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On the Assumption and Improvement of the Judicial Review Mechanism About the Central Bank

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Abstract

Generally speaking, judicial power and administrative power are two important national public powers in a country. It is precisely because of their respective powers that they need to form a check and balance relationship between them. The central bank, as an institution holding the important decisions of national monetary policy and national economic development, its relationship with the government ais either independent or subordinate to the government. It is a special administrative and financial institution. If some of its decisions and decisions are contrary to the national economic development goals, there should be a review mechanism that can review its decisions and decisions in advance to prevent the harm. The core of judicial review is judicial power, and the decision-making of the central bank belongs to the embodiment of administrative power. The check and balance of judicial power over administrative power is a new trend in new fields. This paper discusses the necessity, degree and scope of judicial review by the central bank, and the necessity of establishing a separate special institution, it provides some ideas for the construction of such a special judicial review institution.

Keywords: judicial review, independence, central bank

1. Introduction

Judicial review of administrative decisions to prevent arbitrary and unreasonable exercise of administrative power is an important part of the rule of law. There is no doubt that the judicial system should control the legitimacy of the central bank in performing its functions.[1] It could be said, expanding the judicial review of monetary policy decisions requires not only the growth of judicial expertise, but also a tendency to pay attention to fairness or justice.[2] Stephen Breyer, chief justice of the United States Supreme Court, believes that without understanding regulatory policies, it is impossible to understand and evaluate the central work done by institutions, because in the decision-making of complex financial and monetary affairs, talents with complete technical expertise are required to be competent in this work.[3] Therefore, to a certain extent, the judicial review of the central bank is different from the general judicial review, and has higher requirements for institutions and personnel. In view of the particularity and complexity of monetary policy and other central bank

functions.[4] And determining monetary policy measures in the context of the EU is the exclusive competence of the European Central Bank.[5] Some scholars believe that a special chamber can be established within the European Central Bank to solve these problems, and authorize full-time judges with expertise in financial and monetary affairs to conduct similar judicial review. This view expands a new field of judicial review. It believes that the judicial review of the central bank is a reasonable content of the rule of law, and it is necessary to build an independent specialized agency to review the central bank. In this regard, further improvement is needed, such as how to define the degree and scope of judicial review of central banks with different independence, which will be reflected in this paper.

2. Raising the Problem—Starting from the Relationship Between Judicial Review and the Central Bank

In America, the judicial review system originated from the case of the Supreme Court of the United States in 1803.[6] It is a basic principle under the system of the federal government of the United States. It means that all actions of the government and legislative departments in the administrative direction should be reviewed by the judicial department when applying the principle of judicial review, and under certain circumstances, the results made by the administrative department will be affected by the judicial review of the judicial department. There is also a definition, judicial review refers to the court system (judicial department). The ability of the executive or legislative branches of government to review laws or policies that the judicial system considers unjust or unfair. Through the understanding of the meaning of judicial review, we can see the concept behind it, that is, judicial review is a system of supervision and restriction of one state power (judicial power) over another state power (administrative power).[7] It is different from ordinary accountability. Accountability does not necessarily politicize the central bank. Too much accountability will threaten the effectiveness of independence. When there is a contradiction between justice and politics, we must rely on other mechanisms to hold the central bank accountable.[8] Judicial power symbolizes the judicial organ, while the executive power generally represents the administrative organ. In other words, judicial review can continue to be interpreted as the judicial organ's review of a series of policies and activities of administrative organs and units.

Theoretically, the direction of judicial power and administrative power is different. The research of judicial power focuses on the evaluation and restriction of judicature on the exercise of administrative power. Including the study of judicial respect and judicial review. The executive power focuses on judging which governance mode to adopt, which is more conducive to maximizing social welfare. Then there will be some corresponding problems when judicial power and administrative power restrict each other. What I want to introduce here is a special administrative institution—the central bank. From the perspective of nature, the central bank is one of the national institutions and a department of the government. It intervenes and regulates economic activities by using monetary policy tools in accordance with the objectives and requirements of national macroeconomic development. It is in the leading and leading position of a country's financial industry and the highest financial management institution. Therefore, the nature of the central bank can be expressed as: the central bank is a special government financial institution that formulates and implements monetary policy on behalf of the state, carries out macro-control of the national economy and manages the financial industry.[9] The nature of this institution is similar to that of a government institution, but it is different from ordinary government institutions because it enjoys independent discretion in monetary policy. In this regard, we can lead to some questions. According to the definition of judicial review, what actions or policies of the central bank will be defined as unfair or unfair? Does the judicial review of the central bank need to consider its special administrative independence? When there is a conflict between justice and administration, how can the judicial department grasp the boundary of the scope and degree of review?

3. Problem Solving—Definition of Injustice, Necessity, Scope and Extent

3.1 The Unfair or Unfair Legal and Policy Situations of the Central Bank

Before the global crisis, courts rarely reviewed or interfered in matters decided by the central bank.[10] In some cases in the United States, even though some actions and decisions of the

Federal Reserve on regulation, financial stability and payment system have been subject to judicial review, there is still no mechanism to review the actions and decisions of the Federal Reserve monetary policy[11]. Unlike the United States, in the EU, the judicial system has the power to rule on the discretion or expertise of the central bank. For example, from 2015 to 2016, the European Central Bank decided to implement the monetary policy plan of "quantitative easing". The main measure is that the European Central Bank and the central banks of Member States jointly purchased a large number of bonds in the secondary market (PSPP plan). This plan initially passed the judicial review procedure of the European Court of justice, but on May 5, 2020, the German Constitutional Court ruled that the plan was illegal. The judgment first indirectly confirmed the reviewability of the German Constitutional Court's decree on EU institutions, then denied the European Court's recognition of the legitimacy of the PSPP plan in the preliminary ruling procedure, and finally determined that the plan was illegal on the grounds that the European Central Bank did not fully demonstrate the ratio principle. Specifically, the plaintiff believed that the European Central Bank's PSPP plan was illegal. In the process of formulating and modifying the PSPP plan, the European central bank exceeded its authority and violated the basic principles of German democracy and the rule of law. After the preliminary trial between the constitutional court and the European Court of justice, the constitutional court made a judgment, which found that the European Court had improper methods in defining monetary policy and applying the principle of proportionality. Moreover, the European Central Bank did not fully demonstrate the principle of proportionality, so the PSPP plan exceeded its authority and was invalid. This overturned the results of the judicial review of the European Central Bank by the European Court of justice, and indirectly realized the judicial review of the decision-making of the European Central Bank.

The contradiction between the European Court of justice and the constitutional court in determining the legitimacy of the PSPP plan lies in whether the monetary policy formulated by the European Central Bank under the authorization of EU law is fair and fair, whether it meets the requirements of the authorization scope and the principle of proportionality. Specifically, the definition of monetary policy is mostly based on the purpose and specific measures. The European Court of justice first defines monetary policy from the relevant provisions of EU law, which is the primary purpose of the European central bank according to article 127.1 of the EU operation treaty.[12] Article 282, paragraph 4, of the treaty on the functioning of the European Union requires the European Central Bank to take necessary measures to realize its functions and powers.[13] It can be seen that to judge whether the ECB has violated its own authority, we should examine two factors, namely, the purpose factor and the specific measures taken to achieve the purpose. For compliance with the principle of proportionality, the court only examined whether the PSPP plan is beneficial to the realization of monetary policy objectives, whether the damage caused by this way is the least among the various ways to achieve monetary policy objectives, and whether the damage is balanced with the purpose, which is expressed in more concise language, that is, purpose, necessity and rationality. Of course, the purposes, policies and specific measures mentioned above cannot infringe on the interests of the people.

Drawing on the judicial review activities of the European Court of justice and the German Constitutional Court, it is necessary to judge whether the central bank has made unfair and unjust decisions based on the objectives within its mandate, specific measures and whether such measures comply with the principle of proportionality. If a decision of the central bank violates its own objectives and infringes the interests of other innocent groups, such behavior of the central bank should be judged as unfair and unfair, and then should be subject to judicial review by the judicial system.

3.2 The Relationship Between the Independence of the Central Bank and Judicial Review

As the maker and executor of monetary policy of a country or a community, the central bank's policy is related to the smooth operation of the whole national economy or regional economy. However, the independence of the corresponding central bank is also different according to the emergence of central banks in different countries[14]. So what does the independence of the central bank mean?[15] According to Friedman, the independence of the

central bank refers to the relationship between the central bank and the government, which is similar to the relationship between the judiciary and the government. Based on the differences of economic basis and political basis, each has its own development track. With the changes of today's situation, continuous innovation and the differences between legislation and practice, central banks have formed three modes, namely, the mode with strong independence, the mode with secondary independence and the mode with weak independence. The model of strong central bank independence means that the central bank enjoys the autonomy of monetary policy, and the government has little intervention. Its representatives are the United States and Europe. The second mode refers to the situation with strong independence in practice. For example, the law stipulates that the Ministry of finance is directly under the jurisdiction of the Ministry of Finance and can issue instructions for management, but in fact, the Ministry of Finance rarely uses this power, and its representative is Japan. The model of weak independence means that the central bank is subordinate to the government, its monetary policies and decisions need the approval of the government, and the independence of the central banks in Australia and China is weak.

Through the previous discussion, we can know that judicial review is the check and balance of judicial power over another public power. The main purpose is to review whether a state institution has exceeded its scope of authority and made unfair decisions contrary to its objectives and ideas. The scope of the central bank's discretion arises from its degree of independence, and this discretion is also a key part of its independence[16]. In other words, the stronger the independence of the central bank, the greater its discretion, that is, it is free from political interference. [17]And,[18] its ability to pursue monetary policy objectives in an unrestricted way will gradually increase and formulate policies affecting the national economy in a more free way. In this way, without the supervision of other countries, it is more likely that a decision made by them will damage other fields. Therefore, it is very necessary to establish a judicial review system for the supervision of the central bank with strong independence.

3.3 Define the Scope and Degree of Judicial Review of the Central Bank

According to the practice of American courts, judicial review has obviously become a global phenomenon.[19] Fundamentally, political institutions such as the legislature and the executive have begun to expect and even welcome the court as the arbiter or supervisor of their actions. They adjust their actions to the expected response of the judiciary. As mentioned above, I think it is necessary for the central bank, as one of the administrative organs, especially for the central bank with strong independence, to build a judicial review system to carry out its functions and supervision. In this view, the scope and extent of the judicial review of the central bank and the need to establish an independent institution or chamber are issues that need to be learned from. The following will be discussed one by one.

In a constitutional country where the executive department is responsible to the parliament for the implementation of public policies, the primary reason for judicial review must be to ensure that the policies apply fairly to the basic rights of specific individuals and protect their interests from damage. However, when it can not be reasonably considered to involve the damage of basic rights, the increase of the severity of judicial review will reduce the risk of inadequate implementation of administrative decisions, and increase the possibility of excessive restriction of administrative power.[20] Therefore, when we set up the judicial review system of the central bank, we must define the scope and degree of judicial review and formulate a standard, so as to ensure the optimal effect of the judicial review system.

First of all, as for the scope of judicial review, some people believe that when looking at the scope of review, we need to look at it from different angles, not just on the basis of assuming that we already know the basic rights. On the contrary, we should determine the standards applied by the court when deciding that the decision is invalid on the basis of no content of rights.[21] I hold the opposite view, that is, the scope of judicial review needs to be related to the functions of the central bank, and must involve the monetary policies and decisions of the central bank, which are closely related to the national economy and personal interests. If we can't even realize the most basic guarantee of "stable development of the national economy and not damaging the national interests", then where do we get the "bottom

line", and the unlimited expansion of the scope of judicial review will weaken or challenge the administrative power of the central bank. Generally speaking, the scope of the judicial review system involving the central bank should include "monetary policies and decisions conducive to the development of the national economy and the protection of national interests".

In terms of degree, supranational courts, such as the European Court of justice, have been transformed into an overall constitution binding on Member States and their courts and citizens through various treaties under their supervision, and claim to have comprehensive review power. In fact, this unrestricted approach will undermine the link between judicial review and national sovereignty, and may theoretically violate the basic principles of international law.[22] It can be seen that the European Court of justice adheres to a core idea, that is, the sovereign interests of States and the goal of nation-state integration.[23]

Through the reflection on the views of scholars and the understanding of the degree of judicial review of the European Court of justice.[24] In terms of scope, we need to set up a "monetary policies and decisions formulated by the central bank conducive to the development of the national economy" as the scope, and the degree of review shall not exceed the "purpose of the central bank". If the judicial system's assumption of comprehensive review of the central bank is not desirable, such an approach belongs to the situation of deep review policy, which is not conducive to the balance between judicial power and administrative power, and will lead to the imbalance between the two. If the judicial review system is established according to the above limits of scope and degree, the check and balance between judicial power and administrative power can be realized effectively and reasonably.

3.4 The Necessity of Establishing a Separate Judicial Review Body

We discussed the necessity, scope and degree of establishing the judicial review of the central bank. Next, we need to further discuss whether it is necessary to separate an institution to solve the problem of judicial review of the central bank.

Before discussing the necessity of establishing a specialized institution, I would like to draw a mechanism under the European Banking Union for reference.[25] That is, the regulatory mechanism under European banks.[26] The supervision mechanism is the first pillar of the European Banking Union, and its main task is to supervise credit institutions[27]to exercise prudential Supervision. Credit institutions here mainly include non-governmental regulated institutions or entities in the eurozone.[28] The mechanism itself has no legal personality. It constitutes a multi-level financial supervision administrative system composed of the authorities of World Bank member states.[29] Laws and decisions of an administrative nature involve the state and the people.[30] To some extent, it is part of the constitution. Teixeira said: "SSM is a unique and unprecedented mechanism composed of the whole Europe and Member States, which has no clear definition and classification.".[31] It has the exclusive authority of the banking group listed as an important credit institution and the supervision authority of the national authorities with the power to issue instructions,[32] the authorities are exclusive functions related to financial supervision. To sum up, from the perspective of the purpose of the establishment of the regulatory mechanism, the mechanism is mainly to supervise specific institutions at the financial regulatory level.[33] That is, the work center of regulators is mainly concerned about the problems related to market stability and risk-taking that supervision aims to solve. At the same time, it implies that the relevant personnel implementing supervision must be professionals with relevant knowledge of financial supervision. If regulators do not have relevant professional knowledge, it will have a certain impact on the normal development of institutions. Similarly, the decisions of the central bank will inevitably affect the overall economic development of a country or region. If the makers are wrong, there will be many adverse consequences. If a judicial review body is established to prevent adverse consequences, the reviewers in the judicial review body will also be required to have a clear and clear cognitive ability of the matters under review.

For the judicial review capacity of the central bank, the most important point is "certainty". Why judicial review? After judicial review, a "definite" conclusion will be drawn to guide the central bank how to modify it in order to meet the "needs of the rule of law".[34] The rule of law

is regarded as an important part of the democratic legal system that recognizes and implements basic rights such as equality and freedom. A remarkable feature of the rule of law is certainty, and some scholars believe that this certainty is an important role played by justice as a department of the government.[35] To ensure the certainty of judicial review, judicial precedent can be used as the premise, because it is conducive to the role of law in solving problems in a specific field. At the same time, the court also emphasizes the importance of judicial precedent for review.[36] Therefore, in judicial review, reviewers can appropriately take judicial precedent as the standard of relevant policies of the central bank.

In addition, as mentioned above,[37] Certainty is an important role played by justice as one of the government departments. Here we can boldly imagine that if the judicial review body is established in a chamber of the court,[38] then its essence still belongs to the judiciary. However, the judicial review of the central bank we want to establish is a special judiciary. The object it wants to review is the decision-making of administrative nature. If an institution is under the court system for a long time, its identification or measurement of itself will be more biased towards judicial thinking, the administrative thinking on macro development will be slightly lacking. Therefore, I believe that the establishment of a judicial review body to try the central bank should be independent of the court and set up a special review body separately.

4. Conclusion

In the United States and other countries that implement the separation of powers, the idea behind judicial review is to achieve a balance of power among the judicial, legislative and administrative departments. In China, the concept of judicial review is also to realize judicial supervision of administrative power and balance the relationship between them. For the administrative central bank, the purpose of its decisions and establishment is to formulate monetary policies suitable for the development of the national economy and ensure the stable development of the national economy. Therefore, we need to build and improve a prior "judicial review" system.

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[1] The 'rules versus discretion' debate has a long-standing tradition in administrative law. Judicial review of administrative acts is a requirement of a rule of law based system. There are procedural elements that determine the legality of an administrative act, such as the competence of the entity that issues the act or the procedure to prepare and approve such act, and the existence of a public interest. The more difficult issue is the standard of review judges should apply when they conclude that the administrative act, they are reviewing is not legal or legitimate and must therefore be changed or substituted.

[2] See Matthias Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' (March 2014, German Law Journal, 15 German L.J. 265), p. 280. Goldmann advocates judicial review on the basis of 'rationality checks' which in his view stand in between 'full judicial review' and 'full discretion'. He also refers to the fact that while the perspective of the Judiciary is 'retrospective', monetary policy involves 'forward-looking' estimates (p. 268)

[3] Supra note 1. This paper was presented at a CRASSH seminar organized by the University of Cambridge on 21 March 2018. Will Bateman was the discussant of our paper.

[4] Monetary policy is an exclusive EU competence in accordance with Article 3(1)(c) TFEU while economic policy is coordinated at the EU level (positive integration in accordance with Article 119 TFEU and negative integration in terms of the prohibitions applicable to Member States of the eurozone) but the competence remains at the national level. See Rosa Lastra, International Financial and Monetary Law (Oxford University Press, 2015), Chapters 7 and 8.

[5] Central Bank Accountability and Judicial Review 1 by Charles Goodhart and Rosa Lastra. SUERF Policy Note Issue No 32, May 2018.

[6] Martin Kelly. (2019, September 05). What is Judicial Review? What Is Judicial Review? (thoughtco.com).

[7] See Lastra, (1992). "The Independence of the European System of Central Banks", *Harvard International Law Journal, 33*(2), pp. 475-519; Lastra, (1996, September). Central Banking and Banking Regulation, Financial Markets Group, London School of Economics, London, chapter 1.

[8] "Any recent discussion of accountability often includes a reference to transparency and vice versa. This poses the question of the relationship between the two concepts. Accountability is an obligation to give account of, explain, and justify one's actions, while transparency is the degree to which information on such actions is available. The provision of information is clearly an element of accountability. But accountability is not merely about giving information. It must involve defending the action, policy, or decision for which the accountable is being held to account. The provision of information (transparency) is hardly ever a neutral account of what happened or of what is happening; hence the need for an explanation or justification of the agency's actions or decisions (accountability)." See Rosa Lastra (1996), above note 2, at p. 93.

[9] See Qingtian Wu, Yongliang Zhu. Central Banking. Southeast University Press, (2015), p. 16.

[10] See Peter Conti Brown, (2016). The Power and Independence of the Federal Reserve, p. 94. See also pp 117-120 on judicial review of the FMOC. See also David T. Zaring, Law and Custom on the Federal Open Market Committee (June 27, 2015). *Law and Contemporary Problems, 78*(3), 2015. Available at SSRN: https://ssrn.com/abstract=2624111.

[11] Charles Goodhart, Rosa Lastra. Central Bank Accountability and Judicial Review. SUERF Policy Note No 32. May 2018. https://www.suerf.org/policynotes.

[12] The primary objective of the European Central Bank is to maintain price stability.

[13] The ECB shall take necessary measures to realize its functions and powers in accordance with the treaty on the functioning of the EU and the protocol on the constitution of the European central bank system and the European Central Bank (hereinafter referred to as the "Protocol").

[14] This contribution draws substantially on Charles Goodhart and Rosa Lastra, "Populism and Central Bank Independence", Open Economies Review (2017), https://doi.org/10.1007/s11079-017-9447-y.

[15] M. Friedman. (1962). "Should There be an Independent Monetary Authority", in L. B. Yeager (Ed.), In Search of a Monetary Constitution.

[16] Supra note 1.

[17] Philip Brentford Constitutional Aspects of the Independence of the European Central Bank. International & Comparative Law Quarterly, Volume 47, Issue 1, January 1998, pp. 75—116 DOI: https://doi.org/10.1017/S0020589300061571. Published online by Cambridge University Press: 17 January 2008.

[18] See Eijffinger and de Haan. op. ciL supra n.47. at p.2.

[19] Judicial Review. (2015). Author links open overlay panel Jesse Merriam Joel B. Grossman. *International Encyclopedia of the Social & Behavioral Sciences (Second Edition)*, Pages 897-901.

[20] See Fallon, supra note 120, at p. 67–73 (providing a

typology of "relatively common kinds of tests" adopted by the Court "to help define constitutional limits on governmental powers").

[21] Richard H. Fallon, (2008). The Core of An Uneasy Case for Judicial Review. *Harv. L. Rev., 121*, 1693.

[22] Judicial Review. (2015). Author links open overlay panel Jesse Merriam Joel B. Grossman. *International Encyclopedia of the Social & Behavioral Sciences (Second Edition)*, p. 897-901.

[23] Also see the criticism by Hoexter "'Administrative action' in the courts". (2006). *Acta Juridica, 303*, 309-311, 323; Driver and Plasket "Administrative law". (2003). *Annual Survey of South African Law, 69*, 80; Quinot "Regulating administrative action" in Quinot (ed) Administrative Justice in South Africa: An Introduction (2015) 113.

[24] See Matthias Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' (March 2014, German Law Journal, 15 German L.J. 265), p. 280. Goldmann advocates judicial review on the basis of 'rationality checks' which in his view stand in between 'full judicial review' and 'full discretion'. He also refers to the fact that while the perspective of the Judiciary is 'retrospective', monetary policy involves 'forward-looking' estimates (p. 268).

[25] The Mechanism was established by Council Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision 1 of credit institutions [2013] OJ L 287/63 (henceforth: Basic Regulation). The legal basis of the Basic Regulation is Article, 127(6) TFEU.

[26] For a broader overview, see Danny Busch & Guido Ferrarini (ed.), European Banking Union (OUP 2015).

[27] More precisely credit institutions, financial holding companies and mixed financial holding companies, as well as branches of credit institutions established in non-participating Member States, Cf Article 6(4) and Article 2(3)(4)(5) Basic Regulation.

[28] Article 1(1) Basic Regulation; for the regulation of the opt-in for non-Eurozone Member States, see Article 7 Basic Regulation.

[29] Cf Article 2(2) Basic Regulation.

[30] See Corder "The development of administrative law in South Africa" in Quinot (ed) Administrative Justice in South Africa: An Introduction (2015), 3.

[31] Cf Articles 2(9), 6(1) Basic Regulation.

[32] Article 2(16)(17)(18) Framework Regulation.

[33] Reframing Financial Regulation Charles K. Whitehead. (2010). *Boston University Law Review, 90.*

[34] RADLEY HENRICO. (2018). Subverting the Promotion of Administrative Justice Act in judicial review: the cause of much uncertainty in South African administrative law. Journal of South African Law.

[35] Although the constitution makes no express provision for trias politica, s 40-41 of ch 3 of the constitution refer to a co-operative system of government. It is trite that South African constitutionalism is premised on a system of relative trias politica. Certainty as an imperative demands that the legislature enacts laws which are clear and not ambiguous. See Hoexter "The enforcement of an official promise: form, substance, and the constitutional court" 2015 SALJ 207 218-220.

[36] Interestingly Ngcobo CJ in par 83 expressly found it was unnecessary to make a finding as to whether the exercise of the pardon under s 84(2)(j) of the constitution constituted administrative action for purposes of the act.

[37] Although the constitution makes no express provision for trias politica, s 40-41 of ch 3 of the constitution refer to a co-operative system of government. It is trite that South African constitutionalism is premised on a system of relative trias politica. Certainty as an imperative demands that the legislature enacts laws which are clear and not ambiguous. See Hoexter "The enforcement of an official promise: form, substance, and the constitutional court" 2015 SALJ 207 218-220.

[38] See note 5, the paper has different views on the establishment of a chamber in the court.