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National Constitutional Jurisprudence in a Post-National Europe: The ESM Ruling of the German Federal Constitutional Court and the Disavowal of Conflict

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Abstract: *In its pending decision on the constitutionality of the European Stability Mechanism and Fiscal Compact, the German Federal Constitutional Court (FCC) has recently ruled on several applications for temporary injunctions against the transposition of these instruments. The problem of democratic self-determination under the constraints of monetary integration has been a main concern in the ruling. Yet, the democracy-safeguards the FCC has prescribed are parochial in not considering their impact on other EU Member States, and the Court's view of autonomy is skewed towards the issue of spending. Both concepts are at odds with the current level of transnational interdependence, which the FCC as relay to 'integration by stealth' has facilitated during two decades of EU-jurisprudence. Constitutional jurisdiction should acknowledge its role in this state of affairs and fortify its effort in building judicial networks of deliberative exchange to overcome outworn parochialisms.*

I Introduction

The Euro crisis has demonstrated the limits of economic integration without political community. The institutions of the EU were not prepared to deal with the crisis. In great haste and outside of the formal legal-institutional framework, *ad hoc* coping mechanisms have been set up with questionable democratic legitimacy and uncertain effectiveness. Among these, the Fiscal Compact and the European Stability Mechanism (ESM) have recently generated controversy. Once again, the German Federal Constitutional Court (FCC) has on the occasion of several constitutional complaints against the transposition of these instruments into German law dealt with the question of the democratic compatibility of European integration.[1] As many times before,

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[1] BVerfGE, 2 BvR 1390/12 [2012].

it has not principally thwarted further integration but only demanded supplementary fixes which are supposed to protect the democratic legitimacy of political decision making in the European multilevel polity. The FCC has on 12 September 2012 rendered its negative judgement on the temporary injunction requested by the complainants. The detailed decision on the constitutionality of the ESM treaty and the Fiscal Compact is still pending, with the oral proceedings scheduled for June 2013, but the Court itself announced that major changes in the principal proceedings should not be expected. Against the backdrop of the principal problems of integration in spite of persistent diversity that the Euro crisis again has brought to the light, this paper examines the concepts of democracy and autonomy underlying the latest FCC judgement and it outlines possible alternatives.

The following is an analysis of judicial decisions from the political scientist's perspective, thus drawing on a number of concepts rather foreign to the legal analysis of adjudication. European integration and constitutional jurisprudence are both highly path-dependent.[2] Prior decisions in both domains constrain the leeway for future changes. Retrospectively, they often constitute what Majone[3] calls a *fait accompli* that we have to cope with but cannot simply undo. Among those national actors facing the challenge of an 'ever closer union,' constitutional courts stand out, since they must preserve the constitutionally required democratic credibility of politics. Various authors have recently argued that, as a response to European integration, (constitutional) jurisprudence should or does indeed already take place in transnational judicial networks, where cross-fertilisation and deliberative exchange supersede the parochialism of national jurisdiction.[4] If this is a general rule, the latest decision of the FCC, I will argue, must be the exception.

The article advances three connected arguments. Section II briefly recalls the original construction fault of the Eurozone that is responsible for the current crisis and itself a result of 'integration by stealth.'[5] The following section (III) then reviews the string of Euro-related FCC decisions since the famous *Solange* ruling and situates the latest ESM judgement in this context. The FCC, I claim here, has acted as a relay to integration by stealth. It has threatened to but never actually reined in European (monetary) integration; instead, it by and large confined itself to demanding ornamental democracy-safeguards. Section IV demonstrates that these remedies were largely directed at the national level and have thus become less and less effective and appropriate. In its ESM decision, the FCC has thus applied a doubly particularistic concept of democracy that is at odds with today's post-national constellation, the emergence of which it has, ironically, facilitated in the first place. Not only does the Court restrict its autonomy-safeguards to German politics. It is also highly selective in

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[2] S.K. Schmidt, 'Who Cares about Nationality? The Path-dependent Case Law of the ECJ from Goods to Citizens', (2012) 19 *Journal of European Public Policy* 1; H. Deters and R.U. Krämer, 'Der steuerpolitische "Aktivismus" des Bundesverfassungsgerichts als pfadabhängige Entwicklung', (2012) 31 *Zeitschrift für Rechtssoziologie* 1.

[3] G. Majone, *Europe as the Would-be World Power: The EU at Fifty* (Cambridge University Press, 2010), at 1.

[4] A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004), Chapter 2; C. Joerges, 'Deliberative Supranationalism—Two Defences', (2002) 8 *European Law Journal* 1; B. Kingsbury, N. Krisch and R.B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15.

[5] G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2005).

what it counts as relevant constraints on sovereignty. In that sense, the FCC has not behaved like the proverbial 'Dog that Barks but does not Bite.'[6] In fact, its judgement has bite, but it hurt the wrong governments at the wrong time. The main repercussions concern the 'debtor' states. Section IV also contrasts the FCC's particularistic reasoning with recent thinking on transnational networks of adjudication. I evaluate to which extent the FCC could have engaged in transnational judicial discourse as an alternative to its exercise in constitutional parochialism.

II The Euro Crisis, Path-Dependency and Integration by Stealth

Although the current Euro crisis was fuelled by an external shock—the bursting of the US housing bubble and the subsequent global financial crisis—there is an emerging consensus that the problems we are currently witnessing in the Euro area are structural rather than accidental. Even Eurozone hawks like German finance minister Schäuble today admit that 'a common currency cannot bear too much national diversity.'[7] This, to be sure, is as far from a novel insight as it gets. In 1992, the year of the signing of the Maastricht Treaty, Martin Feldstein warned against the loss of domestic interest rates and the nominal exchange rate as policy instruments.[8] With a national currency, a country could lower domestic interest rates to buffer the negative effects on employment and output caused by a decline in exports. With independent control over its nominal exchange rate, a country could depreciate its currency without going through the period of increased unemployment and lower wages that real exchange-rate reductions imply, and from which Greece is currently suffering.

But in today's centralised currency system, the one-size-fits-all monetary policy of the European Central Bank (ECB) increases the different rates of growth and inflation of the heterogeneous Eurozone Member States.[9] In the first years after the monetary union's inception, inflation in Germany was low, its economy in a cyclical downturn. In this situation, the ECB's high interest rates further decreased consumption and investments. Germany's reactions focused on supply-side measures and exports, at least partly because the Stability and Growth Pact and the centralised monetary system precluded alternative responses. While the German economy, given its low inflation, suffered from too high real interest rates, the situation in countries like Greece, Italy, Ireland, Portugal and Spain (GIIPS) was reversed: their higher inflation meant that the ECB's prime rate locally translated into very low real interest rates. Their economies were booming; wages correspondingly rose and demand skyrocketed, absorbing much

[6] J.H.H. Weiler, 'The "Lisbon Urteil" and the Fast Food Culture', (2009) 20 *European Journal of International Law* 3.

[7] Interview in News Magazine Focus on 17 September 2012 (available at http://www.bundesfinanzministerium.de/Content/DE/Interviews/2012/2012-09-17-focus.html?view=renderPrint).

[8] M. Feldstein, 'The Case against EMU', (13 June 1992), *The Economist* (available at http://www.nber.org/feldstein/economistmf.pdf); see also B. Eichengreen, 'Is Europe an Optimum Currency Area?' in S. Borger and B. Grubel (eds), *The European Community after 1992: Perspectives from the Outside* (Macmillan, 1992), at 138 (available at http://www.nber.org/papers/w3579.pdf).

[9] On the following account, see F.W. Scharpf, 'Monetary Union, Fiscal Crisis and the Preemption of Democracy', LEQS Paper 36/2011 (London School of Economics, 2012); T. Mayer, *Europe's Unfinished Currency: The Political Economics of the Euro* (Anthem Press, 2012); J. Leaman, 'The Size that Fits No-one: European Monetarism Reconsidered', in E. Chiti, A.J. Menéndez and P.G. Teixiera (eds), *The European Rescue of the European Union: The Existential Crisis of the European Political Project* (ARENA, 2012), at 229 (available at http://www.reconproject.eu/projectweb/portalproject/Report19_EuropeanRescueEuropeanUnion.html).

of German exports. In intra-EU trade, balance of payments accounts drifted apart, with Germany exporting more goods and capital to the southern Eurozone members than it imported. The boom in the southern economies was driven and partially sustained by cheap credit and imports. Germany was happy to satisfy the increasing appetite for goods and capital of the allegedly fiscally profligate 'debtor countries.' This changed with the global financial crisis, when credit suddenly became scarce.

The Euro crisis is thus at least partially homemade. A unitary prime rate led to an overheating of the economy in high-inflation countries and recession in low-inflation countries. Unsustainable account imbalances were one result of this process. As stated above, economists have been aware early on that not even the original eleven Euro-members constituted an 'optimal currency area,' in which economic shocks would have a similar impact and in which labour was mobile enough to make local monetary policies unnecessary in case those impacts did differ.[10] Since economic reasons were flimsy at best, the motivation for EMU must have been political. The Euro, Feldstein accordingly inferred, 'is sought by those who want to move to a political union among the current members of the European Community.'[11] A recent 'tweet' by Herrman van Rompuy concerning the Euro 'rescue' measures frankly revealed how this logic of *Majone's fait accompli*,[12] by which one step of economic integration calls for another step in political integration, still applies today. In the eyes of the President of the European Council, 'the goal is not to build a political union for its own sake, it is to make the € stable financially, economically but also politically solid.'[13] The fact that the rationale behind the EMU was and is political does not imply, however, that governments held the same political reasons. By contrast, the decision crucially resulted from the confluence of two different political interests: The wish in particular of France and Italy to counter the German hegemony in monetary affairs which had pressured them into adopting a hard currency policy that did not fit their national economic situation; and a German preference for an independent central bank modelled on the *Deutsche Bundesbank* with the primary objective of price stability.[14]

The decision to go ahead with economic and monetary integration was made before and without being able to agree on concomitant political institutions and in spite of the great institutional, economical and political heterogeneity among Member States that would make centralised monetary policy inefficient. Today, the problems of this arrangement are in plain view. But taking back one or two steps of integration in order to allow governments to re-attain some of their autonomy is not even seriously discussed as an option. Quite to the contrary, if anything, the Euro crisis seems to call for further integration. The 'markets' must be appeased by all means. Any indication of a potential disruption of the Eurozone is deemed to have catastrophic consequences. I cannot evaluate the plausibility of these concerns,[15] but the point bears repeating that this rhetoric mirrors exactly what Majone identified as a 'strategy

[10] M. Feldstein, n 8.

[11] M. Feldstein, n 8 *supra*; see also B. Eichengreen and J. Frieden, 'The Political Economy of European Monetary Unification: An Analytical Introduction', in B. Eichengreen and J. Frieden (eds), *The Political Economy of European Monetary Unification* (Westview Press, 1994), at 1.

[12] G. Majone, n 3 *supra*.

[13] Available at https://twitter.com/euHvR/status/256332737668079616

[14] J. Leaman, n 9 *supra*, 232; G. Majone n 5 *supra*, 109; Mayer n 9 *supra*, Chapter 1, in addition stresses the French and British desire to contain a more powerful post-unification Germany.

[15] But see B. Eichengreen, 'The Breakup of the Euro Area', in A. Alesina and F. Giavazzi (eds), *Europe and the Euro* (University of Chicago Press, 2010), at 11 (available at http://www.nber.org/chapters/

of *fait accompli*—the accomplished fact which makes opposition and public debates useless.'[16] We might not have to go as far as Majone by calling the 'decision to proceed with monetary union before there was any agreement on political union' a *strategy*—suggesting intentional, goal-directed decisions over a long time frame.[17] It is certainly less controversial to point to the path-dependence[18] of European integration. Decisions made in the mode of intergovernmental negotiations by the Member States in the Council are hard to reverse, even in the face of an untenable status quo. They become locked in a 'joint-decision trap,' as policy change requires at least the assent of a small blocking minority, often unanimity, and sometimes even ratification in all Member States.[19] The following section examines the role of the FCC in this process.

III A Dog that Barks but Never Bites? The ESM Judgement and Path-Dependent EU Integration

Since the way back is precluded, the only direction to go is forward—or so it seems. *Sachzwang* ostensibly dictates the emergency measures that have recently been challenged in front of the FCC. The latest of those are the setting up of the ESM and the Treaty on Stability, Coordination and Governance in the EMU (Fiscal Compact). The ESM is in essence a further institutionalisation of the *ad hoc* mechanisms that were put into place to provide financial assistance to Eurozone members in financial distress. It has a maximum lending capacity of 500 billion Euros. Strict austerity conditionalities are attached to the granting of an ESM bailout. The Fiscal Compact essentially tightens the provisions of the existing Stability and Growth Pact that require Member States to limit deficits and debt to 3% and 60% of their gross domestic product, respectively. The major strengthening is a new limit on the annual structural deficit—approximating a balanced budget rule—that has to be transposed into national legal systems through 'preferably constitutional' binding provisions (Article 3, par. 2). Germany was the main advocate behind this *Schuldenbremse*.[20] Countries in breach of the deficit or debt rules must submit an 'economic partnership programme' for approval by Commission and Council, detailing how they are planning to comply. The European Commission monitors the progress of the Signatory States and can impose fiscal sanctions. The excess deficit procedure has been depoliticised: While previously, a qualified majority of governmental votes was required to *adopt* sanctions, the 'six pack' has strengthened the mechanism to the extent that a qualified majority is now required to *reject* the imposition of sanctions ('reverse qualified majority').

Drawing on their right to file a constitutional complaint with the FCC, the association *Mehr Demokratie e.V.* together with more than 37 000 citizens[21] had applied

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c11654.pdf) who famously argues that the Euro is for all practical purposes irreversible as a break-up would produce a bank-run and bond market crisis.

[16] G. Majone, n 3 *supra*, 2.

[17] *ibid*.

[18] P. Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics', (2000) 94 *American Political Science Review* 2; M.A. Pollack, 'The New Institutionalism and EC Governance: The Promise and Limits of Institutional Analysis', (1996) 9 *Governance* 4.

[19] F.W. Scharpf, 'Notes toward a Theory of Multilevel Governing in Europe', (2001) 24 *Scandinavian Political Studies* 1; F.W. Scharpf, 'The JDT Model: Context and Extensions', in G. Falkner (ed.), *The EU's Decision Traps: Comparing Policies* (Oxford University Press, 2011), at 217.

[20] *The Economist* (10 December 2011) (available at http://www.economist.com/node/21541459).

[21] See the coalition's website at http://www.mehr-demokratie.de/md-info_2012-09.html

for a temporary injunction that would prevent the German Federal President from signing the laws implementing the ESM and the Fiscal Compact. A number of members of the *Bundestag* also filed constitutional complaints. In addition, the parliamentary faction *Die Linke* initiated a dispute between organs of the state. The complainants argued that the *Bundestag* had violated their basic rights to democratic participation enshrined in Articles 38 and 20 and protected by the 'eternity clause' (Article 79, par. 3) of the Basic Law, since with its assent to the ESM and Fiscal Compact, the parliament had in effect relinquished its right and responsibility to determine the state budget. In particular, they argued that the ESM could be interpreted so as to entail unlimited liabilities for Germany. The parliamentarians of *Die Linke* focused on the budget constraints imposed by the Fiscal Compact. In their opinion, these were, unlike the pre-existing constitutional *Schuldenbremse*, practically irreversible and thus undemocratic. The right-wing Members of Parliament, by contrast challenged an excessive delegation of powers that in their opinion amounted to a quasi-federal transfer union and was thus *ultra vires*.[22]

President judge Voßkuhle opened the rendition of the judgement on 12 September 2012 by declaring that the applications were 'predominantly founded.' After some irritation and laughter from the audience, he corrected himself quickly to the effect that the applications were, of course, mainly unfounded, as one can read in the press release.[23] This Freudian slip was revealing to the extent that maybe the Court would have liked to add even tighter conditions on fiscal integration than it could in the current political situation. I will return to these 'disavowed' constraints in the subsequent section. In essence, the judgement states that, subject to two conditions, the laws implementing the ESM and Fiscal Compact may enter into force. The first condition concerns a clause of the ESM treaty that could be interpreted to imply that the ESM board of governors could increase the ESM credit capacity and thus German liabilities indefinitely. The German government has to seek confirmation clarifying that any increase in liabilities cannot be decided upon without the assent of the German *Bundestag*.[24] The second condition stipulates that the professional secrecy of the ESM officials may not impair the right of the *Bundestag* to be informed in detail about internal ESM proceedings.[25] Politically, these conditions are mere technicalities and the FCC judgement has indeed been perceived as the expected starting signal for the ESM. That being said, the main proceedings are still pending. Especially the court's take on the later announcement of the ECB that it would not exclude the possibility of buying government bonds from deficit states (outright monetary transactions) is unclear.[26] But since the court denied the second, supplementary motion of one the complainants, Peter Gauweiler, which was directed against the bond-buying programme, a sudden about-turn seems unlikely.[27]

With the latest ESM judgement, the FCC has in effect continued a long-standing line of integration-related jurisdiction that could be summarised as 'approval subject to conditions.' Ever since the first *Solange* judgement,[28] the Court has accepted the latest

[22] BVerfGE 2 BvR 1390/12 [2012] at 146–166. Excerpts of the judgement translated into English are available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html
[23] FCC Press Release 67/2012 (September 12 2012).
[24] BVerfGE 2 BvR 1390/12 [2012], 214.
[25] *ibid*, 259.
[26] *ibid*, 202.
[27] FCC Press Release 65a/2012 (September 11 2012).
[28] *Solange I*, BVerfGE 37, 271 [1974].

integration step but not without reminding lawmakers of its role as the final interpreter of the limits implied in the Basic Law for shifting responsibilities to Community institutions. Since European integration as a rule disempowers high courts *vis-à-vis* lower courts,[29] this continuous reminder is clearly in the FCC's institutional self-interest. The FCC has either spelled out rather precise conditions that German lawmakers must implement in order to make the latest integration step constitution-proof, or it has declared that it will abstain to varying extents from double-checking the decisions made in 'Brussels' so long as a certain level of basic rights protection is guaranteed. Recently, it has also begun to outline an array of state functions, which it considers 'constitutive' of the German state as envisioned in the Basic Law, implying that it would scrap future delegations of power to community institutions in these areas. But like the dog that barks but does not bite,[30] the FCC has only announced what in the future it might consider off limits but it has never really used its veto. It seems to always be the *next* judgement that will finally put the brakes on.[31]

In its famous 1974 *Solange I* judgement,[32] the FCC had originally affirmed its responsibility to control in individual cases the conformity of European secondary law with German constitutional basic rights and thus its authority to declare European law unconstitutional and therefore inapplicable. For all practical purposes, the Court reversed this decision with the *Solange II* judgement[33] in 1986. So long as (ie 'solange') the then European Community, and in particular the European Court of Justice, in general provide an effective protection of basic rights equivalent to that under the German Basic Law, the FCC would for the time being abstain from exercising its jurisdiction on the applicability of European secondary law. This rendition of the *Solange* clause constituted a veritable sanctioning tool in the hands of the FCC, which, however, it has so far refrained from putting to use.

The FCC clarified its relation to the European Court of Justice as one of 'cooperation,' albeit one in which it wanted to keep the upper hand, in its 1993 *Maastricht* ruling[34]—incidentally also the first case that concerned the Euro currency. *Maastricht* theoretically extended the FCC's jurisdiction by ruling that not only national but also supranational administrative acts could in principle be challenged through judicial review on the basis of the Basic Law, and by claiming an *ultra vires* control of EU acts on the basis of the EU treaty. The Court restated its *Solange II* jurisprudence, according to which it would only undertake a general control of the level of basic rights protection but not evaluate individual cases. The complaints in the case were directed against the ratification of the Maastricht treaty, which erected the EU on top of the previous European Communities and *inter alia* created a new and far-reaching supranational monetary policy and the new common currency. The complainants argued that the delegation of state powers to the new supranational institutions would undermine the democracy principle to the extent that it disempowered the *Bundestag*, the main site of political representation of the German *demos*. The Court found that the delegation of powers undertaken in the Maastricht Treaty did not endanger the

[29] K.J. Alter, 'The European Court's Political Power', (1996) 19 *West European Politics* 3.
[30] Weiler, n 6 *supra*.
[31] S.K. Schmidt, A Sense of Déjà Vu? The FCC's Preliminary European Stability Mechanism Verdict' (2013), 14 *German Law Journal* 1, 6.
[32] *Solange I*, BVerfGE 37, 271 [1974].
[33] *Solange II*, BVerfGE 73, 339 [1986].
[34] *Maastricht*, BVerfGE 89, 155 [1993].

protection of democratic basic rights, since an equivalent level of protection was also guaranteed through European law. Once again, the FCC reminded national lawmakers and community institutions of its role as final arbiter, should the EU institutions fail to uphold a high level of basic rights protection.

But at the same time as it wielded the *Solange* stick, on the merits of the case, the Court did reject the major part of the complaints and cleared the way to monetary integration. The FCC even acclaimed the unprecedented independence of the ECB, a 'constitutional monstrosity'[35] according to Majone, since it went far beyond the previous *Bundesbank* independence, which after all was only a matter of statutory law and could be changed by simple majority, in contrast to the primary-law-enshrined ECB mandate. The FCC explicitly subscribed to a technocratic concept of legitimation of the delegation to non-majoritarian institutions. It found the concomitant 'modification of the democracy principle [. . .] defensible' because this arrangement would better protect the monetary value than democratic institutions 'dependent on political approval in the short run.'[36] At the same time, the Court addressed the complainant's concerns about the EU's alleged democratic deficit to the extent that it emphasised the importance of the accountability ('*Rückkoppelung*') of the acts of Community institutions to national parliaments for the democratic legitimacy of the new *Staatenverbund*. On this, it concluded that 'duties and responsibilities of substantial import must stay with the German *Bundestag*.'[37]

With the 2009 ruling on the constitutionality of the Lisbon Treaty ratification,[38] the FCC began to outline what the 'duties and responsibilities of substantial import' it had alluded to in the *Maastricht* decision meant in more concrete terms. In *Lisbon*, the FCC established and quite clearly delineated an 'identity core' of the constitution that went beyond the Articles already covered by the eternity clause (Article 79, par. 3; Basic Law).[39] In addition to the competence to assume competences (*Kompetenz-Kompetenz*) that according to earlier rulings must stay within the national realm, the FCC now also named five substantive issue areas in which the exclusive competence has to remain at the national level, namely questions of citizenship, the monopoly of force, issues involving encroachments on fundamental rights, cultural issues and, crucially, revenue and expenditure. Two observations are worth mentioning in this context. First, although the Lisbon decision was seen (and criticised) as being as close as it gets to the long touted safety brake on European integration,[40] the Court has not at all blocked the ratification, but instead demanded that the implementing law be rectified by strengthening the rights of the *Bundestag*. Second, while the Court has with the identity control invented a new weapon complementing its arsenal of *ultra vires* and *Solange*

[35] G. Majone, n 3 *supra*, 34.
[36] *Maastricht*, BVerfGE 89, 155 [1993], 208–209.
[37] *ibid*, 186.
[38] *Lisbon*, BVerfGE 2 BvE 2/08 [2009].
[39] S. K. Schmidt n 31 *supra*.
[40] Criticism was voiced mainly with regard to what could be seen as condescension towards the European Parliament and with regard to the questionable delineation of the integration-proof 'identity core' of the German constitutional state. For the former, see D. Halberstamm and C. Möllers, 'The German Constitutional Court Says "Ja zu Deutschland!"' (2009) 10 *German Law Journal* 8. The last-mentioned line of criticism is well-reflected in the contributions in A. Fischer-Lescano, C. Joerges and A. Wonka (eds), *The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives*, ZERP Discussion Paper 1/2010 (ZERP, 2010), at (available at http://www.zerp.uni-bremen.de//streamfile.pl?mod=publication&area=files/&file=1264498538_10996_0&mime=application/pdf).

control, the latest decisions on the Euro 'rescue' measures—which by all means fall in the realm of budgetary policy now protected by the 'identity core'—indicate that the Court is more keen on shaking its fists than on delivering an actual punch.

In later judgements, including the recent ESM ruling, the FCC continued to draw upon the notion of legitimation by national parliaments to demand supplementary fixes to domestic laws implementing European initiatives. Two complaints concerned the first Greek bailout in May 2010 and the 'Euro rescue package'[41] in June the same year. The complainants in these cases applied for interim measures, which the court quickly rejected.[42] In the main proceedings, in September 2011, the FCC affirmed the constitutionality of the rescue package and bailout.[43] The complainants had claimed *inter alia* that the measures were *ultra vires* and encroached on their voting right (Article 38, par. 1; Basic Law), which is interpreted widely as ensuring effective democratic rule. The FCC did not address the question whether or not the rescue packages were *ultra vires* or violated the no-bailout-clause of Article 125 Treaty on the Functioning of the European Union. The Court also refrained from any factual assessments about whether or not the German state's granting of the guarantees (24 and up to 148 billion Euros, respectively[44]) was effective or proportionate to avert a default and, by extension, to 'save' the Euro.[45] The FCC did however declare that, in order to preserve the parliamentary budget autonomy, significant aid payments needed parliamentary approval. 'The Bundestag,' the Court clarified, 'is not allowed to delegate indeterminate budgetary powers to other actors.'[46] But since the rescue measures did not entail such an 'automatism,' they did not violate the rights of democratic participation.[47] The *Bundestag* subsequently constituted a budgetary sub-committee, consisting of merely nine members ('*Neuner-Ausschuss*') and charged with sanctioning urgent and partly secretive decisions related to the European Financial Stability Facility (EFSF). In February 2012, the FCC stopped this practice in response to a dispute between organs of the state brought before the court by two MPs of the social-democratic opposition.[48] Empowered by this precedent, also the opposition fraction of the Green party has successfully challenged what the FCC in June 2012 regarded as an infringement by the government of the *Bundestag*'s right to be informed 'comprehensively and at the earliest possible time' about ongoing EU matters according to Article 23 Par. 2 Basic Law.[49] At issue were the negotiations leading up to the decision of the European Council in February 2011 to establish the ESM and the Euro Plus Pact.

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[41] The package that was adopted by the Council of Economics and Finance Ministers consisted of two measures: An emergency funding programme with a volume of up to 60 billion Euros called European Financial Stabilisation Mechanism (EFSM) that was raised on the financial markets, guaranteed by the European Commission and backed by all Member States; and a special purpose entity, the European Financial Stability Facility (EFSF), founded by the Member States. The EFSF can issue bonds on the financial market and lend up to 440 billion Euros to troubled Eurozone countries The EFSF is the precursor to the ESM and will continue to exist alongside it until Irish and Portuguese obligations have been repaid.

[42] BVerfGE 125, 385 [2010]; BVerfGE 126, 158 [2010].

[43] BVerfG, 2 BvR 987/10 [2011].

[44] Bundestagsdrucksache 17/1685, 1.

[45] BVerfG, 2 BvR 987/10 [2011], 130.

[46] *ibid*, 125.

[47] *ibid*, 136.

[48] BVerfGE, 2 BvE 8/11 [2012].

[49] BVerfGE 2 BvE 4/11 [2012].

In none of these rulings did the Court stand directly opposed to further (monetary) integration. It demanded workaround solutions intended to counter the disempowerment of the *Bundestag* that the intergovernmental logic of EU decision making implies. And it piled one new sanctioning potential on top of the next—the *Solange*, *ultra vires* and identity controls—without ever putting them into service. It is true that power may be greatest precisely where sanctions do not need to be put into effect.[50] But there are simply no indications that the FCC's chest beating has toned down the German (or any other) government's determination to proceed. It seems that even if the Court today realises that the 'euro rescue' is going to encroach on the budgetary prerogatives of the *Bundestag*, it cannot squeeze the toothpaste back into the tube, as doing so would risk the unravelling of the Eurozone. So did the 'dog' so far do nothing but bark? It certainly has not bitten the German government; not in the sense of reigning in or reversing integration. By enhancing the veto conditions to the granting of bailouts, it has by contrast strengthened the German bargaining position vis-à-vis the recipient countries. These are the ones who feel the 'bite' of the ruling.

IV Parochialism and Ineffective Remedies: The FCC and the ESM

The ESM ruling is not an effective remedy to the democratic deficit, because it addresses only the national angle of the problem at hand. Indeed, it is particularistic in two different respects. First, the FCC sees the autonomy of the German democratic legislation threatened mainly, if not exclusively, by the additional expenditures and liabilities imposed by future 'Euro aid' packages. Second, in a situation in which the common currency is an accomplished fact, the growth dynamics of the European economies are irreversibly intertwined. The FCC's sole reliance on the participation rights of the German *Bundestag* is the obsolete response to an intergovernmental community that no longer exists. The following section first substantiates this double charge. The obvious follow-up question whether alternatives are conceivable at all has to be deferred to the end.

The ruling sees the 'constitutionally entrenched budgetary prerogative' (*haushaltspolitische Gesamtverantwortung*)[51] of the *Bundestag* threatened exclusively by additional expenditures imposed by financial aids in the context of the 'Euro rescue.' Very much like the Lisbon ruling,[52] the ESM decision focuses only on particular issue areas, in which the EU ostensibly threatens the autonomy of German democratic politics. The asymmetry between 'market-making' and 'market-correcting' European integration is thereby enhanced. In particular, the FCC ignores other fiscal policy restrictions that originate in European law. The most obvious, because explicit, restrictions are the institutionally strengthened debt and deficit targets of the Fiscal Compact. The FCC does address these restrictions but finds them unproblematic simply on the grounds that they accord with the

[50] See on in this point in general C.J. Friedrich, *Man and His Government: An Empirical Theory of Politics* (McGraw-Hill, 1963), and with regard to the FCC's EU-jurisprudence R.U. Krämer, 'Looking through Different Glasses at the Lisbon Treaty: The German Constitutional Courts and the Czech Constitutional Court', in A. Fischer-Lescano, C. Joerges and A. Wonka (eds), n 37 *supra*, 18.

[51] BVerfG 2 BvR 1390/12 [2012], 211.

[52] See M. Blauberger, 'Reinforcing the Asymmetries of European Integration', in A. Fischer-Lescano, C. Joerges and A. Wonka (eds), n 40 *supra*.

constitutional *Schuldenbremse*. Other long-standing restrictions are not even addressed but simply taken for granted, such as the independence of the ECB with its single mandate to ensure price-stability, the right of the European Commission to review the budgetary and fiscal policies of individual Member States and to issue concomitant directions (usually rubber-stamped by the Council) in the context of the 'European semester,'[53] and finally the abolition of capital controls with its problematic implications for tax sovereignty[54] and the fact of a common monetary policy[55] *per se*. Surely, the FCC has ruled on some of theses issues in earlier judgements. It is nevertheless striking, just how lopsidedly the Court evaluated the implications of these issues on parliamentary autonomy.

To explain this one-sidedness, it is easy to point to the *fait-accompli* character of previous integration-steps, their historical irreversibility. Any effort to qualify or let alone undo these steps would be too late in any case. But the particularistic emphasis on some fiscal restrictions rather than others makes sense also on the assumption that the FCC pursues a specific interpretation of how the *Bundestag* should make use of its budgetary prerogative. The FCC bases its assessment of the ESM treaty as being in general conformity with the constitution on the Court's insight that with the ESM, 'the stability-directed orientation of the monetary union [. . .] is not surrendered.'[56] Indeed, the FCC does not give the parliament explicit instructions in this regard. But with this kind of reasoning, the constitutional court judges reveal their preference for a restrictive budget policy in accord with the current European austerity regime. One cannot but wonder whether the ESM would be found unconstitutional if it emphasised 'solidarity' rather than 'stability.' In any case, it is striking how little the Court seems to be aware of existing constraints on parliamentary autonomy that European integration implies beyond spending.

As far as parliamentary autonomy is concerned, the ESM ruling is one-sided also in another respect. It completely ignores the possible implications of its decision on the parliaments and the democratic self-determination in general of other EU Member States, namely the GIIPS countries.[57] The concept of democratic legitimation implicit in the judgement is intergovernmentalism *par excellence*. But the Euro crisis has proven like no other event in EU politics, how tightly interwoven the national economies and with them the fate of EU citizens have become. The economic policy choices the German government made in response to the ECB's interest rate signals, such as its supply-side-centric, export-focused growth strategy, have external as much as domestic impacts. This is a challenge to a purely intergovernmental conception of democratic legitimation, since those affected by political decisions can no longer conceive of themselves as the (howsoever mediated) authors of these very decisions. It was one important normative promise behind the supranationalisation of the

[53] See C. Joerges, 'Recht und Politik in der Krise Europas: Die Wirkungsgeschichte einer verunglückten Konfiguration', (2012) 66 *Merkur* 11, 1026.

[54] P. Genschel and M. Jachtenfuchs, 'How the European Union Constrains the State: Multilevel Governance of Taxation', (2011) 50 *European Journal of Political Research* 3.

[55] See B. Feldstein, n 8 *supra*; F. W. Scharpf, n 9 *supra*.

[56] BVerfG 2 BvR 1390/12 [2012], 233.

[57] In this regard, I agree with S. K. Schmidt n 31 supra, 17-18, who also points out the problematique of the FCC's 'purely national benchmark', which is likely to 'impose externalities on other member states'. I am less optimistic, however, that national parliamentary rights can help to offset the resulting democratic deficit.

European legal system to internalise or, at least to address externalities like these; this in particular but not only from a conflicts law perspective.[58]

It is deplorable but also understandable that the FCC has not addressed this challenge and stuck to its narrow intergovernmental understanding of democratic representation. The more serious losses of autonomy do not occur in Germany but in those states that must comply with the Troika-imposed conditionalities in order to avert a default. In comparison to the factual hollowing-out of the political institutions in the recipient countries, the *Bundestag*'s disempowerment pales.[59] This is not to say that the latter can be shrug off. But it shows that the FCC's democracy concept does no longer live up to reality.

During the decades in which it has ruled on the EU, and crucially in the *Maastricht*[60] and *Euro*[61] judgements, the FCC has never actually reigned in European integration in general or monetary integration in particular. Its response has always been and remained 'yes, but.' Only demanding ornamental, domestic democracy-safeguards, and never questioning the *finalité* of the integration process, the Court has acted as a relay to integration by stealth. It has accepted the faulty argument that economic integration in the guise of a 'stability union' based on quasi-constitutional legal principles can be neatly separated from politics. The FCC has approved *Maastricht* roughly 20 years ago. The concomitant increase in the interdependence of national fates has today become fully apparent. Now the Court should be frank enough to acknowledge this fact and take the consequences. Certainly, it would be unfair to suggest that the FCC could have exactly foreseen the current Euro disaster.[62] In any case, it is too late now to turn back. Had the Court said 'no' to the ESM, it would have had seriously aggravated the crisis.[63]

But this is not the only alternative. There are at least two other ways of acknowledging the consequences of *Maastricht*. First, the FCC might have simply considered the implications of its ruling for the debtor countries. Even if the Court had then argued it unnecessary to take into account the concerns of foreign countries, an explicit treatment would have been an improvement. Democratic rule is a common normative heritage and part of the shared identity and constitutional *acquis* of all EU Member States. Also the EU institutions themselves are, however imperfectly,

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[58] C. Joerges, 'Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws', in B. Kohler-Koch and B. Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield, 2007), at 311.

[59] W. Streeck, 'Wissen als Macht, Macht als Wissen: Kapitalversteher im Krisenkapitalismus', (2012) 66 *Merkur* 9/10 aptly describes the rise of government by experts in the countries of the Euro-periphery.

[60] *Maastricht*, n 36 *supra*.

[61] *Euro*, BVerfGE 97, 350 [1998]. The FCC rejected two constitutional complaints against the German participation in the third stage of the currency union. It emphasised the margin of appreciation of the German political institutions in assessing whether the monetary union would become a 'stability union.' This rendered inadmissible a complaint against a possible encroachment on the right to property (Art 14, Par. 1(ii) Basic Law).

[62] Whether such an empirical assessment would be a matter of judicial rather than political decision making is another question, altogether.

[63] As a side note, this also demonstrates how fragile the legitimacy basis of the FCC in reality is. On the one hand, it has to rule independently of political influence. On the other hand, it is dependent on popular support. See G. Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press, 2005); H. Vorländer, 'Die Deutungsmacht des Bundesverfassungsgerichts', in R.C. van Ooyen and M.H. Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (VS-Verlag, 2006), at 189.

designed according to this principle. From this vantage point, the *Bundestag*'s budget right is not better than the budget right of the parliaments of the 'beneficiary countries' under close supervision of the 'Troika' and constrained by 'rescue' conditionalities. Nevertheless, the *Bundestag*'s budget committee has deliberated on confidential details of Ireland's prospective budget before the Irish parliament had even seen it.[64] At the time of writing, dissenting *Pasok* parliamentarians were reclaiming their right to vote individually on each of the privatisations of state-owned enterprises provided for in the Memorandum of Understanding between the 'Troika' and the Greek state.[65]

Second, the FCC could have tried to engage in and promote an emerging transnational discourse among high courts, domestic and European. It would thereby have implemented 'comity,' a central principle of conflicts law, the legal discipline that traditionally has dealt with disputes involving multiple jurisdictions and external effects of domestic legal judgements.[66] 'Comity of nations' originally means 'respect owed to the laws and acts of other nations by virtue of common membership in the international system—a presumption of recognition that is something more than courtesy but less than obligation.'[67] Less than obligation: The FCC is bound to the Basic Law, in which, for example, the budgetary prerogative of the *Bundestag* is entrenched. For good reason, foreign law does not have the same degree of obligation. More than courtesy: This can be read at least as an invitation to consider the effective functioning of the democratic institutions of the GIIPS countries, including *their* parliaments.[68] The idea here is not necessarily to suggest a substantively different ruling. The hope is rather to set a process of transnational 'constitutional cross-fertilisation'[69] in motion that can form the nucleus of a nascent post-national legal system.[70] Slaughter describes this still emerging but already more than only utopian system as network-shaped structure, consisting of courts from different states and at different levels, which exchange judicial arguments across jurisdictions and fields of law. They cross-reference similar case-law and draw inspiration from their foreign counterparts, sometimes even 'negotiating with one another over the outcome of specific cases.'[71] Being of heterarchical shape, there is no last resort in this structure; neither national nor supranational courts have the final say. The same is true for the relation between national high courts. '[N]ational courts remain acutely conscious of their prerogatives as representatives of independent and interdependent sovereigns, even as they recognise the need for cooperation and even deference to one another.'[72] Lacking clear hierarchy, 'persuasive authority' becomes all-important.[73] The suspicion that the FCC in its ESM ruling was more interested in 'defending democracy for the

[64] *Financial Times*, 18 November 2011.
[65] *Neue Zürcher Zeitung*, 31 October 2012.
[66] See Joerges, n 58 *supra*.
[67] Slaughter, n 4 *supra*, 86, who references *Hilton v. Guyot*, 159 US 113, 164 (US 1985).
[68] On 'due consideration' as a conflicts-of-law norm see L. Vielleichner, 'Berücksichtigungspflicht als Kollisionsregel', in N. Matz-Lück and M. Hong (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem – Konkurrenzen und Interferenzen* (Springer, 2012), at 109.
[69] Slaughter, n 4 *supra*.
[70] On this idea see J. Habermas, *The Crisis of the European Union: A Response* (Polity Press, 2012).
[71] Slaughter, n 4 *supra*, 65.
[72] *ibid*, 68.
[73] *ibid*, 75.

sake of national autonomy'[74] than *vice versa* is precisely due to its inchoate attempt at persuasion. Ideally, the Court would have aimed at persuading a wider audience than the German citizens instead of applying corrections that were directed only at the domestic side of democratic representation.

What does it mean in practical terms with regard to the recent FCC decision to 'engage in transnational legal discourse'? First, the FCC has invited to the proceedings in addition to the representatives of the German central and state governments, the *Bundesrat* (second 'state' chamber) and the *Bundestag* a number of *amicus curiae*, namely experts from the *Bundesbank* and the EFSF. To better understand the external effects of its judgements, the FCC could have extended its invitation to selected *amicus curiae* from government institutions of the 'recipient' countries. As regards the 'cross-fertilisation' among High Courts, the FCC could have taken into consideration the previous judgement of the Estonian Supreme Court from 12 July 2012.[75] The Estonian Court had to rule on the parallel question to which extent the restriction, implied in the ESM treaty, of financial competences of the Estonian parliament and of the sovereignty of Estonia is compatible with its constitution. Second, the decision on the constitutionality and possible *ultra vires* character of the ECB's prospective bond-buying programme (outright monetary transactions) is still pending.[76] Before taking a decision on this matter in the main proceedings, the FCC should follow the Irish example of the *Pringle* case[77] and take the unusual step to submit a corresponding question to the European Court of Justice (ECJ). The substantive result may not be very different from the outcome that is to be expected, but it would signal the FCC's readiness to conceive of itself as a 'Member Court' in a European Community of High Courts.

V Conclusion

While the FCC has, at least since its Maastricht judgement, endorsed European integration in many areas, it has maintained a strangely national outlook in its democratic reasoning. The way it conceives of autonomy constraints and the remedies it has prescribed against the democracy deficit are stubbornly parochial. This one-sidedness is particularly apparent in the recent preliminary ESM judgement. It is all the more irritating since the FCC itself has facilitated monetary integration and the concomitant interdependence of European citizens' fates in different Member States. To be sure, every constitutional court is bound by its particular national constitutions—and rightly so. But even within the legitimate confines of this framework, the FCC could have shown greater sensitivity for policy externalities and autonomy concerns of other Member States; it should open up for a transnational exchange of judicial arguments among national high courts and the ECJ.

As a practical implication, transnational exchange of legal arguments necessitates that those foreign actors affected by a ruling should be given voice, for example as *amicus curiae*. National high courts should moreover use every opportunity to extend

[74] J. Habermas, 'Drei Gründe für "Mehr Europa"', Talk given at the 'Deutscher Juristentag 2012', published in *Süddeutsche Zeitung*, 22 September 2012.
[75] Estonian Supreme Court *en bac*, 3-4-16-12 [2012].
[76] BVerfG 2 BvR 1390/12 [2012], 202.
[77] Irish Supreme Court, 339/2012 [2012]. For a discussion of the case cf V. Borger 'The ESM and the European Court's Predicament in *Pringle*' (2012), 19 *European Journal of Political Research 1*.

the forum in which judicial questions with external effects are discussed. This can be an additional reason to submit questions to the ECJ. From a conflicts law perspective, this invites the issue of how the judicial process can remain decentralised while taking foreign concerns into account. The notion of 'Member Court' could serve as inspiration for future investigation.

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