU law that the contested national law purports to implement.
- In the meantime, a national judge has an obligation to extend interim protection to EU law based individual rights, without an obligation to set suspect national law aside.

A new balance?

- Do the new developments reflect transformation of the (unilateral) duty of loyal cooperation into the (reciprocal) duty of sincere cooperation?
- Art. 4(3) Lisbon:
 - Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.