



Weighing European Integration against Democracy?

The German Constitutional Court's Decision on ECB Operations

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The German Constitutional Court dealt a major blow to European integration when it recently ruled that the Federal Government and the German Parliament had violated rights of citizens to be protected against potentially negative consequences of the European Central Bank's (ECB's) Public Sector Purchasing Program (PSPP). For the first time in history the Constitutional Court did not accept the ruling of the European Court of Justice (ECJ) of December 11, 2018 that stated that the ECB's program did not *obviously* violate the central bank's mandate as outlined in the EU treaties.

As the research on European integration has consistently shown close judiciary cooperation between the ECJ and the national courts in member states has been a key driver of the integration process towards forming an "ever closer union". This intense cooperation rested upon two important pillars. First, the ECJ educated national courts in seminars and network meetings in order to receive their cooperation and acceptance of ECJ judgements – the most important precondition of legal unity in the EU. Previously, all national courts accepted the notion that only the ECJ interprets EU law authoritatively. Now, the Constitutional Court finds that the ECJ overstepped the boundaries of its powers granted by the European Union treaties. Second, the ECJ was careful in not exceeding its limits by strategically assessing whether or not its rulings would be accepted and supported by national courts. The recent German Constitutional Court ruling is the first instance in which the second pillar of judiciary cooperation broke down, too. By finding the ECJ's ruling obviously deficient because it violates the principle of proportionality as a shared method of legal interpretation the German Court sent an extremely strong message to the ECJ; the ECB, EU member states, and the German government: do not overstep the limits of your mandate but observe the rights of citizens. The silent but extremely effective alliance among politically independent institutions – the Commission, courts, and central banks – finally broke down.

Democracy, the public, and organized interests seem to be the foremost winners of this broken alliance. After the Constitutional Court's ruling the political power will shift away from independent, non-majoritarian (i.e. non-elected) institutions such as the ECB and the ECJ towards majoritarian ones composed of elected officials. Delegating authority to non-majoritarian institutions used to be a convenient method for elected officials to evade having to make unpopular decisions that burden important segments of their constituencies. However, the Constitutional Court indicated that circumventing political accountability has clear limitations. If governments or parliaments want to spend money on unpopular causes, they should face public opposition and therefore need to organize supportive political majorities. Paying the interdependence costs of the common currency, the Euro, or unlimited funding cash strapped governments through the ECB need the support of the broader public and the burdened interest groups. These funding operations will also become more transparent as they leave the stealthy realm of non-majoritarian decision making and enter the space of public debate in majoritarian institutions. In the end, the Constitutional Court's ruling strengthened the possibilities of political participation of German interest groups such as life insurers, savers, or tenants negatively affected by ECB operations.

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Moreover, democracy is further strengthened because non-majoritarian institutions must meet more stringent legitimacy requirements. Typically, these institutions rely on output legitimacy. This means, their decisions are approved *ex post* when the public understands that a policy is the right thing to do, *even when* the burden on citizens is high. However, the ruling says that courts and central banks must present all the reasons that justify their decisions. Only the ability of the public to evaluate these reasons meets the standards of transparency and legitimacy required for non-majoritarian decisions in democracies. The key problem why the Constitutional Court did not accept the ECJ decision of 2018 was that the ECJ and the ECB failed to publicize their reasons for independent evaluation by other institutions and the wider European public.

Yet, these clear democratic gains may be balanced over time by the potential for policy failures that jeopardize the stability of the Euro and the European Union. Evading public scrutiny of unpopular but necessary decisions might have been choices of convenience for elected officials. However, sometimes they were options of last resort, too, when political majorities in governments or parliaments were far out of reach. This problem has been compounded recently when member states' societies and subsequently national parliaments became more fragmented and polarized. Under the conditions of strained relations between politicians and their constituents unpopular or painful policies cannot be approved. Over time, gridlock in national parliaments can erode the Euro as the common currency and/or the process of European integration more general. While the Constitutional Court's ruling clearly empowers the public and puts back key decisions into the hands of elected officials, it ignores the growing divide between states and societies as well as political elites and the general public in Europe. Common goods such as a common currency or European integration need to be underwritten by policies that include individual or collective sacrifices. As the gap between political elites and the general public grows it is unlikely that electorates understand the need for these sacrifices or are prepared to accept the respective burden. When painful decisions by non-majoritarian institutions are no longer an option, the pressure will be on state-society relations to build new bridges between elites and masses that strongly support the production of common goods.

Legally, the Constitutional Court's ruling can bind German institutions only. However, their restricted room for operations can indirectly affect the European Union and its other member states. The ruling might limit the extent to which the German central bank can participate in and contribute to the ECB's bonds purchasing programs. This restriction might jeopardize the political independence of the ECB, its monetary policy operations, and subsequently the stability of the Euro. Moreover, other member states will face severe consequences forcing them to implement stricter austerity programs domestically. In the end, this chain of consequences reinforces German dominance in European politics because the burden of economic and social adjustments moves toward weaker southern member states. It is therefore no surprise that both the European institutions and member states organized in the "friends of cohesion" group strongly oppose the Constitutional Courts ruling by using both legal and economic arguments. The Union can work only, if no public authority questions its legal unity and primacy. The Euro needs to be based on a more solid economic foundation of solidarity among members. Yet, this episode unveils the true dilemma of the European Union: strained democratic state-society relations and the promotion of further European integration pull the Union into diametrically opposite directions.