How, when, and why European Institutions cope with legal ambiguity of treaty provisions

Political and Judicial Mechanisms of Conflict Resolution

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Abstract - Outline

The EU treaties constitute the objectives, tasks and limits for the EU's common policies, and they define the competences, procedures and instruments for the EU institutions and their constituent actors. In this respect, the treaties are the primary legal source of the EU. Yet, they often remain vague in their wording and provisions and require further interpretation. This lack of clarity is not unknown to other treaties and constitutions. In the EU, however, vagueness in the wording is exacerbated by (a) the large number of member state interests involved, (b1) unifying and (b2) diverging interests of and within supranational institutions, and (c) by the nature of EU treaty provisions.

The resulting legal and political ambiguity in EU treaty law is often intentional due to the fact that it allows compromises in developing the para-constitutional fabric of governance that would otherwise not have been possible, and can be found in all major treaty revisions. Even though this practice may be the only way forward in deadlocked negotiations, underlying conflicts of interests are not resolved. Rather difficult questions are shifted into the future and create a high demand for interpretation and concretization of the EU treaties after the taking effect.

In the practice of the EU there are essentially two ways to resolve these conflicts: *either* politically, by the creation of secondary law (including regulations, directives and decisions) and soft or tertiary law (such as agreements, guidelines, recommendations, declarations, opinions); *or* judicially, by bringing an action before the Court of Justice of the European Union (CJEU). Both ways of dealing with legal ambiguity thus play a central role in the EU and the process of European integration.

At the same time, scientific knowledge about how these manifold political and judicial ways to cope with legal ambiguity and conflict that stems thereof remains rather fragmentary. This especially applies to the empirical studies in the field.

Building on the historical neo-institutionalist theory and structu-rationalist perspectives on treaty development, we intend to

- Create a data-base of bilateral and multilateral IIAs and similar informal rules from 1958 to 2020 (1952-2003 done [Hummer/Kietz/Maurer/Snyder 2007-2010]; 2003-2020 to be completed)
- Create a data-base of ECJ proceedings on inter-institutional conflict (1979-2020),
- To answer the following questions:
    - **Regarding IIAs and similar rules**:
    - What precisely constitutes IIA and other forms of soft rule and what functions do these instruments fulfil in the EU's political system?
    - Assuming IIAs and other means of institutional soft law as vehicles of incremental constitutional change, what are the concrete mechanisms behind such processes: Which actors make use of these instruments, why and how?
    - Why and under what conditions are the procedures established by IIAs and similar rules introduced at a later point in time to primary law?
    - Within which limits do tertiary law and informal rules operate: When are IIAs permitted not only to implement EU primary law by clarifying it and rendering it more concrete but also to change – at the sub-constitutional level – the EU's fabric of governance?
    - **Regarding ECJ cases:**

- When / why do EU actors challenge informal rules of norm-interpretation?
- When do actors decide to join one of the conflicting parties before and during an ECJ proceeding?
- When do EU actors refrain from challenging informal rules at the ECJ?
- Why and under what conditions is ECJ case-law translated into treaty primary law?
- **Regarding the relationship between informal rules and ECJ proceedings:**
- When / why do EU actors generate a strategic reflection about one of the ways to solve inter-institutional conflict?
- When do EU actors opt for a combination?

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