

Book Reviews

Hugo J. Hahn/ Ulrich Häde: Währungsrecht

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Almost twenty years ago, Hugo Hahn delivered the first edition of “Währungsrecht” (Monetary Law) to the German-speaking public. Unlike Hahn, who had in fact to write a wholly new study, Ulrich Häde, his former assistant, could draw heavily upon the parental advice of his older colleague until he died in March 2010 just before the book was finished.

Häde decided to change not only the rather unique rhetoric of Hahn but also to widen the perspective of the book. In 1990, the book focused mainly upon national (German) monetary law and included a very lucid assessment of the monetary union between West and East Germany, which had been established some months before the (then) two Germanys re-united. Since the introduction of the Euro in 1999, monetary law in the (then 11, now 17) Member States of the Economic and Monetary Union (EMU) is primarily part of European Union law. Thus, the main fourth Part of the book deals almost exclusively with EU and especially EMU issues.¹

The book is divided into five Parts containing altogether 29 Chapters. Part A, entitled “Money and Currency – Foundations” starts with explaining some main steps in the history of money – from coins to

¹ Häde had some very intensive discussions with me about the direction as well as the scope of modifications at the start of his work and also later on, during the process of re-writing, since he thought that the comments of another scholar who had worked with Hahn closely for more than two decades might be helpful when trying to adapt Hahn’s concepts and thoughts to more recent developments. It has been a great pleasure for me to be asked for critical recommendations and I am very glad that Häde was always ready to accept my commentaries even when I (rarely) differed from his opinions.

electronic money – as well as three basic functions of money: general medium of payment, value storage, unit of account and/or payment. Häde continues by analyzing further fundamental categories, discussing definitions of currency, monetary policy, monetary and central banking law, law of foreign exchange and, last but not least, international monetary law.

Chapter 3 of Part A. deals with money in a specific legal sense, i.e. with its different legal aspects (quoting Mann's famous study). Money has an ambiguous nature being both a factual and a normative phenomenon, thus there is no single concept of money. Häde therefore draws a clear distinction between the concepts of (public) monetary law and private (civil) law. Part A. closes with short remarks on the relationship between money and units of account, also giving some examples of the latter, like "currency basket" related units.

Part B. focuses on issues of monetary value. The principle of "nominalism" is dealt with in Chapter 5 and starts with conceptual problems, analyzing the scope of application of this principle. Next, the author shows various ways for contracting parties to exclude the effects of nominalism by using index and similar clauses ("Wertsicherungsklauseln") also analyzing their legal conformity with German constitutional law as well as with EU law.

The following Chapters 7 and 8 complement the discussion on the prevalence of "nominalism" or "valorism" by first sketching relevant jurisprudence of German federal (civil and labor) courts and then addressing the issue of adjusting public law monetary obligations by asking if a creditor's claim to this end could be derived from the fundamental right of (private) property.

The second main topic of Part B. concerns securing the stability of monetary value. Häde distinguishes between a (normative) mandate based upon (national) constitutional law obliging the central bank as well as other governmental bodies to take utmost care of monetary stability on the one hand and individual property rights on the other. Whereas the concept and protection of property under German constitutional law seem rather broad, they neither exempt the actual monetary value of assets nor the value of money as such from market risks.

A shorter Part C. concentrates upon the development of German monetary and central banking law. Although there is little doubt that anyone interested in issues of monetary law and policy will be able to derive much valuable insight from the fine descriptions of the period up to 1945, the end of the Third Reich, the period from the Allied occupa-

tion until the reunification of Germany and finally participation in the EMU, Chapters 10 and 11, could perhaps have been somewhat less extensively detailed for the contemporary reader. Anyway, they should be a solid foundation for the final Chapter of Part C. where the author elaborates very impressively upon the role and status of the Deutsche Bundesbank (German Central Bank) in current German central banking law. Häde not only points to various links between the earlier German construction and the European system of central banks but he also clearly explains the German constitutional framework for the Deutsche Bundesbank and its autonomy as well as its organizational features and he shows the content and scope of different tasks to be fulfilled by the Deutsche Bundesbank outside its competences as a component of the European System of Central Banks (ESCB).²

Part D. contains the essence of the book. It starts with some historical remarks on European monetary integration until the conclusion of the Maastricht Treaty, followed by a description of how the Euro was introduced, including comments on later modifications until the coming into force of the Lisbon Treaty in late 2009. In more than half of the Chapters following, the author paints an impressive picture of various facets of the EMU. Since monetary integration lies at the core of this on-going project, Häde decided quite correctly to put specific economic aspects at the end of Part D. where he looks more closely at some important issues of the complementary, but less consolidated “economic union”, like coordination of and surveillance on Member States’ economic policies, prohibitions laid down in arts 123 et seq. of the Treaty on the Functioning of the European Union (TFEU) and budgetary discipline within the EU (including an assessment of the Stability and Growth Pact).

Chapters 15 to 20 focus on important elements of the EMU, beginning with fundamental principles, in particular pointing to price stability as primary aim of EU monetary policy, and then describe “institutions of the monetary union”, i.e. the eurosystem, as well as the components at both levels, i.e. the European Central Bank and national central banks. Further Häde deals with the system’s internal structure, as well as the legal status of the European Central Bank and the ESCB.

Next, the author makes an assessment about the ESCB’s tasks concentrating mainly on monetary policy but also analyzing various

² The ESCB comprises the ECB (European Central Bank) and the national central banks of all EU Member States (article 282.1 of the Treaty) whether they have adopted the Euro or not.

(broader) participatory and advisory rights of the European Central Bank. In Chapter 18, Häde discusses the legal nature of the European Central Bank and national central banks activities since the legal acts of the ESCB are at least, in detail, different from those of other EU organs. Moreover, the ESCB Statute provides for rather unique guidelines and instructions to be used by European Central Bank organs (Governing Council, Executive Board) to strongly influence the activities of one or all national central banks. The discussion on the rather complex issue of ways and means of legal redress (central banks being in the role either of claimants or of defendants) is completed by some thoughts about contractual and tort liability, once again in respect both of the European Central Bank and the national central banks.

The last Chapter on central topics of the EMU comes back to problems of the independence of the European Central Bank, i.e. its foundations and goals, the limits of national central banks autonomy, different aspects (institutional, functional, personal, financial), and finally asks whether the specific shape of independence of the ESCB which may be attributed to the EU primary law does conform with the principle of democracy.

The following Chapters (21 to 26) deal with some further aspects of EU monetary law, although the general line of argument might not always be wholly transparent and consistent. For example, why were issues of dissolving the EMU put almost at the end of Part D. whereas the law of Euro coins and notes is dealt with in Chapter 23, after Häde has listed several “other actors” of monetary policy and before he analyzed “external monetary policy”?

For sure, Häde hardly neglects any really important issues of EMU law. Thus, in a very interesting, although again somewhat heterogenous Chapter 21, he looks at public relations issues at first, then evaluates the relationship between the European Central Bank and other EU institutions as well as between the ESCB and EU Member States. Thereafter, the author points at the “Eurosysteem Mission Statement” and at codes of conduct for European Central Bank staff, and finally, analyzes the provisions on (free) access to European Central Bank documents.

Chapter 25 entitled “Member States outside the Eurozone” starts with describing the so-called “pre-ins”, i.e. EU Member States the status of which in the closer eurosysteem is an exceptional one, goes on to explain the special rules concerning Denmark and the United Kingdom, and then ends with asking whether a unilateral introduction of the Euro as currency by a “pre-in” country would be lawful under the TFEU.

The final Part E. of the book intends to give an overview of global aspects of monetary law. Although some 15 pages – or just 5 percent of the book’s whole volume – are hardly enough to sketch the most important topics thereof, Häde was right to add two Chapters to his study. The first dedicated to the International Monetary Fund, the second mentioning some other players in international monetary and financial relations, since 21st century multi-level economic and monetary governance is characterized by interdependence of and interaction between international (global), regional (e.g. European) and national actors and as cross-border phenomena can only be treated by intensified cooperation.

The new edition of “Währungsrecht” manifestly demonstrates how monetary law is transgressing the era of monetary sovereignty of single (nation) states and becoming internationalized, or at least Europeanized. But although the EU’s Economic and Monetary Union might have been a success during the first ten years of its existence, its role as a model for other areas of closer monetary integration all over the globe seems to have been cast into doubt since early 2010 when some Eurozone members got into grave economic difficulties and IMF financial assistance was applied for.

If I had the choice to select between “Währungsrecht” and the sixth edition of “*Mann on the Legal Aspect of Money*”, written by Charles Proctor and published in 2005, I would certainly prefer the former book. It may be shorter than the second one, but it seems better to me in all other important aspects. I seldom found a book with fewer (and only minor) mistakes in both form as well as substance. You will find not only much detail on monetary law and on related fields when using the index at the end of the book, but moreover, every person interested in legal aspects of money and currency will find profound knowledge about a phenomenon that “makes the world go round”.

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