

Sovereignty and Democracy in the European Polity

Reflections on Dieter Grimm's Essay¹

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In the German-speaking academic universe, Dieter Grimm is one of the rare authorities in constitutional law whose work communicates not only with normative political theory but also with the concerns of empirically oriented political-science research. I count on his tolerance, therefore, if I approach his brilliant essay on the location of legal sovereignty in the European Union from the perspective of a political scientist worried about the current state and future perspectives of democratic government in the multilevel European polity.

1. Grimm's basic model

I begin with an attempt to restate what I conceive to be the basic structure of Grimm's argument: Sovereignty in his view can no longer be equated with the legal recognition of the internal supremacy and external autonomy of a state with comprehensive and concentrated governing powers. Quite apart from factual constraints that have always limited the effective reach of national governing powers, after World War II the state's external autonomy has become legally constrained by the transfer of some governing powers to the United Nations and, to a much greater extent, to the institutions of European integration. Rejecting the notion of subdivided segments of sovereignty, Grimm resorts to a conceptual solution from the discussion of the federal constitution in 19th-century Germany: Sovereignty in multilevel polities is to be defined not at the level of public powers, which may be subdivided and assigned to different tiers of government, but at the level of the constitutional authority or *Kompetenz-Kompetenz* to allocate these governing powers

In the EU, however, national constitutional autonomy is legally constrained by the ECJ's assertion of the supremacy and direct effect of European law. At the same time, the European Parliament has gained a role in Treaty revisions even if these continue to depend on the agreement of all member states or of their governments in the European Council (Art.48 TEU). So if neither the Union nor its member states enjoy full constitutional autonomy, one might conclude that the concept of sovereignty has lost its usefulness for analyses of the EU's

¹ Grimm, Dieter 2012a: Wer ist souverän in der europäischen Union? In: Dieter Grimm: Die Zukunft der Verfassung II. Berlin: Suhrkamp, 275-292.

institutional architecture. Grimm is reluctant to accept this conclusion, however. He refers to the positions of the *Bundesverfassungsgericht* and of some other constitutional courts which claim the authority to protect a core of national constitutional autonomy and democratic self-determination against the supremacy of European law. And his analysis of the amendment procedures modified by the Lisbon Treaty do show that all Treaty revisions that would extend EU competences will still require ratification in all EU member states. In other words, as member states have retained *Kompetenz-Kompetenz*, it is still meaningful to assert their sovereignty in the EU. The reason, he explains in the concluding section, is that even in its attenuated form the concept serves a useful function in protecting democracy at the national level against the ever-increasing encroachments of European law with lesser democratic credentials.

I have of course no reason to disagree with Grimm's legal analysis, and I fully share the democratic concerns it is meant to defend. But I do have some questions regarding its practical reach and its implications for a normative theory of democratic legitimacy in the multilevel European polity.

2. Kompetenz-Kompetenz and democratic self-determination

From the perspective of normative political theory, sovereignty as it had originally been understood by Jean Bodin and Thomas Hobbes did imply a sovereign – i.e., a natural or legal person with the capacity for effective action employing supreme, comprehensive and concentrated governing powers. And once the monarchic sovereign had been displaced by popular sovereignty, it could be equated with the capacity of democratically accountable parliaments and governments to shape the order of their societies within the normative constraints of a democratically authorized national constitution. But this equation cannot be maintained if sovereignty is reduced to the concept of *Kompetenz-Kompetenz* in multilevel polities and if the exercise of remaining national powers is increasingly constrained by extensions of supreme European law that are not under the control of national parliaments and governments. And when the link between the concept of sovereignty and collective self-government is broken, normative political theory must deal with the difficulties of defining democratic legitimacy without assuming the omnipotence of the collective self.

At the limit, surely, democratic legitimacy may be destroyed by factual and legal constraints that leave no room for autonomous policy choices. The exact location of that limit is hard to define. But its definition is less critical in democratic federal states where the powers of regional governments are also circumscribed by the central state's *Kompetenz-Kompetenz*. In the absence of deep linguistic, ethnic or religious cleavages, political debates, party competition and electoral accountability in federal states tend to focus on the exercise of governing powers and constitutional choices at the central level. In other words, constitutional competence is shifted to a level where institutional choices have stronger democratic credentials. And if a given allocation of competences should be considered inappropriate, the central state's legitimate *Kompetenz-Kompetenz* will allow decentralizing as well as centralizing reforms of the constitutional architecture.

In the European polity, by contrast, democratic legitimacy is weak at the Union level. As Grimm and others have pointed out, the preconditions of a politically salient collective political identity, a common public space and the electoral accountability of policy makers are as yet underdeveloped or non-existent at the European level. In effect, therefore, the transfer of governing powers from member states to the EU may be supported by output-oriented arguments, but any such transfer must be considered a net loss of input-oriented democratic legitimacy in the European polity. It is for this reason, I presume, that Grimm finds it important to defend the *Kompetenz-Kompetenz* of EU member states. But how much protection could that provide for democratic self-determination at the national level?

The principle of conferred powers (Arts. 4 (1) and 5 (1) TEU), it is true, seems to ensure that the individual member state is able to control the initial delegation of competences to the EU. But once the agreement has been given, individual *Kompetenz-Kompetenz* is lost: Any attempt to correct a mistaken delegation – such as the over-centralized rules of monetary integration – may be blocked by the veto of a single member state. Hence the assignment of *Kompetenz-Kompetenz* to lower-level governments is asymmetric, allowing only the option of constitutional centralization, but not its reversal. In the European Union, moreover, even this asymmetrical control of the transfer of governing powers has been seriously incomplete in the past, and it is presently being overridden by European responses to the euro crisis.

3. Integration through law as a challenge to Kompetenz-Kompetenz

Given the practical irreversibility of delegated competences, their interpretation becomes a crucial element of EU governing functions. And since the ECJ is the authoritative

interpreter of European law, it is in fact able to define the reach of European-law constraints on national governing powers. In principle, that is also true of the constitutional courts in federal states. But these are generally trying to establish a fair balance between the equally legitimate concerns of the central and provincial levels of government, whereas the ECJ has long been praised as the “motor of integration” and celebrated for having promoted “integration through law” in periods when member states seemed to lack sufficient enthusiasm for deeper integration. In other words, the ECJ acts not as the neutral arbiter of a federal balance, but as a partisan promoter of centralization.² In effect therefore, the *Kompetenz-Kompetenz* of EU member states may indeed control the transfer of governing powers to the Union through formal amendments to the Treaties. But once the Treaty and its amendments are in force, the ECJ is able and willing to employ its monopoly of Treaty interpretation in order to extend the reach of European powers and the domain of European-law constraints on national powers. And that is not all. Even where the ECJ’s interpretation of ordinary EU legislation exceeds clear limits defined by the Council in the text of a directive, Member States cannot correct that interpretation as long as it is supported either by the Commission or by the European Parliament under the rules of the “Community Method”.

It is true, as Grimm points out, that the *Bundesverfassungsgericht* and other constitutional courts are claiming the power to protect core areas of national constitutional identity and political autonomy not only against European legislation but also against their “creeping” erosion through the ECJ’s case law. But Grimm also noted that the German court has so far side-stepped all occasions where it might have actually challenged the supremacy of European law, or the ECJ’s monopoly of its interpretation.³ And since any national court must realize that the unity of European law would be destroyed if the constitutional concerns of all 27 EU member states were to prevail over ECJ interpretations, I doubt that the judicial extension of European powers may be stopped through the intervention of national constitutional courts.

From the perspective of normative political theory, however, I have tried to argue elsewhere, national political autonomy and constitutional identity may suffer more from the

² Cappelletti, Mauro, Monica Seccombe, and Joseph H.H. Weiler (eds.) 1985: *Integration through Law. Europe and the American federal experience*. Berlin: De Gruyter; Alter, Kareen 2001: *Establishing the Supremacy of European Law*. Oxford: Oxford University Press.

³ Grimm, Dieter 2012b: *Von Lissabon zu Mangold*. In: Dieter Grimm, *die Zukunft der Verfassung II. Auswirkungen von Europäisierung und Globalisierung*. Berlin: Suhrkamp, 178-181.

ECJ's judicial legislation than from European political legislation:⁴ Under the high consensus requirements of the Community Method, it is unlikely that the directives and regulations that are actually adopted would violate highly salient concerns that are seriously defended by national governments. ECJ decisions, by contrast, do not have to pass the filter of qualified-majority voting and, as Dieter Grimm has emphasized, they are also more disconnected from the normative discourses of the affected political communities than the decisions of national constitutional courts.⁵ At the same time, their impact on Member State politics is primarily achieved through the enforcement of court-defined individual rights – emphasizing “economic liberties” ensuring the free movement of goods, services, establishments, capital and labor, and now increasingly rights of non-discrimination on grounds of gender, age, disability, nationality, etc. As a consequence, the liberalizing, deregulatory and individualizing effects of the ECJ's case law have been a major factor promoting the “liberal-capitalist” transformation of European politics.⁶ In other words, the cumulative effect of judicial legislation does interfere with the constitutional autonomy of EU member states in ways that cannot be controlled by their formal *Kompetenz-Kompetenz*.

4. The impact of the euro crisis on Kompetenz-Kompetenz

But more direct and more massive interferences are also happening as a consequence of European policies designed to deal with the present euro crisis. In order to appreciate the importance of these recent developments, however, it is necessary to provide at least a basic outline of the underlying economic causes of the present crises:⁷

By joining the European Monetary Union (EMU), member states had given up the capacity to manage the aggregate demand of their economies through the instruments of

⁴ Scharpf, Fritz W. 2009: Legitimacy in the Multilevel European Polity. In: *European Journal of Political Science* 1 (2), 173-204; 2010: The Asymmetry of European Integration, or why the EU cannot be a ‘Social Market Economy’. In: *Socio-Economic Review* 8 (2), 211-250.

⁵ Grimm, Dieter 2012c: Zur Rolle nationaler Verfassungsgerichte in der europäischen Demokratie. In: Dieter Grimm, *Die Zukunft der Verfassung II. Auswirkungen von Europäisierung und Globalisierung*. Berlin: Suhrkamp, 128-152, at 140-146.

⁶ Höpner, Martin, Armin Schäfer (Hrsg.) 2008: *Die politische Ökonomie der europäischen Integration*. Frankfurt/M.: Campus; Münch, Richard 2009: *Das Regime des liberalen Kapitalismus. Inklusion und Exklusion im neuen Wohlfahrtsstaat*. Frankfurt/M.: Campus.

⁷ The following discussion is based on analyses presented in Scharpf, Fritz W. 2011: *Monetary Union, Fiscal Crisis and the Pre-emption of Democracy*. In: *Zeitschrift für Staats- und Europawissenschaften* 9 (2), 163-198; Scharpf, Fritz W. 2012: *Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis*. Cologne: MPIfG Discussion Paper 12/6: http://www.mpifg.de/pu/mpifg_dp/dp12-6.pdf; Scharpf, Fritz W. 2013: *Political Legitimacy in a Non-Optimal Currency Area*. Cologne: MPIfG Discussion Paper 13/15: http://www.mpifg.de/pu/mpifg_dp/dp13-15.pdf.

monetary and exchange rate policy, and they had accepted European constraints on deficit-financed fiscal policy. Given the extreme heterogeneity of economic and institutional conditions in the eurozone, however, the centralization of macroeconomic policies generated strongly diverging economic outcomes in individual economies, resulting a dramatic rise of current-account deficits in some countries, and corresponding surpluses in others. So when the international financial crisis of 2008 caused a world-wide credit squeeze, the overly indebted deficit economies were pushed into a particularly deep recession. And as states came to rescue their over-extended banks while capital markets responded to rising state deficits with high risk premia on government bonds, the risk of state insolvencies was seen as a threat to the survival of the Monetary Union.

Committed to saving the euro at any cost, European policy makers set up rescue funds providing lower-interest credit to embattled governments while the ECB offered low-interest liquidity to eurozone banks. The recipients of rescue credits, however, were obliged to accept “conditionalities” defined by the European Commission and strictly controlled by the “Troika” which imposed large and precisely defined cutbacks on public expenditures and employment as well as extremely incisive “reforms” of social security and labor relations legislation. What matters in the present context is the fact that these requirements, whose acceptance was ensured by the threat of immediate state bankruptcy, were in no way limited by the *acquis* of governing powers that had been explicitly transferred to the European Union in Treaties up to Lisbon.

If these measures might have been defended by as exceptional responses to an acute emergency or by reference to the rules of bankruptcy proceedings, that cannot be said of the permanent regime that was established at the end of 2011 By the “Sixpack” regulations, including a tightened version of Stability Pact and, in particular, a new “Excessive Imbalances Procedure” (EU 1176, 2011). Its economic logic appears quite straightforward:

If the Monetary Union is to be maintained, uniform European monetary and exchange-rate policies must continue to be oriented to average eurozone conditions. And since “one size fits none”, they will continue to generate macroeconomic imbalances among heterogeneous eurozone economies. At the European level, moreover, there are no other instruments of macroeconomic policy that could stabilize the resulting booms or recessions in individual economies. EMU member states, on their part, will continue to be deprived of the instruments of macroeconomic management: If they must cope with a recession, they cannot use monetary

reflation to increase domestic private demand; they cannot devalue the currency to increase export demand, and they cannot engage in deficit spending to increase public-sector demand. Conversely, if the economy is overheating, they also cannot reduce aggregate demand through monetary restraint or a revaluation of the currency. What remains, then, are national policies that directly affect wage incomes and social incomes as well as investments, and consumer demand in particular sectors of a given economy. Compared to the ad-hoc shifts between expansionary and restrictive monetary policies, all these options are much less flexible, requiring legislation that intervenes in the formation of relative prices and wages in market economies, and they have much greater political salience. In short they are difficult to implement in competitive democracies. As a consequence, democratically accountable national governments may not be able or willing to adopt these policies autonomously—which is why the Excessive Imbalance Procedure relies on the Commission to specify appropriate measures for individual member states and why it also provides for severe sanctions in case of non-compliance.

To this effect, the Commission has defined a “scoreboard” of eleven internal and external statistical “indicators,” ranging from current-account balances, real effective exchange rates and export market shares to house prices, private sector debt and unemployment rates.⁸ If Commission-defined upper or lower thresholds are exceeded, the Commission will investigate and, upon finding excessive imbalances, will issue “recommendations” which may become binding and entail quasi-automatic sanctions in case of noncompliance. In contrast to rules on budget deficits, however, practically all the variables listed in the scoreboard are not under the direct control of governments, and it is certainly not obvious what governments should do to combat imbalances the specific case. Nor does the regulation itself try to specify the range of measures that could be required. It merely requests that governments should comply with the Commission’s recommendations which “...*should be addressed to the Member State concerned to provide guidance on appropriate policy responses. The policy response of the Member State should use all available policy instruments under the control of public authorities*” (EU 1176/2011 at § 20).

In other words, just like the Memoranda of Understanding addressed to the recipients of EFSF or EMS credits, the Commission’s recommendations may specify any and all of the governing powers of EMU member states. And whereas the Memoranda are enforced by the

⁸ Alert Mechanism Report, COM (2012) 68 final.

threat of withholding EMS rescue credits, the recommendations of the Commission may be made legally binding and may, in case of noncompliance, be sanctioned by an annual fine in the amount of 0.1 percent of GDP (EU 1174/2011 at Art. 3, 2 and 5). Moreover, while recommendations and sanctions are formally attributed to the Eurogroup Council (in whose decision the target government has no vote), the Commission's proposals "are deemed to have been adopted" unless they should be rejected by a qualified majority (EU 1176/2011 at Art. 10, 4; EU 1174/2011 at Art. 3, 3). What we have here, therefore, is a new European regime that is remarkable for a number of reasons:

1. It establishes a sanctioned European power to direct and control the exercise of national governing powers without regard to the allocation of European and national governing functions in Arts. 2-6 TFEU.
2. The domain of this power is not and cannot be specified in the authorizing legislation.
3. The exercise of this power is not and cannot be bound to pre-defined general rules.

Given the diversity and volatility of economic conditions, the choice of measures must indeed be as discretionary as were the decisions of national governments when they alone had to cope with the vagaries of their economic and social systems. But of course, national governments are politically accountable for their discretionary choices, and the success or failure of their economic policy tends to be one of the most salient issues in national elections. By contrast, the Commission, which inevitably must be in charge here, lacks any democratic credentials. And even if the responsibility of the Council were not disabled by the reversed-qualified-majority rule, its decisions would also lack democratic legitimacy: German Council members are nationally legitimated to decide for Germany, but German voters and the *Bundestag* could not authorize them to adopt and enforce policies for Portugal. From the perspective of Portuguese citizens, Council decisions amount to a rule by foreign governments.

The structure of the euro regime is also a functionally distorted. In the constitutions of federal democracies, discretionary central-government interventions in the constitutional domains of lower-level polities either do not exist, or they are allowed only under the very restrictive conditions in a state of emergency. But then, there is no need for such interventions because in these constitutions the democratization and centralization of governing powers have progressed alike. Thus democratically accountable federal governments are in control of a large national budget, and they are not only in charge of macroeconomic policies but also

responsible for all economic and social policies that affect the economic and social conditions in the regions. By comparison, the Monetary Union appears as being vastly over-centralized in the domain of macroeconomic policies and vastly under-centralized with regard to its democratic legitimacy, its fiscal resources and its economic and social policy powers.

From an economic perspective, therefore, the Sixpack regime appears as an attempt to cope with a functionally perverse allocation of governing powers in the Eurozone. In order to protect the over-centralized macroeconomic regime, it subjects the exercise of powers which remain constitutionally assigned to EU member states to discretionary central interventions and controls. But as these lack democratic legitimacy at the European level and will interfere with the design of democratically legitimated economic and social policies at the national level, political opposition and, apparently, non-compliance are being anticipated. Instead of relying, as the European Union generally does, on the respect of its member governments for the rule of law, the Sixpack regulations must put their trust in the threat of severe economic sanctions to ensure the compliance with “recommendations” even if these are declared to be legally binding.

Whether these threats will suffice to ensure the effectiveness of the Sixpack regime is as yet uncertain. If it were to fail, macroeconomic imbalances may well continue as an endemic problem of the Monetary Union. What matters here, however, are the constitutional implications of its success. If the present euro regime should indeed be practiced and enforced as intended, the *Kompetenz-Kompetenz* of EU member states will be restricted to the formal transfer of governing powers through Treaty amendments.⁹ But it will no longer protect a domain of autonomous democratic self-determination against discretionary interventions by European authorities.

5. *Implications*

In conclusion, this state of affairs has significant implications for Dieter Grimm’s and the German Constitutional Court’s position: From their perspective, *Kompetenz-Kompetenz* is the crucial principle that protects not only member-state sovereignty but also the democratic

⁹ It is true, of course, that the regulations establishing the Sixpack regime were adopted with the approval of governments in the Council and of the European Parliament. But the “Community Method” of European legislation, which in the case of regulations does not even require transposition by national parliaments, is surely not the constitutional equivalent of the processes through which EU Treaty amendments must be debated, negotiated, adopted and ratified in all member states. Yet the impact of these regulations on national constitutional autonomy is potentially much more pervasive than what is being envisaged by proposals for specific Treaty changes that are presently on the European agenda.

legitimacy of governing authority at the national level. If that is accepted, the impact of the ECJ's judicial legislation on national constitutions should be seen as a challenge to the principle. In the present euro regime, however, the principle is not merely challenged but blatantly disregarded. Hence its potential for legally unimpeded European interventions in the domain of national governing powers ought to be a matter of utmost concern not only with regard to its legality under European law¹⁰ but also with regard to constitutional constraints at the national level. Conceivably, therefore, the German Constitutional Court might find it more difficult to sidestep challenges to the Sixpack regulations than to the OMT policies of the European Central Bank. In any case, however, these ought to be promising issues for creative analyses in European and national constitutional jurisprudence.

¹⁰ The Treaty base of these regulations appears questionable: Höpner Martin and Florian Rödl 2012: Illegitim und rechtswidrig. Das neue makroökonomische Regime im Euroraum. In: Wirtschaftsdienst 2012/ 4.