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Hand-out

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Constitutionality challenges against crisis measures in Europe

Bundesverfassungsgericht, Germany

Quotes from its decisions of 7 September 2011 and 12 September 2012
For their full texts, and English translations of main parts, go to:
http://www.bundesverfassungsgericht.de/ [in German and English], notably to:
http://www.bundesverfassungsgericht.de/en/decisions/rs20110907_2bvr098710en.html
http://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html

Background

- Background of the *Grundgesetz* (Basic Law): 'never again'
- Constitution ('Basic Law') contains an absolute limit to protect the identity of Germany: Article 79 (3) declares inadmissible a constitutional change that would affect fundamental principles of the German public order. Nevertheless, the Constitution is, in principle, friendly to European law ("*Europarechtsfreundlich*") and EU law should be abided by (paragraph 109).

- Germany's Basic Law: Article 20

(1) The Federal Republic of Germany is a democratic and social federal state.
(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.
(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

- Germany's Basic Law: Article 88

Article 88 [The *Bundesbank*]
The Federation shall establish a note-issuing and currency bank as the Federal Bank [*Bundesbank*, RS].
Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank that is independent and committed to the overriding goal of assuring price stability.

- Germany's Basic Law: Article 23 (1)

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the *Bundesrat*. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

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- Germany's Basic Law: Article 79

(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty respecting a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defense of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.
(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the *Bundesrat*.
(3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Quotes
[*there is overlap in the quotes as they are from different decisions on similar subject matter*]

- The German constitutional provision on the election of the *Bundestag* (Article 38) protects the electorate from losing the material contents of their constitutionally guaranteed supreme authority ("*verfassungsstaatlich gefügten Herrschaftsgewalt*"), in particular in regard to supranational organizations.
- In situations in which there is a danger that the powers of the current or future parliaments are being de-substantiated, making a representation of popular preferences ("*eine parlementarische Repräsentation des Volkswillens*") - which is aimed at the realization of the political will of citizens - impossible in law or in practice, this defensive dimension ("*abwehrrechtliche Dimension*") of Article 38 becomes relevant (literally: 'comes to fruition')

[A clear shot across the bow against any transfer of competences to EU or EFSF that would undermine the budgetary authority of the *Bundestag*.]

- The *Bundestag* is not entitled to transfer its budgetary responsibilities to other actors by way of 'indefinite budgetary appropriations' ("*unbestimmte haushaltpolitische Ermächtigungen*").
- In particular, it is not permitted to adopt legislation through which the *Bundestag* would submit itself ("*sich ausliefern*") to financial mechanisms that either in total or through an overall assessment of the individual measures taken thereunder, can lead to indeterminate fiscal burdens ("*nicht überschaubaren haushaltsbedeutsamen Belastungen*") without preceding constitutive approval (by the *Bundestag* or its budget committee, RS).
- It is not permissible to establish permanent mechanisms under international law that lead to the assumption of liability for voluntary decisions of other States, notably if they have consequences that are hard to oversee
  ("*Es dürfen keine dauerhaften völkervertrags-rechtlichen Mechanismen begründet werden, die auf eine Haftungsübernahme für Willensentscheidungen anderer Staaten hinauslaufen, vor allem wenn sie mit schwer kalkulierbaren Folgewirkungen verbunden sind.*").
- Every individual measure of assistance on the basis of solidarity undertaken by the federal government at the international level or within the EU must receive the assent of the *Bundestag*
  ("*Jede ausgabenwirksame solidarische Hilfsmaßnahme des Bundes größeren Umfangs im internationalen oder unionalen Bereich muss vom Bundestag im Einzelnen bewilligt werden*").

Moreover, sufficient parliamentary influence on how funds made available are being dealt with must be secured.

- In a constitutionally grounded state, decisions on budget funding and budget outlays are a fundamental part of the capacity to organize oneself in a democratic fashion ("*demokratische Selbstgestaltungsfähigkeit*", briefly: democratic self-governance capability).
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- As the representatives of the people, the elected members of the *Bundestag* should retain control over fundamental budgetary decisions, even in a system of intergovernmental governance [which I understand to be the Constitutional Court's description of the joint management of the euro crisis by the Eurozone governments, RS]
- The *Bundestag* is not entitled to transfer its budgetary responsibilities to other actors by way of 'indefinite budgetary appropriations' ("*unbestimmte haushaltpolitische Ermächtigungen*").
- In particular, it is not permitted to adopt legislation through which the *Bundestag* would submit itself ("*sich ausliefern*") to financial mechanisms that either in total or through an overall assessment of the individual measures taken thereunder, can lead to indeterminate fiscal burdens ("*nicht überschaubaren haushaltsbedeutsamen Belastungen*") without preceding constitutive approval [by the *Bundestag* or its budgetary committee, RS].
- (…) the design as a stability union that the monetary union has to date been given under the Treaties does not mean that a democratically legitimised change in the concrete structure of the stability requirements under European Union law would be incompatible with Article 79 (3) of the Basic Law from the outset.
- Not every single manifestation of the stability community is guaranteed by paragraphs 1 and 2 of Article 20 of the Basic Law in conjunction with Article 79 (3) of the Basic Law, which are the only relevant provisions here.
- Article 79 (3) of the Basic Law does not guarantee the unchanged further existence of the law in force but those structures and procedures which keep the democratic process open and, in this context, safeguard parliament's overall budgetary responsibility. Already in its Maastricht judgment, the Federal Constitutional Court held that, in order to comply with the stability mandate, a continuous further development of the monetary union may be necessary if otherwise the conception of the monetary union, which had been designed as a stability union, would be departed from. If the monetary union cannot be achieved in its original structure through the valid integration programme, new political decisions are needed as to how to proceed further. It is for the legislature to decide how possible weaknesses of the monetary union are to be counteracted by amending European Union law.
- National budgetary autonomy is presumed by the Treaties as an essential competence of directly democratically legitimized State parliaments, a competence which, moreover, cannot be divested.
- It is only on the basis of strict adherence to the Treaty provisions [as interpreted by the German Constitutional Court, RS] that acts adopted by institutions of the EU are sufficiently legitimized in and for Germany. The treaty-based idea of monetary union as a stability community is the basis for, and the object of, the German ratification of the relevant Treaty ("*Die vertragliche Konzeption der Währungsunion als Stabilitätsgemeinschaft ist Grundlage und Gegenstand des deutschen Zustimmungsgesetzes*").

[Thus, the Constitutional Court further emphasizes the idea of EMU as directed towards stability, meaning price stability (RS).]

- A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (Article 20 (1) and (2), Article 79 (3) of the Basic Law) is that the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently "the master of its decisions"
- Admittedly, it is primarily the duty of the *Bundestag* itself to decide, while weighing current needs against the risks of medium- and long-term guarantees, in what maximum amount guarantee sums are responsible.
- But it follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the *Bundestag*'s control and influence
- As representatives of the people, the elected Members of the German *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental governing. In its openness to international cooperation, systems of collective security and European integration, the Federal Republic of Germany binds itself not only legally, but also with regard to fiscal policy. Even if such commitments assume a substantial size, parliament's right to decide on the budget is not necessarily infringed in a way that could be challenged with reference to Article 38 (1) of the Basic Law. Rather, the relevant factor for adherence to the principles of democracy is whether the German *Bundestag* remains the place in which autonomous decisions on revenue and expenditure are made , including those with regard to international and European liabilities.
- If essential budget questions relating to revenue and expenditure were decided without the mandatory approval of the German *Bundestag*, or if supranational legal obligations were created without a corresponding decision by free will of the *Bundestag*, parliament would find itself in the role of mere subsequent enforcement and could no longer exercise its overall budgetary responsibility as part of its right to decide on the budget
- Moreover, no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are hard to calculate.
- The *Bundestag* must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure. Insofar as supranational agreements are entered into which by reason of their scale may be of structural significance for parliament's right to decide on the budget, for example by giving guarantees the honouring of which may endanger budget autonomy, or by participation in equivalent financial safeguarding systems, not only every individual disposal requires the consent of the *Bundestag*; in addition it must be ensured that sufficient parliamentary influence shall continue to be made on the manner of dealing with the funds provided
- The Basic Law not only prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*) to the European Union or to institutions created in connection with the European Union .
- Blanket empowerments for the exercise of public authority may also not be granted by the German constitutional bodies.
- It is therefore constitutionally required not to agree dynamic treaty provisions with a blanket character, or if they can still be interpreted in a manner that respects the responsibility for integration, to establish, at any rate, suitable safeguards for the effective exercise of such responsibility.

- Accordingly, the Act of assent and the national accompanying laws must therefore be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union, or for institutions created in connection with the European Union, of taking possession of *Kompetenz-Kompetenz* or of otherwise violating the Basic Law's constitutional identity, which is not open to integration.
- For borderline cases of what is still constitutionally admissible, the German legislature must, where necessary, make effective arrangements in its legislation accompanying the Act of assent to ensure that the responsibility for integration of the legislative bodies can sufficiently develop
- (…) the design as a stability union that the monetary union has to date been given under the Treaties does not mean that a democratically legitimised change in the concrete structure of the stability requirements under European Union law would be incompatible with Article 79 (3) of the Basic Law from the outset.
- Not every single manifestation of the stability community is guaranteed by paragraphs 1 and 2 of Article 20 of the Basic Law in conjunction with Article 79 (3) of the Basic Law, which are the only relevant provisions here.
- Article 79 (3) of the Basic Law does not guarantee the unchanged further existence of the law in force but those structures and procedures which keep the democratic process open and, in this context, safeguard parliament's overall budgetary responsibility. Already in its Maastricht judgment, the Federal Constitutional Court held that, in order to comply with the stability mandate, a continuous further development of the monetary union may be necessary if otherwise the conception of the monetary union, which had been designed as a stability union, would be departed from. If the monetary union cannot be achieved in its original structure through the valid integration programme, new political decisions are needed as to how to proceed further. It is for the legislature to decide how possible weaknesses of the monetary union are to be counteracted by amending European Union law.

Estonian Supreme Court / *Riigikohus*

See: http://www.nc.ee/?lang=en [in Estonian, Russian, English and (not the judgment:) French]
Judgment of 12 July 2012, Case No. 3-4-1-6-12, at: http://www.riigikohus.ee/?id=1347
[see, also, dissenting opinions]

- Article 4 (4) ESM Treaty ('emergency voting procedure': 85% of votes cast decide on financial assistance) violates the principle of sovereignty in Estonian Constitution
- Legitimate aim for this infringement found elsewhere
- Economic and financial sustainability of euro area is included in constitutional values of Estonia
- Infringement is proportional if suitable, necessary and moderate for achievement of objective (economic and financial stability, guaranteeing rights and freedoms)
- Respect for legislative choice in fulfillment of financial obligations (vis-à-vis other euro area MS in ESM Treaty)

The Hague District Court

Decision of Judge R.J. Paris of 1 June 2012 in the Case of *Wilders e.a. against the State of the Netherlands, LJN* (State Judicial Decisions Numbering): BW7242, District Court of The Hague, 419556 / KG ZA 12-523
See: http://www.rechtspraak.nl

- A request for an injunction against the Dutch Parliament's adoption of the ratification act concerning the Treaty establishing the European Stability Mechanisms (ESM), before a new parliament was installed after forthcoming elections, was denied by the District Court in The Hague.
- In his decision, the Dutch Judge also rejected the ground of alleged infringement of Article 125 TFEU (the no bail-out clause) through the establishment of the ESM: the prospective amendment of the TFEU would exclude any doubt about the compatibility of a support mechanism with the no bail-out clause and the Dutch Government had explained to Parliament that the current text of the TFEU also allowed such support.

European Court of Justice

See: http://curia.europa.eu/

Constitutionality of austerity measures tested
References to the ECJ for a preliminary ruling

- *Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios, SA* (Case C-128/12), 8 March 2012
- *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial - Companhia de Seguros, S.A.* (Case C-264/12), 29 May 2012

Direct challenge of ECB acts

- Request for annulment of the ECB decisions widening collateral requirements in respect of Greek, Irish and Portuguese public debt instruments and of the ECB's Securities Market Programme: *Städter* (Case T-532/11),
- Decision of the General Court of 16 December 2011
- On appeal: Case C-102/12 P

References to the ECJ

- A German eurosceptic think tank (*Europolis*) is said to have requested the German Constitutional Court to refer the legality under EU law of the ESM to the ECJ
- The Irish Supreme Court has referred the question of the legality of the establishment of the ESM to the ECJ: Case C-370/12 (*Pringle*)
- *Pringle* Case

  Thomas Pringle v The Government of Ireland, Ireland and the Attorney General, [2012] IESC 47, Supreme Court Record Number: 339/2012, 31 July 2012
  See: http://www.supremecourt.ie/ [in English and Gaelic]
  Questions referred to the ECJ:
  (1) **Whether European Council Decision 2011/199/EU of 25th March 2011 is valid**:
    - Having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and, in particular, whether the proposed amendment to Article 136 TFEU involved an increase in the competences conferred on the Union in the Treaties;

- Having regard to the content of the proposed amendment, in particular whether it involves any violation of the Treaties or of the general principles of law of the Union.

(2) **Having regard to**

- Articles 2 and 3 TEU and the provisions of Part Three, Title VIII TFEU, and in particular Articles 119, 120, 121, 122, 123, 125, 126, and 127 TFEU;
- the exclusive competence of the Union in monetary policy as set out in Article 3(1)(c) TFEU and in concluding international agreements falling within the scope of Article 3(2) TFEU;
- the competence of the Union in coordinating economic policy, in accordance with Article 2(3) TFEU and Part Three, Title VIII TFEU;
- the powers and functions of Union Institutions pursuant to principles set out in Article l3 TEU;
- the principle of sincere cooperation laid down in Article 4(3) TEU;
- the general principles of Union law including in particular the general principle of effective judicial protection and the right to an effective remedy as provided under Article 47 of the Charter of Fundamental Rights of the European Union and the general principle of legal certainty;

is a Member State of the European Union whose currency is the euro entitled to enter into and ratify an international agreement such as the ESM Treaty?

(3) **If the European Council Decision is held valid, is the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty subject to the entry into force of that Decision?**

Order of the President of the Court, 4 October 2012 to grant the Irish Supreme Court's request for an **accelerated procedure**. See: http://curia.europa.eu/

Reminder: EU law takes precedence

- *Costa vs. Enel* **(**Case 6/64), decision of 15 July 1964, [1964] ECR 585
- *EEA Agreement* (Opinion 1/91), 14 December 1991, [1991] ECR I-6079
- ECJ interprets EU law in final instance
- National courts may or need to (highest courts) refer to ECJ for preliminary ruling: Article 267 TFEU
- National (constitutional) courts do not determine scope and application of EU law

- **Costa/ENEL quotes**

"By contrast with ordinary international treaties, **the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply**.

By creating a Community of unlimited duration, **having** its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, **real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves**."

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"The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it **impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them** on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. **The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty** set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7."

"(…) the law stemming from **the Treaty, an independent source of law**, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

"**The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights**, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."

- **Opinion 1/91 quote**

"(…) the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of **a Community based on the rule of law**. As the Court of Justice has consistently held, the **Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, <u>in ever wider fields</u>, and the subjects of which comprise not only Member States but also their nationals** (see, in particular, the judgment in Case 26/62 Van Gend en Loos [1963] ECR 1). The **essential characteristics** of the Community legal order which has thus been established are in particular its **primacy over the law of the Member States** and the **direct effect** of a whole series of provisions which are applicable to their nationals and to the Member States themselves."